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Associate Justices

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[1] Died Nov. 11, 1941.

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LOS ANGELES COUNTY

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CALIFORNIA REPORTER

IN VOLUME

117 PACIFIC REPORTER

SECOND SERIES

18 Cal.2d 623

In re KRAUSE'S ESTATE.

KRAUSE v. DODGE.

L. A. 16906.

Supreme Court of California.

Sept. 23, 1941.

1. Wills ⇐118, 119

Where testatrix did not subscribe her name to will in presence of attesting witnesses nor acknowledge that instrument had been signed by her or by her authority nor declare that it was her will, will was denied probate on ground of failure to satisfy statutory requirements for execution and attestation of wills. Probate Code, § 50.

2. Wills ⇐108

Statutory formalities for execution and attestation of a will cannot be waived or disregarded. Probate Code, § 50.

3. Wills ⇐117

The Probate Code requires the subscription or acknowledgment of a will to be made before the two witnesses present at the same time, and where this requirement is not met, instrument must be denied probate. Probate Code, § 50.

4. Wills ⇐289

A presumption exists that a will was properly executed.

5. Wills ⇐289

Where attitude of subscribing witness to will was not adverse and her testimony was clear, uncontradicted and without conflict and showed positively that testatrix did not sign purported will in presence of attesting witnesses and that she neither declared nor acknowledged to witnesses that it was her will or that she had subscribed it, facts so established admitted of no other conclusion than that will was not executed in accordance with Probate Code, and the trial court was not justified in forming conclusions in accordance with presumption of proper execution of the will. Probate Code, § 50.

In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Proceeding in the matter of the estate of Orrie Emma Krause, deceased. From an order granted upon petition of V. Stanley Dodge admitting to probate an instrument which purported to be the last will and testament of Orrie Emma Krause, deceased, John Krause, contestant, appeals.

Order reversed.

Joseph Musgrove, Fred O. McGirr, and Thomas L. Cannan, all of Los Angeles, for appellant.

Hansen & Sweeney and Victor R. Hansen, all of Los Angeles, for respondent.

PULLEN, Justice pro tem.

This appeal is from an order admitting to probate an instrument which purports to be the last will and testament of Orrie Emma Krause, deceased.

On the hearing of the cause the testimony of a subscribing witness, Mrs. Frizelle, furnished practically the only evidence showing the circumstances surrounding execution of the instrument. This testimony, in substance, was embodied in findings of the court, from which the following is quoted:

"On or about the 25th day of March, 1929, Orrie Emma Krause telephoned next door to Mina H. Cullinan and asked her to come over with Mrs. Frizelle and witness a will; and Mrs. Frizelle at the request of Mrs. Cullinan went over to Mrs. Krause's home with her to witness a will. Mrs. Krause did not say anything about her will when said witnesses arrived in her presence to witness a will, other than: 'There is the pen and ink, sign it.' Said paper was folded so that the signature thereon, if any, could not be seen. The only creases appearing on the sheet at time of trial were the usual ones, made by folding 8 x 13 paper twice. * * * Orrie Emma Krause did not sign said will in the presence of said

witnesses, nor declare or acknowledge to them, or either of them, that it was her will or that she had subscribed said will." From the facts so found the court concluded as a matter of law that the purported will "was executed in accordance with the requirements of law (In re Estate of Pitcairn, 6 Cal.2d 730, 59 P.2d 90), and it should be admitted to probate". The order of admission was entered accordingly.

At the time the instrument was signed by the witnesses, section 1276 of the Civil Code, now embodied in section 50 of the Probate Code, provided: "Every will, other than a nuncupative will, must be in writing; and every will, other than an olographic will, and a nuncupative will, must be executed and attested as follows: * * * 2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority. 3. The testator must, at the time of subscribing or acknowleding the same, declare to the attesting witnesses that the instrument is his will; * * *."

[1-3] Applying the above provisions to test the sufficiency of the execution and attestation of the instrument here under review, it is seen that there was a failure to meet the required formalities and to satisfy the statutory requirements. The testatrix did not subscribe her name in the presence of the attesting witnesses, or either of them; neither did she acknowledge that the instrument had been signed by her or by her authority, or declare that it was her will. These formalities cannot be waived or disregarded. The law requires the subscription or acknowledgment to be made before the two witnesses present at the same time, and where this requirement is not met, the instrument must be denied probate. In re Estate of Emart, 175 Cal. 238, 165 P. 707, L.R.A.1917F, 866; In re Estate of Lawrence, 196 Cal. 321, 237 P. 738.

[4] In concluding as a matter of law that the "will was executed in accordance with the requirements of law" and should be admitted to probate, the trial court relied upon In re Estate of Pitcairn, 6 Cal. 2d 730, 59 P.2d 90, 91, to support its ruling. In the Pitcairn case the instrument under review was entirely in the handwriting of the testatrix with the exception of the date, and although it did not contain the usual complete form of attestation clause, it was subscribed by two witnesses, one of whom testified "that the testatrix asked him to sign his name to a paper which she declared constituted her 'last wishes' as to where her money was to go when she died", and the other "that she was not in the room when the testatrix signed, and that she was asked to sign 'a piece of paper,' without being told that it was a will". There was evidence of an adverse attitude on the part of these witnesses, and the recollection of one of them was untrustworthy. Confronted with this unreliable evidence of the circumstances under which the instrument was executed, the trial court refused to credit the testimony of the witnesses. It found the facts in accordance with the presumption of due execution, and admitted the will to probate.

[5] The factual situation disclosed by the record in the case at bar is not analogous to that of the Pitcairn case. Here the attitude of the subscribing witness was not adverse and her testimony was clear, uncontradicted, and without conflict. It showed positively that the testatrix did not sign the purported will in the presence of the attesting witnesses, and that she neither declared nor acknowledged to them that it was her will or that she had subscribed it. The trial court gave credit to this testimony and made specific findings in accordance with it. The facts so established and the specific findings admitted of no other conclusion than that the will was not executed in accordance with the requirements of law. In the Pitcairn case, uncertain testimony was discredited, findings were made in accordance with the presumption of due execution, and the trial court was entitled to rely upon the presumption in drawing its conclusions of law. In the present case the uncontradicted testimony was credited, the facts were found in accordance with it, and the court was not justified under such circumstances in forming its conclusions in accordance with the presumption but should have based them upon the facts found.

Appellant complains of the admission in evidence of an entry from the diary of the testatrix, reading as follows: "Made my last will March 25, 1929. Mrs. Cullinan, Mrs. Frizell were witnesses." In admitting this evidence, the trial court remarked that it was harmless, as it was merely corroborative of the facts appearing on the face of the will. The question of whether this ruling was prejudicially erroneous need not be decided in view of the fact that the order admitting the instrument to probate

must be reversed for the reasons first above set forth.

The order is reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.



18 Cal.2d 627

KENNEDY v. OCCIDENTAL LIFE INS. CO.

L. A. 17922.

Supreme Court of California.

Sept. 24, 1941.

Rehearing Denied Oct. 23, 1941.

1. Insurance ⇐365(1)

Where five-year, convertible, nonparticipating, term policy gave insured a right to reinstatement after lapse on compliance with certain conditions, such policy was not void but merely suspended during the period in which reinstatement was possible, and reinstatement did not involve the formation of a new contract.

2. Insurance ⇐365(1)

Where five-year, convertible, nonparticipating, term policy gave insured a right to reinstatement after lapse on compliance with certain conditions, such right to revive the policy by reinstatement constituted a valuable contractual right, the consideration for which is found in the premiums paid and to be paid under the original policy, and insurer had no arbitrary or discretionary right to refuse reinstatement of such policy if all the conditions therefor had been complied with.

3. Insurance ⇐365(2)

Where five-year, convertible, nonparticipating, term policy by its terms gave insured a contractual right to have policy reinstated after lapse upon compliance with certain conditions, such terms of policy could not be varied by provision in application for reinstatement that it should not be effective until approved at home office of insurer during insured's lifetime, any such agreement to impose different terms being unsupported by consideration.

4. Insurance ⇐365(2)

If insured has fulfilled all conditions for reinstatement in accordance with terms of policy and is in fact in good health at the time application for reinstatement is made, his subsequent death, arising from conditions not involved in proof of insurability furnished in connection with application for reinstatement, but before insurer has acted upon application, will not prevent recovery under the policy.

5. Insurance ⇐365(2)

If at the time an application for reinstatement of lapsed policy was submitted insurer would have been justified in rejecting the application or in requiring further proof before reinstating the policy, insurer may do so even though the death of the insured has intervened.

6. Insurance ⇐365(2)

Where five-year, convertible, nonparticipating term policy provided for reinstatement within five years from date of default upon insured furnishing satisfactory evidence of insurability, and upon payment of all overdue premiums and payment or reinstatement of any indebtedness under the policy with interest, the placing of such proof and payment in the hands of insurer's local office was sufficient and additional condition precedent to reinstatement that application therefor, proof of insurability and payment of overdue premiums must reach insurer's home office before insured's death would not be implied.

7. Insurance ⇐365(2)

The Supreme Court favors view that recovery upon lapsed insurance policy may be had if evidence of good health accompanying application for reinstatement was given honestly and in good faith by insured, even though insured was in fact suffering from a hidden disease.

8. Insurance ⇐365(2)

An agreement to reinstate an insurance policy upon satisfactory evidence of insurability does not give the insurer the power to act arbitrarily or capriciously, but evidence of insurability which would be satisfactory to a reasonable insurer is all that is required.

In Bank.

Appeal from Superior Court, Fresno County; H. J. Austin, Judge.

Action by Lawrence Kennedy, administrator with the will annexed of the estate of Theza Van Antwerp, deceased, and as

guardian of John Alan Van Antwerp, a minor, against the Occidental Life Insurance Company, to recover on a policy of insurance. From a judgment in favor of the defendant after a directed verdict, plaintiff appeals.

Judgment reversed.

For prior opinion, see 109 P.2d 1014.

L. M. Linneman, of Dos Palos, and Lawrence Kennedy, of Fresno, for appellant.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for respondent.

GIBSON, Chief Justice.

This appeal was taken by plaintiff from a judgment entered in favor of defendant, after a directed verdict.

On April 25, 1935, Archibald Reid Van Antwerp took out a five-year, convertible, non-participating, term policy of insurance with defendant, for the sum of $5,000, payable to his wife, if living, otherwise to his son. The policy provided for quarterly premiums of $21.50, and for a period of thirty-one days grace before lapsing. All payments were made up to and including the quarterly premium which fell due on October 25, 1938, but the premium falling due on January 25, 1939, was not then paid. The defendant notified the insured that the thirty-one day grace period would expire February 25, 1939. On March 21, 1939, the insurance agent who had secured the policy called upon the insured and prepared an application and health certificate for reinstatement of the policy. The evidence is in conflict as to whether it was signed by the insured on that day, or on March 31, 1939. The insured said that he would not have the money to pay the premium until about April 1st, and the agent agreed to advance it for him. Again there is a conflict in the evidence as to whether this understanding was reached on March 21, or March 31, 1939. On March 31, 1939, the agent drew his check in favor of the defendant insurance company, covering several payments including the premium due from the insured, and left it with the application for reinstatement at the Fresno office of the defendant at about 4 p. m. of that day. They were mailed to the head office at Los Angeles between 4:30 and 5 p. m. the same day and were received in Los Angeles the morning of April 1, 1939.

Van Antwerp was found dead lying on his bed partially clothed in the early morning of April 1, 1939. He was last seen alive at 8 p. m. the evening before and when found had been dead for several hours. He was survived by both beneficiaries under the policy.

Defendant tendered its check to Mrs. Van Antwerp for refund of the premium forwarded March 31, 1939. She died August 31, 1939, without accepting the check, and Lawrence Kennedy, as the administrator of her estate and guardian of the minor son, instituted this suit to recover the face amount of the policy. At the close of the evidence, defendant's motion for a directed verdict was granted and judgment was entered accordingly.

The provision of the policy with reference to reinstatement reads as follows: "Should this policy lapse by reason of any default, it may be reinstated at any time within five years from date of default, upon the Insured furnishing evidence of insurability satisfactory to the Company, and upon payment of all overdue premiums, and upon payment or reinstatement of any indebtedness under the Policy at the date of default, with interest on such overdue premiums and indebtedness at a rate not to exceed six per cent. per annum from date of default."

The policy also provided: "Premiums must be paid at the Home Office of the Company, unless otherwise provided, and in any case only in exchange for an official receipt signed by the Secretary and countersigned by the person to whom payment is made."

The application for reinstatement signed by the insured contained a provision that "in no event shall the same become effective unless and until this application and certificate is approved at the Home Office of the Company and the full amount due is paid during the lifetime and good health of the Insured."

Plaintiff contends that the right to reinstatement is a contractual right and that when the insured has complied with the requirements for reinstatement set forth in his policy, including the furnishing of satisfactory evidence of insurability and the payment of premiums, the insurer may not escape liability because the insured has died before it acted upon the application for reinstatement. The validity of this contention can be determined only by a careful analysis of the manner in which

a reinstatement clause such as the one here involved affects rights and obligations of the parties to an insurance contract.

Courts are not in agreement as to the legal effect of reinstatement clauses in insurance policies. Some courts have held that an application for reinstatement of a lapsed policy constitutes an offer to enter into a new contract which must be accepted by the insurer before any contract exists between the parties. Foley v. New World Life Ins. Co., 185 Wash. 89, 52 P.2d 1264, 105 A.L.R. 473; Broughton v. Equitable Life Assurance Soc., 5 Cir., 71 F.2d 821, 823; MacDonald v. Metropolitan Life Ins. Co., 304 Pa. 213, 155 A. 491, 77 A.L.R. 353; cf. Tatum v. Guardian Life Ins. Co., 2 Cir., 75 F.2d 476, 98 A.L.R. 345; 77 A.L.R. 357. Under this theory the insurer's agreement to waive the lapsing of the policy will be treated as consideration for the agreement of the insured to be bound by any new terms imposed in the application for reinstatement (Foley v. New World Life Ins. Co., supra) and no recovery may be had for any loss occurring before the insurer has accepted the application for reinstatement either expressly or, perhaps by allowing an unreasonable time to lapse without acting thereon. See Broughton v. Equitable Life Assurance Soc., supra; Foley v. New World Life Ins. Co., supra.

[1, 2] We are of the opinion, however, that reinstatement under a policy such as is present in this case does not involve the formation of a new contract. By the terms of the policy the insured is given a right to reinstatement after lapse upon compliance with certain conditions. During the period in which reinstatement is possible the policy is not void but merely suspended. The right to revive the policy by reinstatement is a valuable contractual right, the consideration for which is found in the premiums paid and to be paid under the original policy, and the insurer has no arbitrary or discretionary right to refuse reinstatement if all the conditions therefor have been complied with. These views are supported by the weight of authority. Rothschild v. New York Life Ins. Co., 106 Pa.Super. 554, 162 A. 463; Mutual Life Ins. Co. v. Lovejoy, 203 Ala. 452, 83 So. 591; Officer v. New York Life Ins. Co., 73 Colo. 495, 216 P. 253; Union Central Life Ins. Co. v. Merrell, 52 Ga. App. 831, 184 S.E. 655; Muckler v. Guarantee Fund Life Ass'n, 50 S.D. 140, 208 S.E. 787; Bowie v. Bankers Life Co., 10 Cir., 105 F.2d 806, 808; Hogue v. Supreme Liberty Life Ins. Co., 59 Ohio App. 409, 18 N.E.2d 503; Froehler v. North American Life Ins. Co., 374 Ill. 17, 27 N.E.2d 833; Illinois Bankers Life Ass'n v. Palmer, 176 Okl. 514, 56 P.2d 370; Republic Life Ins. Co. v. Craige, 186 Okl. 692, 100 P.2d 281; Burchfield v. Home Benefit Ass'n, Tex.Civ. App., 73 S.W.2d 559, 561; 7 Temple Law Q. 374; 98 A.L.R. 345; 3 Applemon, Insurance Law and Practice, 609, 612, 654.

[3] Applying this theory of the nature of reinstatement, we hold that the provision in the application for reinstatement that it should not be effective until approved at the home office of the company during the lifetime of the insured cannot vary the terms of the original policy. The insured had a contractual right to be reinstated under the terms of his policy and any agreement to impose different terms is unsupported by consideration. Illinois Bankers Life Ass'n v. Palmer, supra; Rothschild v. New York Life Ins. Co., supra; Hogue v. Supreme Liberty Life Ins. Co., supra; 3 Applemon, op. cit. supra, 651, 652.

[4] The further question as to whether the insured had complied with all the conditions for reinstatement imposed by the original policy before his death is more difficult. It has been held in a number of cases containing similar reinstatement provisions that where the insured within the authorized time furnishes proof of insurability which is not open to valid objection in form or substance and tenders all premiums in arrears plus interest thereon, and where in fact the insured is in good health at the time he makes application for reinstatement, he has at that time fulfilled all the conditions for reinstatement and his subsequent death, arising from conditions not involved in his proof of insurability, will not prevent recovery under the policy, even though the insurer has not acted upon his application prior to his death. Officer v. New York Life Ins Co., supra; Prudential Ins. Co. v. Union Trust Co., 56 Ind.App. 418, 105 N.E. 505; Bowie v. Bankers Life Co., supra; Parker v. California State Life Ins. Co., 85 Utah 595, 40 P.2d 175; Jackson v. Northwest Mutual Relief Ass'n, 78 Wis. 463, 47 N.W. 733; cf. Republic Life Ins. Co. v. Craige, supra; Forney v. Fidelity Mut. Life Ins. Co., 87 Kan. 397, 124 P. 406; Wichman v. Metropolitan Life Ins. Co., 120 Mo.App. 51, 96 S.W. 695; Burchfield v. Home Benefit

Ass'n, supra; 105 A.L.R. 479. The facts in Officer v. New York Life Ins. Co., supra, are almost identical with those in the present case. The policy provided for reinstatement on "written application to the home office with evidence of insurability satisfactory to the company" and payment of overdue premiums with interest. The policy also provided: "Premiums are due and payable at the home office, unless otherwise agreed in writing." One of the terms of the reinstatement application was that the policy was not to be reinstated until acted on by the company at its home office. The application and premium payment were delivered to the branch office of the company in Denver on October 1. The insured died October 4, before the application reached the home office on October 5. The court said [73 Colo. 495, 216 P. 256]: "* * * we hold that the policy was reinstated, and that its restoration related back to the time when the application was delivered to the branch office in Denver. The fact that the insured died, after he had fully complied with the conditions of his contract, furnished no ground for a refusal by defendant to restore the policy."

[5] While there is authority to the contrary (see Foley v. New World Life Ins. Co., supra; Broughton v. Equitable Life Assurance Soc., supra), even in states which do not follow the new contract theory (e. g., Hogue v. Supreme Liberty Life Ins. Co., supra, holding that the insurer has a reasonable time within which to approve the reinstatement application; 105 A.L.R. 484), we believe that the better rule is expressed in the cases just cited. The right to reinstatement is given in the original policy and was bought and paid for by the insured. When he has submitted evidence of insurability which would be satisfactory to a reasonable person and has paid all the premiums which he would have paid even though the policy had not lapsed, there is no valid reason why his policy should remain suspended while the application goes through the insurer's routine for approval. Of course, if at the time the application was submitted the insurer would have been justified in rejecting the application, or in requiring further proof before reinstating the policy, it may do so even though the death of the insured has intervened. Muckler v. Guarantee Fund Life Ass'n, supra. This was the situation in most of the cases cited by the respondent. Exchange Trust Co. v. Capital Life Ins. Co., 10 Cir., 49 F.2d 133, insured failed to disclose a serious illness at the time of applying for reinstatement; Peters v. Colonial Life Ins. Co., 128 Pa.Super. 21, 193 A. 460, insured failed to fill out blanks in application; Fishman v. Eureka-Maryland Assur. Corp., 120 Pa.Super. 490, 183 A. 98, insured had not tendered all overdue premiums; Conway v. Minnesota Mut. Life Ins. Co., 62 Wash. 49, 112 P. 1106, 40 L.R.A.,N.S., 148, evidence of undue consumption of alcohol by insured at time of application.

[6] In this case no question was raised in the trial court or in the briefs on appeal as to the sufficiency of the evidence of insurability furnished by the insured; no contention was made that the correct amount of overdue premium was not submitted; and there was no suggestion of fraud or misrepresentation on the part of the insured. The application and the money were in the hands of the Fresno office of the company and in the mails on the way to the home office before the death of the insured. The insured had done all that was required on his part to reinstate the policy and we see no reason to imply the additional condition precedent to reinstatement contended for by the defendant that the application and the premium should have reached the home office of the defendant before the death of the insured. In a number of the cases cited recovery was allowed where the insured died while the application for reinstatement was in the mails. Officer v. New York Life Ins. Co., supra; Prudential Ins. Co. v. Union Trust Co., supra; Parker v. California State Life Ins. Co., supra; Jackson v. Northwest Mut. Relief Ass'n, supra.

[7] Some cases have suggested that recovery will be allowed only if the death of the insured is accidental and in no way relating to his insurability or only if it arises from causes subsequent to the filing of the application. Bowie v. Bankers Life Co., supra; Burchfield v. Home Benefit Ass'n, supra. On the other hand, it has recently been held that recovery will be allowed if evidence of good health is given honestly and in good faith by the insured, even though in fact he is suffering from a hidden disease. In Froehler v. North American Life Ins. Co., supra, the insured made application for reinstatement on May 4, stating that he was then in good health. A week or so later he consulted a doctor and on May 19 died from the effects of an

operation for a brain tumor. The insurer, on hearing that the operation was to be performed, notified the insured on May 19 that his application for reinstatement had been refused because the evidence of insurability was not satisfactory. The court allowed a recovery under the policy, stating: "The record shows without dispute that the insured had furnished all the evidence he had been asked to furnish and that that evidence was entirely satisfactory. The jury found that it was honestly given and the situation is no different than if the insured had been struck by lightning or hit by a truck on May 15, 17, or 19, 1933." [374 Ill. 17, 27 N.E.2d 836.] While we need not now decide which is the correct rule since there is nothing in the evidence here to show that the death of the insured was related in any way to his insurability at the time of submitting his application for reinstatement, we are inclined to the view of the Illinois Supreme Court in the Froehler case. When the insured has paid all overdue premiums with interest and has furnished in good faith and satisfactory form all the evidence of insurability required by the insurer, the original policy is revived and the insurer having received all he bargained for in that policy, should be liable for any loss thereafter occurring to the same extent as if the policy had never lapsed. See 9 Fordham L.Rev. 430, 432-434.

[8] The case principally relied upon by the defendant to sustain the judgment of the trial court, Greenberg v. Continental Casualty Co., 24 Cal.App.2d 506, 75 P.2d 644, 649, is not, properly interpreted, contrary to our conclusions herein expressed. In that case plaintiff sued for damages for refusal of the insurer to reinstate a noncancellable policy of accident and health insurance. The application for reinstatement, showing large insurance policies in other companies, was rejected by the company because it was against its business practice to participate in such insurance if the applicant was already insured to a certain amount in other companies. The court held that because of these outside factors of insurance, the satisfactory quality of the evidence of insurability involved more than mere good health of the applicant and the application was properly rejected. This reason for denial of reinstatement, it should be noted, existed just as much at the time of signing the application as it did when the application reached the home office. However, the statement of the court, in the Greenberg case, that what shall constitute "satisfactory evidence" of insurability "is purely a private matter addressed to the discretion of those officers of the company charged with the responsibility of determining such question, and is in no sense that judicial discretion which appellate courts have the authority to review", must be disapproved. The overwhelming weight of authority is to the effect that an agreement to reinstate an insurance policy upon "satisfactory evidence" of insurability does not give the insurer the power to act arbitrarily or capriciously, but that evidence which would be satisfactory to a reasonable insurer is all that is required. Thompson v. Postal Life Ins. Co., 226 N.Y. 363, 123 N.E. 750; Bowie v. Bankers Life Co., supra; Haselden v. Standard Mut. Life Ass'n, 190 S.C. 1, 1 S.E.2d 924, 926; Illinois Bankers Life Ass'n v. Palmer, supra; 3 Applemon, op. cit. supra, 661, 662.

The judgment is reversed.

CURTIS, CARTER, and TRAYNOR, JJ., and PULLEN, Justice pro tem., concurred.

SHENK, J., being disqualified, did not participate.



46 Cal.App.2d 855

PECK v. MARTINEZ et al.

Civ. 12599.

District Court of Appeal, Second District, Division 1, California.

Sept. 26, 1941.

1. Quieting title ⇐34(1), 35(2)

The complaint in a suit to quiet title to realty must state facts sufficient to constitute a present cause of action and to show that plaintiff is entitled to relief as of time when complaint is filed, and averments of complaint must be express and not left to inference and must affirmatively allege that plaintiff has an existing interest in realty at time when suit is brought, and such interest must be stated with sufficient certainty to

enable the court to see that plaintiff has such a right as warrants judicial interference.

2. Quieting title ⇐35(2)

In a suit to quiet title to realty, plaintiff must allege the nature of his right or title against which defendant asserts an adverse claim, and plaintiff cannot merely allege that he has an interest in land described in complaint and that defendant claims an interest in such land adverse to plaintiff.

3. Quieting title ⇐35(2)

Where complaint in suit to quiet title to realty alleged that plaintiff had an interest in land described in complaint and that defendants claimed an interest in the land adverse to plaintiff, it was proper to sustain demurrer to complaint on ground that complaint was uncertain in that it could not be ascertained therefrom what right, if any, plaintiff had in the land.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Suit to quiet title to realty by Ray Peck, as administrator, etc., against Barbara Martinez and others. From a judgment of dismissal following the sustaining of a demurrer to the complaint, and plaintiff's declination to offer an amendment, plaintiff appeals, opposed by Joe Anderson.

Affirmed.

Barry Sullivan, of Los Angeles, for appellant.

David E. Hinckle, of Los Angeles, for respondent.

WHITE, Justice.

This action was brought to quiet title to certain real property. The first cause of action alleged only that "The plaintiff for cause of action shows to the Court that he has an estate in, interest in, or lien or encumbrance upon, the following described property * * *" (describing the same) "* * * and that the defendants claim a certain estate or interest in, or lien upon, the same adverse to the plaintiff". The second and third causes of action were dismissed. The fourth cause of action alleged that the defendants were in possession of the described real property and were illegally and unlawfully collecting the rents therefrom.

The defendants filed a general and special demurrer to the complaint, and following the action of the trial court in sustaining the demurrer with leave to amend and the declination of plaintiff to offer an amendment, a judgment of dismissal was entered, from which judgment this appeal is taken. It also appears that plaintiff dismissed his first cause of action as to defendant Barbara Martinez.

We deem it necessary to notice but one point raised by the demurrer, because that point seems fatal to the complaint and to furnish a justification for the ruling of the trial court. The point in question is "that said complaint is uncertain in that it cannot be ascertained therefrom, and particularly from paragraph II of the first cause of action, what right, if any, plaintiff has in the land to which he seeks to quiet title".

[1-3] It is of course elementary and fundamental that the complaint must state facts sufficient to constitute a present cause of action and to show that the plaintiff is entitled to relief as of the time the complaint is filed. The averments of the complaint must be express and not left to inference, and must affirmatively allege an interest existing at the time the suit is brought. Such title must be stated with sufficient certainty to enable the court to see that the plaintiff has such a right as warrants judicial interference. He must show the nature of his right or title against which defendant asserts an adverse claim. He cannot simply allege, as in the case at bar, that he has "an estate in, interest in, or lien or encumbrance upon" the property. Defendant was entitled to a distinct statement of the facts which plaintiff claimed to exist, viz., whether he claimed ownership of, or a lien upon, or an encumbrance upon the property in question; and it is no answer to an objection to averments made in the alternative, as in the instant case, to say that if either averment is true plaintiff has stated a cause of action. The demurrer was properly sustained upon the grounds of uncertainty and ambiguity.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.

46 Cal.App.2d 799

DAVIS et al. v. OLYMPIC REFINING CO.

Civ. 12551.

District Court of Appeal, Second District, Division 1, California.

Sept. 22, 1941.

Mines and minerals ⇐78(1)

Where oil and gas lease provided that lessee might, by giving lessor written notice, extend period for commencing first well for not to exceed five years by paying monthly rental per acre each month in advance of extended period, and that all rentals should cease when drilling was commenced or premises quitclaimed, and lessee failed to commence drilling within required time, and paid monthly rental in advance for some 20 months without giving written notice of extension and then ceased paying rent without quitclaiming premises to lessors who did not declare default, lessee was liable for monthly rentals, since it was unnecessary to execute written notice of extension so long as payments were tendered and accepted, and lease could be terminated only by commencement of drilling or quitclaiming premises.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by Phoebe J. Davis and others against the Olympic Refining Company for rents alleged to be due under an oil and gas lease. From a judgment for the plaintiffs, defendant appeals.

Affirmed.

Edmund Nichols and Edmund Nichols, Jr., both of Los Angeles, for appellant.

Preisker, Goble, Twitchell & Stephan, of Santa Maria, for respondents.

YORK, Presiding Justice.

Respondents as owners of certain real property situate in Santa Barbara county, on June 1, 1936, entered into an oil and gas lease with appellant Olympic Refining Company, as lessee, which provided in part as follows:

"3. The Lessee agrees to start the drilling of a well for oil within six months from the date of this agreement, and to continue the work of drilling such well, after commencing the same, with due diligence until a depth of 3000 feet has been reached, unless oil is discovered in paying quantities at a lesser depth, or unless such formations are encountered at a lesser depth as will indicate to the geologist of the Lessee that further drilling would be unsuccessful.

* * *

"8. The Lessee may, by giving the Lessor written notice of intention so to do, extend the period for commencing the first well, * * * for not to exceed five years by paying to the Lessor a rental of $2.00 per acre per month, payable monthly on the first day of each and every month in advance of said extended period. All rentals shall cease when drilling is commenced or the premises quit-claimed. Rental payable on the basis of 320 acres."

It is undisputed that lessee failed to commence the drilling of a well for oil within six months of the date of the agreement and paid the rental of $2.00 per acre each month from December 1, 1936 to and including August 1, 1938, upon a basis of 320 acres of land or $640 per month. On October 21, 1938, the instant action was commenced by the lessors to recover rentals alleged to be due and payable on September 1, and October 1, 1938. Up to the time of the trial, no well had been commenced on the said land, the land had not been quitclaimed, and a default had not been declared by the lessors under the lease. Neither had the written notice of extension provided for in the lease been given by the lessee.

At the conclusion of the trial, the court found that the total sum of $3,200, being the rental for five months payable in advance on September 1, 1938 to and including January 1, 1939, was due and payable under the lease; and that lessee "did elect to extend the period for commencing the first well, as provided in said lease. That * * * both parties to said lease * * * waived any written notice provided for in said lease by the payment and acceptance of said rental".

From the judgment which was entered in accordance with the findings of fact and conclusions of law for the sum of $3,200 in favor of lessors, this appeal is prosecuted by the lessee "on the theory that the right of appellant to extend the period of drilling the first well under said * * * lease by the giving of written notice of intention and by the payment of the stipulated monthly rental was permissive, and when exercised and rental paid each month, it extended the period for one month only

and no rental accrued, unless appellant gave written notice of its intention to extend said period for a definite period of time, in any event not to exceed five years".

The only reasonable construction of the lease was followed by the trial court. The amounts paid by appellant were made under the terms of the lease, and it was unnecessary to give any written notice of extension so long as the monthly payments were tendered and accepted. The only way in which the lease could be terminated and the liability to pay rental obviated would be for appellant to commence drilling or quitclaim the premises, as provided by the terms of the said lease.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concurred.



46 Cal.App.2d 857

PEOPLE v. LOPEZ.

Cr. 3481.

District Court of Appeal, Second District, Division 1, California.

Sept. 26, 1941.

Hearing Denied Oct. 23, 1941.

1. Infants ⇐20

Evidence sustained conviction for contributing to delinquency of a minor. St.1937, p. 1033, § 702.

2. Indictment and Information ⇐191(8)

In prosecution under information charging accused with aiding and abetting in commission of crime of statutory rape, wherein the acts committed tended to show commission of the acts charged and such acts in themselves actually constituted the offense of contributing to the delinquency of a minor, conviction of the latter offense was proper. Pen.Code, § 261; St.1937, p. 1033, § 702.

3. Criminal law ⇐193½

Where accused was charged in information with the offense of aiding and abetting in commission of crime of statutory rape, a judgment convicting the accused of the lesser offense of contributing to the delinquency of a minor would prevent a retrial of the accused upon original charge, since the judgment constituted an "acquittal" of the crime of aiding and abetting in commission of crime of statutory rape. Pen.Code, § 261; St.1937, p. 1033, § 702.

See Words and Phrases, Permanent Edition, for all other definitions of "Acquittal".

4. Criminal law ⇐27

The offense of aiding and abetting in the commission of the crime of statutory rape is a "felony". Pen.Code, § 261.

See Words and Phrases, Permanent Edition, for all other definitions of "Felony".

5. Criminal law ⇐27

The offense of contributing to the delinquency of a minor is a "misdemeanor". St. 1937, p. 1033, § 702.

See Words and Phrases, Permanent Edition, for all other definitions of "Misdemeanor".

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Virginia Lopez was convicted of contributing to delinquency of a minor, and she appeals.

Affirmed.

Donald MacKay and Prentiss Moore, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant Virginia Lopez was charged in an information filed by the district attorney with aiding and abetting her codefendant in the commission of the crime of statutory rape. A jury trial having been waived, the court found appellant guilty "of the crime of contributing, a lesser offense than that charged in the information, but necessarily included therein", and sentenced her to the county jail for the term of one year.

This appeal is prosecuted from the judgment of conviction and from the order denying motion for new trial.

The following question is presented by appellant for determination by this court: "Where a defendant is charged in one

count with the violation of section 261 of the Penal Code, can such defendant be found guilty of contributing to the delinquency of a minor (Section 702, Welfare and Institutions Code, St.1937, p. 1033), a misdemeanor, where no such crime is charged or alleged in the information or complaint?" Appellant urges that before she could be found guilty of a lesser offense than that charged against her, such lesser offense must necessarily be included in the charged offense, and "must not only be a part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof"; and cites in support of this theory the case of People v. Bevans, 19 Cal.App.2d 288, 65 P.2d 92, 93. The cited case is not in point in support of such contention, but in fact does in a measure support the judgment rendered.

The minor prosecutrix testified that her clothing was removed against her will by appellant and that appellant then placed said minor on the bed and held her down while the act of intercourse was accomplished. Appellant's codefendant La Rue pleaded guilty to contributing to the delinquency of said minor, under the charge of statutory rape as set forth in the information, and was permitted to file an application for probation. While said application was pending, La Rue appeared as a witness for appellant and, while he admitted having had sexual intercourse with the prosecutrix, he denied that appellant was actually present in the room when the act or acts occurred.

[1] There was sufficient evidence introduced to justify the trial court in finding appellant guilty as charged in the information. However, it is apparent that the trial judge discounted a great deal of the testimony and disbelieved some portions of it, but the evidence was sufficient to support his finding that appellant committed the offense of which he found her guilty.

[2-5] The only question raised which is worthy of discussion is, whether the court was justified as a matter of law in rendering the judgment which it did. There is some slight conflict in the decisions as to the law on this subject, but it is the better rule to hold that, where the acts committed tended to show the commission of the acts charged and where such acts in themselves actually constituted the lesser offense, i. e., contributing to the delinquency of the minor, a conviction had of the lesser offense should be sustained. The judgment rendered would prevent the retrial of appellant upon the original charge, for the reason that it amounted to an acquittal of the greater crime, to-wit: aiding and abetting in the commission of the crime of statutory rape, which is a felony, while the lesser offense, of which appellant was found guilty, is a misdemeanor.

The judgment and order appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concurred.



46 Cal.App.2d 805

HART v. IRVINE et al.

Civ. 13135.

District Court of Appeal, Second District, Division 2, California.

Sept. 22, 1941.

1. Trial ⇐139(1), 178

Directed verdict for defendant may be granted only when court in disregarding conflicting evidence and viewing the evidence in light most favorable to plaintiff, giving plaintiff's evidence proper value and indulging in every legitimate inference deducible therefrom, finds that evidence is insufficient to support verdict for plaintiff.

2. Automobiles ⇐245(8)

In action for injuries sustained by minor bicyclist when struck by automobile, evidence of defendant's negligence required submission of case to jury.

3. Automobiles ⇐245(74)

A minor bicyclist who looked in both directions before proceeding across street, and who did not see defendant's approaching automobile, was not contributorily negligent as a matter of law.

4. Automobiles ⇐245(67)

Where one who commences to cross street fails to look in direction from which automobiles may be expected, issue of his

contributory negligence is usually "question of law" for court but where one looks but does not see an approaching automobile or, seeing one, erroneously misjudges its speed or distance, the question is usually one for jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

5. Negligence ⇐85(2)

Child of 11 years is not to be held to same degree of care as an adult but is chargeable only with such ordinary care for his own safety as a prudent person of like age, intelligence and experience would exercise under similar circumstances.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Alvin Hart, a minor, against Rodman Irvine, and others, for damages for injuries suffered when Alvin Hart was struck by an automobile. From a judgment on a directed verdict for defendant, plaintiff appeals.

Reversed.

Faries & McDowell, of Los Angeles, for appellant.

Lyndol L. Young, of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff commenced this action to recover damages for injuries which he suffered on December 20, 1939, when he was struck by an automobile driven by defendant Mary D. Irvine. When the evidence had been received the trial court instructed the jury to return a verdict for defendants, stating that plaintiff had failed to prove negligence on the part of defendants and also that plaintiff was guilty of contributory negligence as a matter of law. Plaintiff has appealed from the judgment entered upon the verdict returned in accordance with the instruction of the court.

At the time of the accident plaintiff was of the age of eleven years and nine months. With another boy of about the same age, Ellis Hassell, he had been delivering magazines. Both boys were using bicycles. They rode their bicycles along an alley 20 feet in width to a point where the alley intersected Alpine drive, a street approximately 70 feet in width from property line to property line and 30 feet in width from curb to curb. Mrs. Irvine, who will hereinafter be referred to as defendant, was driving her automobile in a southerly direction on Alpine drive on her right side of the highway near the center of the street. In the seat by her side was her baby son, aged three and one half years, and in the rear was her Doberman pinscher dog. As plaintiff rode his bicycle across Alpine drive the left front part of defendant's car struck the rear wheel of the bicycle near the center of the street, hurling plaintiff through the air a distance of about 15 feet.

[1, 2] In reviewing the action of the trial court in directing a verdict for defendants the rule to be observed by the appellate court is well established. We are bound to view the evidence in the light most favorable to plaintiff, to give to plaintiff's evidence all the value to which it is legally entitled, including every legitimate inference that may be drawn therefrom, and we must disregard all evidence in conflict therewith. If, viewed in this manner, there is evidence in the record of sufficient substantiality to support a verdict in plaintiff's favor the action of the trial court in directing a verdict for defendants cannot be sustained. Estate of Lances, 216 Cal. 397, 14 P.2d 768. Although the evidence in the case before us is conflicting, we are satisfied that plaintiff produced sufficient evidence to give support to a verdict if the jury should find in his favor.

From plaintiff's evidence it appears that he and his companion reached Alpine drive at approximately the time the sun set on the day of the accident, 4:47 p. m. Plaintiff testified: "Q. When you came to Alpine, what did you do, if anything? A. We stopped at the alley and put our feet down so we would not fall over when we started out. We looked north and then south. We looked out for the cars to come up, because the cars come up from the boulevard there". He further testified that he did not see any automobile approaching and started to cross Alpine drive; that Ellis yelled at him and he "tried to speed up". He further stated: "This car came down the street and Ellis yelled at me and I tried to speed up but it hit me on the rear wheel of my bicycle." It appears that there is a bend in Alpine drive, and Ellis Hassell testified that he saw defendant's car when it was coming around the bend, a distance of at least 260 feet from the alley. Although defendant

testified that she stopped her car in about 8 feet, there is evidence that she travelled a distance of about 200 feet before bringing her car to a stop. Defendant returned to the scene of the accident and stated that her dog had been bothering her. Plaintiff's mother testified that in a conversation at the hospital after the accident she asked defendant whose fault it was and that defendant replied: "Don't bother him it was my fault. I take full responsibility." Defendant testified that her lights were "on" at the time of the accident but other witnesses testified that it was daylight and the headlights of the car were not lit.

In support of his contention that the negligence of defendant was established plaintiff refers to the fact that defendant lived in the vicinity of the accident and was familiar with the locality, and argues that she failed to keep a proper lookout and failed to keep her car under proper control; that as plaintiff rode a distance of approximately 35 feet to the center of Alpine drive he was in plain view of defendant for a considerable distance after she drove around the bend on Alpine drive; that the force with which the bicycle was struck, as indicated by the distance plaintiff was hurled through the air, and also the distance which defendant travelled after the accident, approximately 200 feet according to plaintiff's evidence, give rise to inferences of negligence and of excessive speed. If the issues had been submitted to the jury and the jury had drawn inferences of negligence on the part of defendant it could not be held as a matter of law that such inferences were unreasonable.

[3-5] The trial court also erred in concluding that plaintiff was guilty of negligence as a matter of law. The record contains positive evidence that plaintiff stopped his bicycle and looked in both directions before proceeding across Alpine drive but did not see defendant's automobile. It is a general rule that one who commences to cross a street intersection and fails to look at or in the direction from which automobiles may be expected to be coming should be regarded as failing to take any precaution at all for his own safety. In such a situation the issue of his contributory negligence is usually a question of law for the court. But where, as here, one looks but does not see an approaching automobile, or seeing one, erroneously misjudges its speed or distance, the question is usually one for the jury. White v. Davis, 103 Cal.App. 531, 284 P. 1086. The rule just mentioned was applied in the case cited to a situation in which the plaintiff was an adult. It is especially appropriate in a case in which the plaintiff is a child of eleven years of age, who is not to be held to the same degree of care as an adult but is chargeable only with such ordinary care for his own safety as a prudent person of like age, intelligence and experience would exercise under similar circumstances.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concurred.



46 Cal.App.2d 817

BANK OF AMERICA N. T. & S. A., v. HOLLYWOOD IMP. CO. et al.

Civ. 2786.

District Court of Appeal, Fourth District, California.

Sept. 23, 1941.

Hearing Denied Nov. 17, 1941.

1. Mortgages ⇐306

An instrument, reciting that in consideration of mutual promises of the parties it is agreed that maturity of note secured by real estate mortgage be extended to a specified date and that the mortgagor agrees to pay the obligation in accordance with its terms as extended, was construed not only as an extension, but also as an acknowledgment of the obligation and a renewal of the terms of the mortgage within the meaning of statute requiring such renewals to be executed by the formalities required in case of a grant of real property. Civ.Code, §§ 1091, 2922.

2. Limitation of actions ⇐148(4)

A written agreement between holder and owner of note secured by real estate mortgage and maker and mortgagor, which not only extended maturity of note but also constituted a renewal of the note and mortgage and contained an acknowledgment of the obligation, operated to start a new period of limitation on the indebtedness.

3. Mortgages ⇐25(6)

A presumption of the existence of a consideration for a note and mortgage arises

from the writing itself, and such presumption is itself evidence.

4. Mortgages ⇐25(6)

The burden of proof rests upon a party seeking to invalidate a note and mortgage for want of consideration.

5. Mortgages ⇐306

An agreement between owner and holder of note secured by real estate mortgage and maker and mortgagor, which not only extended maturity date but also constituted a renewal of the obligation to pay the indebtedness secured by the mortgage, conferred on the mortgagor an advantage or benefit which constituted a sufficient "consideration" for the execution of the agreement, there being an implied agreement to forbear on the part of the mortgage holder.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

6. Mortgages ⇐306

Where all parties admittedly signed an instrument extending the time for payment of a note secured by real estate mortgage and no fraud or deception was claimed or found, it was unnecessary to a complete execution of the instrument that a copy thereof must be left with all of the parties.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by the Bank of America N. T. & S. A. against the Hollywood Improvement Company and others to foreclose a real estate mortgage. From a judgment in favor of defendants, plaintiff appeals.

Affirmed in part and reversed in part.

Louis Ferrari, of San Francisco, and Edmund Nelson and A. S. Goldflam, both of Los Angeles, for appellant.

Bordwell, Mathews & Wadsworth, of Los Angeles, for respondents.

GRIFFIN, Justice.

This action was filed June 28, 1938, for the foreclosure of a mortgage given by Hollywood Improvement Co., a corporation, to secure a promissory note dated May 1, 1929, in the sum of $25,000, payable on or before one year after date, and made payable to George L. and Pauline A. Eastman, who subsequently became endorsers of the note. The complaint sets forth fully the various endorsements and deliveries of the note and the various assignments of the mortgage through which means the note and mortgage came into the possession of the appellant which, at the time this action was instituted, was the owner and holder of the note and mortgage. On April 25, 1934, the appellant as party of the second part, and respondents as parties of the first part, agreed in writing to extend the time for payment of the note to and including the first day of May, 1935, and respondents again agreed to pay the note and mortgage according to the terms thereof as extended.

The extension agreement, offered by appellant and received in evidence over objection, provided that "* * * in consideration of the premises and of the mutual promises of the parties hereto, it is agreed as follows: (1) the maturity of the principal of said promissory note is extended to May 1, 1935. (2) The first parties and each of them jointly and severally agree to pay the indebtedness evidenced by said promissory note in accordance with the terms thereof as extended by this agreement".

Respondents George L. Eastman and Pauline A. Eastman filed an answer and relied for their defense upon their discharge as endorsers of the note, by reason of the fact that the note had not been presented for payment, that no notice of dishonor had been given to the respondents, that there was no protest of the note, and further that there was no consideration for their signing of the extension agreement.

The respondent Hollywood Improvement Co. filed an answer denying that they agreed in writing to extend the time of payment of the promissory note and that neither it nor any of the defendants paid any consideration to the plaintiff for the execution by plaintiff of the extension agreement in writing above mentioned. It also pleaded the bar of the statute of limitations, subdivision 1, section 337 of the Code of Civil Procedure. The respondents also contend that the extension agreement was not fully executed in that there had been no delivery of the extension agreement to the respondents. The controversy in this case arises over the validity of the so-called extension agreement.

It was stipulated at the trial that other than the agreement itself there was no consideration given the appellant for the signing of the purported agreement. The trial court found that no consideration of any kind or nature was paid or given to the

plaintiff by the defendants or any of them or by any other person on behalf of the defendants for the signing by plaintiff of the purported written extension agreement; that the purported extension agreement was never delivered to the respondents and was never executed; that the cause of action was barred by the statute of limitations. It entered judgment accordingly. Plaintiff appealed.

The appellant concedes "that the defense of the respondents George L. Eastman and Pauline A. Eastman, based on the failure of consideration to them for the signing of said extension agreement is valid, and therefore will not further prosecute the appeal from that portion of the judgment in favor of the defendants John L. Eastman and Pauline A. Eastman, but prosecutes this appeal solely from that portion of the judgment in favor of the respondent Hollywood Improvement Co., a corporation".

The point to be determined by this court on the question of consideration is whether the agreement by appellant to extend the maturity of the note to May 1, 1935, and by respondent Hollywood Improvement Co. to pay the note according to its terms at the expiration of the extended period constituted a legal consideration.

Appellant contends that the mutual promises of the parties and the actual forbearance to sue by the appellant constituted a valid contract and was supported by a legal consideration.

Respondent, in support of the judgment, argues that the new agreement was a mere nudum pactum because there was no new and valuable consideration given or paid to appellant for the signing of the purported agreement.

Section 2922 of the Civil Code provides that a mortgage can be created, renewed or extended, only by writing, executed by the formalities required in case of a grant of real property. (See § 1091, Civ. Code.) The renewal or extension here involved was so executed. The language of the agreement must be construed, not only as an extension, but also as an acknowledgment of the obligation and a renewal of the terms of the mortgage. The maturity of the principal was extended to May 1, 1935, and each party acknowledged the obligation and respondent agreed to pay it in accordance with its terms as extended. In Moore v. Gould, 151 Cal. 723, 91 P. 616, it was held that (quoting from syllabus) "An instrument in writing, executed by the * * * maker of a promissory note and mortgage, securing the same, certifying and declaring that such mortgage, 'together with the promissory note and debt secured thereby (which were particularly described), is hereby renewed and extended for the further term of two years from date,' constitutes a renewal of the note and mortgage within the meaning of section 2922 of the Civil Code. Such instrument is also an acknowledgment of the debt, and in either aspect it operated to start a new period of limitation thereon." The language of the extension and renewal there construed was quite similar to the one here involved. The court then held that the instrument "constitutes a renewal of the note and mortgage within the meaning of section 2922 of the Civil Code" and further held that each of them contained an acknowledgment of the debt and thus operated to start a new period of limitation. To the same effect are German S. & L. Society v. Hutchinson, 68 Cal. 52, 8 P. 627; Smith v. Lawrence, 38 Cal. 24, 99 Am.Dec. 344; Southern Pacific Co. v. Prosser, 122 Cal. 413, 52 P. 836, 55 P. 145; London, etc., Bank v. Bandmann, 120 Cal. 220, 52 P. 583, 65 Am.St.Rep. 179; Seaton v. Fiske, 128 Cal. 549, 61 P. 666; Newhall v. Hatch, 134 Cal. 269, 66 P. 266, 55 L.R.A. 673; Code Civ.Proc. 360; Concannon v. Smith, 134 Cal. 14, 66 P. 40; Dearborn v. Grand Lodge, etc., 138 Cal. 658, 72 P. 154; Tolman v. Smith, 85 Cal. 280, 288, 24 P. 743; McKelvey v. Wagy, 157 Cal. 406, 108 P. 268; Schwartz v. Edmunds, 20 Cal.App.2d 530, 67 P.2d 351.

[1, 2] This same conclusion must be reached in the instant case as to the Hollywood Improvement Co., the maker of the note and mortgage involved. Under the authorities cited, there could be no question but that if the appellant had treated the extension agreement as nudum pactum and had disregarded it and sued in violation of its terms prior to the new due date, the defense that the action was prematurely instituted would have been sufficient. See, also, Harting v. Cebrian, 10 Cal.App.2d 10, 51 P.2d 195.

Respondent relies upon the general rule, applicable to a mere extension of time of payment, to the effect that an agreement to extend the time of payment after the principal sum has become due cannot be enforced where there is no consideration therefor, as it is a mere nudum pactum (18 Cal.Jur. p. 153, § 452), and cites in support thereof

McCann v. Lewis, 9 Cal. 246; Hughes v. Davis, 40 Cal. 117; Peachy v. Witter, 131 Cal. 316, 63 P. 468; Stroud v. Thomas, 139 Cal. 274, 72 P. 1008, 96 Am.St.Rep. 111; Marinovich v. Kilburn, 153 Cal. 638, 96 P. 303; Dean v. Sedan Milling Co., 19 Cal.App. 28, 124 P. 736; Robson v. O'Toole, 60 Cal.App. 710, 214 P. 278; Gould v. Keith, 9 Cal.App.2d 284, 49 P.2d 623; Berkowitz v. Tyderko, Ltd., 13 Cal.App.2d 561, 57 P.2d 173; and Braun v. Crew, 183 Cal. 728, 192 P. 531.

We have examined the authorities cited and do not believe the facts in the instant case come within the rule there declared. The form of agreement, in effect, constituted not only an extension but a renewal of the obligation to pay the indebtedness evidenced by the note in accordance with the terms thereof as extended by the agreement, and an implied agreement to forbear on the part of appellant. Such form of renewal has been approved in several cases. Moore v. Gould, supra; Steiner v. Davis, 24 Cal.App.2d 692, 76 P.2d 157.

[3, 4] A presumption of a consideration for a note and mortgage arises from the writing itself. Such presumption is itself evidence. Moore v. Gould, supra. The burden of proof is upon the party seeking to invalidate the instrument for want of consideration. Atlas Mixed Mortar Co. v. Stein, 125 Cal.App. 31, 13 P.2d 766.

[5] In the late case of Adolph Ramish, Inc., v. Woodruff, 2 Cal.2d 190, page 207, 40 P.2d 509, 517, the court said: "It has been repeatedly held that the extension of time in which to pay money due confers upon the debtor an advantage or benefit which in itself constitutes a sufficient consideration for the execution of an instrument by him * * *." It quoted from 19 Cal.Jur. p. 842, § 37, as follows: "Any suspension or forbearance of a legal right constitutes a sufficient consideration. Thus an agreement to forbear to sue upon an obligation presently due is a sufficient consideration for the giving of a note. Even though the forbearance is for one day only, there is a sufficient consideration as the law does not weigh the quantum." See, also, Harting v. Cebrian, supra, which was an action on a promissory note given in renewal of a prior note. The court there held that the second note (due ninety days after date) was at least an implied contract to forbear for a period of ninety days and that alone constituted a sufficient consideration to support the instrument. To the same effect are General v. Anthony, 38 Cal.App.2d 321, 100 P.2d 1087; Hammond Lumber Co. v. Cravens, 82 Cal.App. 685, 256 P. 428; Lincoln Holding Corp. v. Levering, 219 Cal. 427, 27 P.2d 74; Tripler v. McDonald Lumber Co., 173 Cal. 144, 148, 159 P. 591; Miller v. Roach, 15 Cal. App.2d 427, 59 P.2d 418; Shlaudeman v. Grubel, 15 Cal.App.2d 499, 59 P.2d 873; Hutchon v. Rose, 130 Cal.App. 735, 20 P.2d 357; Parrino v. Rallis, 116 Cal.App. 364, 2 P.2d 515; State Loan, etc., Co. v. Cochran, 130 Cal. 245, 62 P. 466, 600; Vassere v. Joerger, 10 Cal.2d 689, 76 P.2d 656; and Woollomes v. Gomes, 26 Cal. App.2d 461, 79 P.2d 728. This same principle is enunciated in the late case of Easton v. Ash, 18 Cal.2d 530, 116 P.2d 433, decided August 28, 1941.

[6] The argument in reference to the question of the due execution of the agreement requires but little attention. All parties admittedly signed the instrument. No fraud or deception was claimed or found. The court found as true that all of the parties to the extension agreement signed it. It was unnecessary to a complete execution of the document that a copy thereof must be left with all of the parties as contended and found by the court. Schwartz v. Edmunds, supra, 20 Cal.App.2d page 532, 67 P.2d 351.

We therefore must conclude that the finding of the trial court that there was no consideration for the giving of this agreement, that the statute of limitations had barred the action, and that there was no due execution of the instrument is without legal or evidentiary support.

Appellant abandoned its appeal from the judgment in favor of George L. Eastman and Pauline A. Eastman. That portion of the judgment is therefore affirmed. For the reasons expressed, the judgment in favor of the Hollywood Improvement Co. is reversed. Appellant will recover its costs of appeal against the Hollywood Improvement Co. Respondents George L. Eastman and Pauline A. Eastman will recover their costs of appeal against appellant.

MARKS, Acting P. J., concurred.

46 Cal.App.2d 843

STEWART et al. v. SUPERIOR COURT OF TULARE COUNTY et al.

Civ. 2700.

District Court of Appeal, Fourth District, California.

Sept. 24, 1941.

1. Courts ⇐212

Where action in which injunction was issued by superior court was equitable in character, in which exclusive appellate jurisdiction was vested in Supreme Court, application for a writ, such as a writ of certiorari to review order granting injunction should have been made to Supreme Court and not to a District Court of Appeal.

2. Appeal and error ⇐100(1)

An appeal lies from an order of the superior court granting an injunction restraining a county clerk from certifying referendum petitions against a legislative enactment. Code Civ.Proc. § 963.

3. Certiorari ⇐5(1)

Where action in which injunction was issued by superior court restraining a county clerk from certifying referendum petitions against a legislative enactment was equitable in character, and order granting injunction was appealable, petitioner's proper remedy for review of order was by appeal and not by petition for a writ, such as a writ of certiorari. St.1941, p. 2079; Code Civ.Proc. § 963.

Original proceedings by Gladys Stewart, etc., and others against the Superior Court of Tulare County and others for certiorari to review and annul an order of the Superior Court of Tulare County restraining respondent County Clerk from certifying certain referendum petitions against a legislative enactment.

Petition for writ denied.

Clarence E. Todd, of San Francisco, for petitioners.

R. E. Combs and Maddox & Abercrombie, all of Visalia, for respondents.

PER CURIAM.

Petitioners seek to have us review and annul, in this original proceeding for a writ of certiorari or other appropriate writ, an order of the Superior Court of Tulare County restraining Gladys Stewart, as County Clerk of Tulare County, from certifying certain referendum petitions against a legislative enactment known as "Senate Bill 877", being the so-called "Hot Cargo" statute passed by the last legislature. St.1941, p. 2079. There are two sufficient reasons why we should not grant the writ.

[1] First: The action in which the injunction was issued is equitable in character, in which exclusive appellate jurisdiction lies in the Supreme Court. Application for a writ in such a case should have been made to the Supreme Court and not to a district court of appeal. Collins v. Superior Court, 147 Cal. 264, 81 P. 509; Estate of Turner, 39 Cal.App. 56, 177 P. 854; Gunder v. Superior Court, 100 Cal.App. 334, 279 P. 822; Bern Oil Co., Ltd., v. Superior Court, 5 Cal.App.2d 21, 41 P.2d 939.

[2, 3] Second: An appeal lies from the injunction sought to be reviewed here. § 963, Code Civ.Proc. Petitioner's proper remedy is by appeal, and not by petition for a writ. Casner v. Daily News Co., Ltd., 12 Cal.2d 402, 84 P.2d 1032; Young v. Superior Court, 16 Cal.2d 211, 105 P.2d 363; Casner v. Superior Court, 23 Cal.App.2d 730, 74 P.2d 298.

The petition for the writ is denied.



ADAMS v. TALBOTT (DUNGAN, Intervener).

Civ. 11426.

District Court of Appeal, First District, Division 2, California.

Sept. 25, 1941.

Rehearing Denied Oct. 25, 1941.

See 118 P.2d 23.

1. Appeal and error ⇐66

An interlocutory judgment is not "appealable". Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable".

2. Appeal and error ⇐344

If a judgment entered on June 19, 1939, was a final judgment, a notice of appeal from judgment filed on November 9, 1939, was too late. Code Civ.Proc. § 939.

3. Appeal and error ⇐937(2)

Where plaintiff made a motion for judgment quieting plaintiff's title on ground that defendant did not comply with provisions of judgment in quiet title suit, motion was denied, and plaintiff then attempted to appeal from judgment, the District Court of Appeal could not, on plaintiff's appeal from order granting defendant's motion to strike out plaintiff's notice of appeal, indulge in presumption that judgment became final at time of filing of appeal therefrom. Code Civ.Proc. §§ 663, 944.

4. Appeal and error ⇐1074(3)

That trial court, on appellee's motion, struck out appellant's notice of appeal and request for transcript was not prejudicial where notice was a nullity.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Suit by D. Adams against Paul Talbott to quiet title to realty, wherein defendant filed a cross-complaint and J. M. Dungan intervened. Judgment was entered for defendant and plaintiff filed a notice of appeal from the judgment. From an order granting defendant's motion to strike out plaintiff's notice of appeal and to terminate proceedings on appeal, plaintiff appeals.

Order affirmed.

Garth V. Lacey, of Salinas, for appellant.

J. P. Mandl, of Salinas, for respondent Talbott.

Stanley K. Lawson, of Salinas, for respondent Dungan.

NOURSE, Presiding Justice.

Plaintiff appeals from an order granting defendant's motion to strike plaintiff's notice of appeal and to terminate proceedings on appeal.

On January 12, 1938, plaintiff commenced this action to quiet title to real property against defendant, who filed a general denial and a cross-complaint alleging that he was an aged man and that he had transferred the property to plaintiff upon a trust agreement for his benefit to be reconveyed to him when the property was cleared of debts. On April 13, 1938, Dungan, a creditor of defendant, intervened to protect certain creditor's rights in any property in which defendant may have an interest. On January 14, 1939, the court in a memorandum decision decided that a trust existed in favor of defendant, and on March 22, 1939, the court made a determination of the issues presented in an accounting rendered by plaintiff. On June 19, 1939, the court filed its findings and conclusions of law based upon the former memoranda decisions and entered a judgment in accordance therewith. The judgment provided that plaintiff held the real property as trustee and she was ordered to reconvey it to defendant upon the condition that defendant pay certain moneys to her and to others; plaintiff was ordered to administer the trust faithfully until a reconveyance was had and she was to be allowed a reasonable compensation for her services; in the event that the defendant should fail to perform the conditions set forth within 90 days from the entry of judgment plaintiff would be entitled to a decree of the court quieting her title. Notice of entry of the judgment was served on plaintiff on June 21, 1939. On October 10, 1939, plaintiff filed a "First and Final Account of Trustee and Application to Settle Said Account and Dismiss Trustee". On October 19, 1939, defendant served on plaintiff a demand for reconveyance in accordance with the judgment. On October 17, 1939, plaintiff filed a notice of motion for a judgment quieting her title upon the ground that defendant had not fulfilled the orders included in the judgment of June 19, 1939, requiring payment of certain moneys within 90 days. On October 23, 1939, the court denied plaintiff's motion by an order which stated that defendant had been ready, willing and able and had offered within the 90 days' period to comply with the conditions of the judgment; the plaintiff was ordered to reconvey the property pursuant to the judgment. On November 9, 1939, plaintiff filed a notice of appeal "from the judgment" rendered in favor of defendant, requested the clerk to prepare a transcript and gave notice that she would deliver the deed to the county clerk pursuant to the Code of Civil Procedure, section 944. On November 20, 1939, defendant moved to strike from the records plaintiff's notice of appeal, notice and request for a transcript and notice of deposit of the deed with the clerk, and for an order terminating the proceedings on appeal. The court granted this motion by its order on December 15, 1939, upon the ground that the judgment entered on June 21, 1939, was a final judgment and the time for appeal had expired. On December 22, 1939,

plaintiff moved the court to vacate its order striking her notice of appeal and terminating the proceedings on appeal; this motion was made upon the ground that the judgment was only interlocutory and until the court made a final determination of all of the future conditions and acts imposed in it any appeal would be anticipatory and a nullity. The court denied plaintiff's motion on January 10, 1940. Plaintiff appeals from the order of December 15, 1939, which granted defendant's motion and ordered plaintiff's notice of appeal, notice and request for a transcript and notice of deposit of deed with the clerk stricken from the record and which further ordered that the proceedings in said court on appeal be terminated.

[1-3] The order must be affirmed for these reasons: If the judgment of June 19, 1939, is interlocutory it is nonappealable. § 963, Code Civ.Proc. If it is a final judgment the notice of appeal filed on November 9, 1939, was too late. § 939, Code Civ.Proc. Appellant argues that the judgment was purely interlocutory, but that she "has presumed that the Judgment became final at the time of filing her appeal, after she had made her motion to quiet her title, and same had been denied". This is a presumption in which we may not indulge. Appellant's motion was one similar to those authorized by section 663 of the Code of Civil Procedure for the entry of a different judgment. If that motion had been granted and a different judgment had been entered as demanded the appeal would lie from that judgment and not from the one entered on June 21, 1939. But the appellant has not appealed from the order denying her motion, and the merits of that motion are not involved in this proceeding.

[4] The appellant also attacks the jurisdiction of the trial court to strike her notice of appeal and her request for a transcript from the records of the trial court. It is argued that this is a matter solely within the jurisdiction of the appellate court. But the notice of appeal was a nullity from the beginning and can serve no other purpose than to cloud the title to the property involved in the proceeding. The notice and request for a transcript related to a purported appeal which the court must deem not to have been taken. It is not necessary for us to decide whether jurisdiction to dismiss those proceedings rested in the appellate court alone. It is manifest from the entire record that the appeal must have been dismissed sooner or later and that the appellant has suffered no prejudice from the action taken by the superior court.

The order appealed from is affirmed.

STURTEVANT and SPENCE, JJ., concurred.



46 Cal.App.2d 779

PEOPLE v. HARRISON.

Cr. 3482.

District Court of Appeal, Second District, Division 2, California.

Sept. 19, 1941.

1. Criminal law ⇐1156(1)

Where accused's trial counsel is charged in affidavits of having been too intoxicated during course of the trial properly to advocate the cause of accused, for purpose of supporting motion for new trial, decision of trial judge that there is no merit in the affidavits is binding on reviewing court unless it should clearly appear that trial court's decision was arbitrary.

2. Criminal law ⇐1156(1)

Where the record before the reviewing court evidenced an intelligent attention to his duties by the attorney for accused, in view of presumption that he did his duty, the exercise of discretion by trial judge in denying motion for new trial on ground that the trial attorney was intoxicated during the trial and that accused did not have his day in court would not be disturbed on appeal.

3. Constitutional law ⇐321

On appeal from conviction for lewdly and lasciviously laying accused's hands criminally upon each of four of his children, wherein record of trial before examining magistrate was not before reviewing court, accused could not obtain reversal on ground that he did not have his day in court because his trial counsel neglected in cross-examination of the children to confront them with statements made by them at the preliminary hearing of the accused. Pen.Code, § 288.

4. Criminal law ⇐1144(10)

In prosecution of accused for having lewdly and lasciviously laid his hands criminally upon each of four of his children, accused's trial counsel was presumed to have done his duty as he saw it and there was a fair presumption that he exercised a wise discretion in not attempting to harass children of tender ages by having them re-emphasize to jury that which they had already recited, and accused was not entitled to reversal on ground that accused did not have his day in court because his trial counsel neglected in cross examination of children to confront them with statements made by them at the preliminary hearing of accused. Pen.Code, § 288.

5. Infants ⇐20

Evidence sustained conviction of accused for having lewdly and lasciviously laid his hands criminally upon each of four of his children. Pen.Code, § 288.

6. Criminal law ⇐935(1), 1159(2)

The rule that, where evidence is insufficient, a new trial will be granted, applies primarily to trial judge, but it applies likewise to reviewing court where it is made to appear that the trial judge has abused his discretion, and that the record is destitute of evidence of accused's guilt.

7. Witnesses ⇐40(1)

Under Penal Code provisions, if a child under ten years of age appears to the trial judge to be "competent", that is, to have the capacity to receive impressions and to relate them truthfully, he becomes a competent witness. Pen.Code, § 1321; Code Civ.Proc. §§ 1879, 1880.

See Words and Phrases, Permanent Edition, for all other definitions of "Competent".

8. Criminal law ⇐1153(2)

After trial court has heard a child give his testimony and has determined that the child is a competent witness, the determination is not a matter of review any more than the trial court's ruling upon the capacity of any other witness. Pen.Code, § 1321; Code Civ.Proc. §§ 1879, 1880.

9. Criminal law ⇐1153(2)

Where review of testimony of child appearing in the record showed that the trial court was justified in allowing her to testify before the jury, the reviewing court was not concerned with the lack of thoroughness in the child's voir dire examination. Pen.Code, § 1321; Code Civ.Proc. §§ 1879, 1880.

10. Criminal law ⇐371(9, 12)

In prosecution of accused for having lewdly and lasciviously laid his hands criminally upon each of four of his children, proof of crimes similar to those alleged in the information against the same children was admissible to show motive or intent. Pen.Code, § 288.

11. Criminal law ⇐371(1)

When a defendant maintains that an act of which he stands accused is an innocent act, it is proper to call witness who can testify to prior attempts by the defendant to commit the same offense with which he stands charged, or similar offenses.

12. Criminal law ⇐371(9)

In prosecution of accused for having lewdly and lasciviously laid his hands criminally upon each of four of his children, wherein the intent of the accused was an important factor in proof of his guilt, it was competent to show other indecencies of the accused committed with respect to another child in order to leave no doubt as to criminal quality of the acts charged in the information; such evidence being calculated to rebut the innocent intent claimed by accused. Pen.Code, § 288.

Appeal from Superior Court, of Los Angeles County; Charles Burnell, Judge.

Virgil E. Harrison was convicted of having lewdly and lasciviously laid his hands criminally upon certain of his children, and he appeals.

Affirmed.

Edward Alan Mosk and Warren White, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

This appeal is from the judgments of conviction and from the order denying defendant's motion for a new trial. Defendant was accused by information charging him in four counts with violating section 288 of the Penal Code, which makes it a felony for a person wilfully to commit a lewd and lascivious act upon the body of a child under the age of 14 years with the intent of arousing or gratifying the sexual

desires of such person or of such child. After taking evidence for two days from seven witnesses for the prosecution and from eleven witnesses for the defense and after argument of counsel, defendant was convicted on all four counts on April 22, 1941, and was sentenced to prison, the terms to run concurrently.

Defendant is 34 years of age. He has seven children. He has been totally blind for six years. Because of this physical infirmity, living in total darkness as he does, we have reviewed the record with the utmost compassion. Four of his little girls and his boy were the victims of his deplorable crimes. For obvious reasons we omit their Christian names and shall refer to the girls as AB, age 14 years; EC, age 12½; ID, age 9½, OV, age 8; and the son UZ, age 11 years.

Defendant was convicted of having lewdly and lasciviously laid his hands criminally upon each of four of his children thus designated. According to their testimonies respectively, AC, age 14, the eldest daughter, was in the eighth grade. His criminal act against her as charged occurred December 10, 1940. She recounted his other attempts. The daughter EC, who was 12½ years of age at the time of the trial, was in the sixth grade. She narrated his misconduct toward her as having occurred in the preceding September. The daughter ID was more than 9½ years of age at the time of the trial and was in the fourth grade. His crime against her took place in the latter part of November, 1940. According to the testimony of the son, who was past 11 years of age and in the fourth grade, he was his father's victim of the unspeakable crime. Each of the four children testified to abhorrent and sickening details. Neither the denial by defendant nor his excuse that he had merely rubbed their backs influenced the jury to disregard the testimony of these children. The daughter OV, age 8, had been his victim at other times. More of her sorrow later.

Defendant bases his appeal for a new trial and for a reversal of the judgment upon the following grounds:

1. That he did not have his day in court;

2. That the evidence is not sufficient to support the judgment;

3. That the court committed errors of law in the conduct of the trial.

The contention that he did not have his day in court is based upon the assertion that his counsel was intoxicated throughout the trial; that he himself was blind and unfamiliar with court procedure; and that as a consequence he did not have proper representation at the bar.

In presenting his motion, he filed affidavits to the effect that on the day of the trial his counsel was sluggish in his speech; that he failed to ask questions on cross examination that would have aided his defense; that he failed to develop the testimony of appellant or other defense witnesses; that he failed to bring still other witnesses into court at all; and that the reason for all this was that his counsel was intoxicated. Other affidavits were all couched in similar language and were calculated to convince the trial judge that defendant's trial counsel was too intoxicated properly to perform his duties as an advocate of appellant before the jury. In support of his contention, he cites the case of State of North Dakota v. Keller, 57 N.D. 645, 223 N.W. 698, 64 A.L.R. 434. In that case the trial court determined as a fact (at the hearing of the motion for a new trial) that the trial counsel there had been drunk during the course of the trial. The facts there recited were that no witnesses at all were called for the defense; that defendant did not testify; that few objections were made; that no instructions were submitted and no exception taken to those presented by the state. The trial court having there determined that inasmuch as the defendant's trial lawyer was admitted to practice law, it was powerless to grant a new trial. In reversing the case, the appellate court held that under such a set of facts as found, it was at least the duty of the trial court to advise the defendant as to his right to select other counsel and to afford him reasonable opportunity to do so; that it was the duty of the court to see that a fair trial be had. But, in the instant case, all of the seven witnesses for the prosecution were cross-examined and one-half of the time consumed in taking evidence was utilized in presenting witnesses for the defense. On the hearing of the motion for a new trial, the judge stated that the cross-examination of all witnesses was very ably conducted and covered every possible ground; that he thought the new counsel was making an improper attack upon his brother lawyer; that if the trial counsel had been guilty as charged in the affidavits, he would have sent him to jail for contempt of court; that he had interviewed the attaches of his court with respect to the

claim of intoxication of defendant's counsel; that each of them had said that there was not the slightest indication that the counsel was under the influence of liquor. The deputy district attorney stated at the hearing that he observed nothing during the conduct of the trial on the part of counsel that indicated any lack of respect for the court or anything that indicated in any way that counsel was unable to fulfill his duty to his client.

[1, 2] Where appellant's trial counsel is accused by affidavits of having been too intoxicated during the course of the trial properly to advocate the cause of appellant for the purpose of supporting the motion for a new trial, the decision of the trial judge that there is no merit in the affidavits is binding upon the appellate court unless it should clearly appear that the court's decision was arbitrary. People v. Gourdin, 108 Cal.App. 333, 291 P. 701. Where the record before this court evidences an intelligent attention to his duties by the trial lawyer, in view of the presumption that he did his duty, the exercise of discretion by the trial judge in denying the motion for a new trial will not be disturbed on appeal. People v. Gay, 37 Cal.App.2d 246, 99 P.2d 371.

[3, 4] Another basis for his claim that he did not have his day in court is that the trial counsel neglected in the cross-examination of the children to confront them with statements made by them at the preliminary hearing of defendant. There are three answers to this claim: (1) The record of the trial before the examining magistrate is not before this court; (2) inasmuch as the purpose of this contention is to show that the trial counsel was intoxicated, since the trial judge found to the contrary, that record would be immaterial; (3) since the trial counsel is presumed to have done his duty as he saw it, it is a fair presumption that he exercised a wise discretion in not attempting to harass children of such tender ages by having them re-emphasize to the jury that which they had already recited with such clarity and firmness as to convince the jury of the truth of their utterances.

[5, 6] The claim that the evidence is insufficient to justify the verdict needs no comment in view of the loathsome acts of defendant detailed in the testimony of each of the children. The authorities cited by counsel (People v. Adams, 14 Cal.2d 154, 93 P.2d 146; People v. McCullough, 38 Cal.App.2d 387, 101 P.2d 531; People v. Feary, 85 Cal.App. 433, 259 P. 491) are expressions of the fundamental law that where evidence is insufficient a new trial will be granted. That rule applies primarily to the trial judge. It applies likewise to the appellate court where it is made to appear that the trial judge has abused his discretion where the record is destitute of evidence of defendant's guilt.

Finally the claim that the court committed errors in the course of the trial is based upon the assertion of appellant that since all of the children were under 14 years of age at the time of the trial, it was the duty of the court to remove the presumption that the children were not possessed of the requisite knowledge and understanding to testify. Citing People v. Bernal, 10 Cal. 66. Such was never the law. The cited case was decided fourteen years before the statute was enacted that "all persons capable of perception and communication may be witnesses". Code Civ.Proc., § 1879; Pen. Code, § 1321.

[7-9] It is the law that children under ten years of age cannot be witnesses where they appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly. Sec. 1880, Code Civ.Proc. The last cited section means nothing more than that if a child under ten years of age appears to the trial judge to be competent, i. e., to have the capacity to receive impressions and to relate them truthfully, he becomes a competent witness. People v. Gasser, 34 Cal.App. 541, 543, 168 P. 157. After the judge has heard the child give his testimony and has determined that it was a competent witness, such determination is not a matter of review any more than his ruling upon the capacity of any other witness. People v. Craig, 111 Cal. 460, 44 P. 186; People v. Morcumb, 28 Cal.App.2d 465, 82 P.2d 714. There is nothing in the testimony of any of the five children that indicated in the slightest degree his incompetency to testify. The only two daughters under ten years of age were ID and OV. At the time of the trial, ID was more than 9½ years of age; her testimony was responsive, coherent and intelligent. The fourth daughter was OV, eight years of age. The trial judge satisfactorily tested her qualifications on voir dire. In addition to the fact that the trial judge became satisfied as to her competency, the record of her testimony shows that she was intelligent enough to receive impressions and competent intel-

ligibly to relate them. Since a review of her testimony appearing in the record shows that the court was justified in allowing her to testify before the jury, we are not concerned here with any lack of thoroughness in her voir dire examination. People v. Freeman, 24 Cal.App.2d 619, 75 P.2d 640.

[10, 11] Appellant also contends that he was prejudiced by the court's ruling in allowing the children to testify with respect to other similar acts done by him at times other than those alleged in the information. Proof of similar crimes against the same child is admissible to show motive or intent. People v. Craig, supra; People v. Harrison, 14 Cal.App. 545, 548, 112 P. 733; People v. Love, 29 Cal.App. 521, 524, 157 P. 9; People v. Hall, 25 Cal.App.2d 336, 339, 77 P.2d 244. But appellant reaches the crescendo in his criticisms of the trial court in protesting that it was error to allow OV, although not named in the information as a victim, to testify to her father's criminal behavior toward her. But the answer to this assignment is that while on the witness stand appellant denied that he had committed any of the criminal acts charged against him and protested that all he ever did was innocently to rub the backs of his children when they requested him to do so. Also, on cross-examination he denied that he had violated section 288 of the Penal Code with respect to his daughter OV and he offered other witnesses to prove that the only time he touched his children was when they came to have their backs rubbed before bed time. To meet this special defense that his acts were all innocent and proper, it was appropriate for the prosecution to present the youngest of the four daughters who, it was developed by appellant, was the first to make the complaint to her grandmother of his conduct, and who related such offensive details as could not have been the suggestion of others or the figment of her own imagination. When a defendant maintains that an act of which he stands accused is an innocent act, it is proper to call witnesses who can testify to prior attempts by the defendant to commit the same offense with which he stands charged or similar offenses. People v. Williams, 6 Cal. 2d 500, 58 P.2d 917.

[12] In view of the fact that the intent of the defendant was an important factor in the proof of his guilt, it was competent to show other indecencies of the appellant committed with respect to still another child in order to leave no doubt of the criminal quality of the act charged in the information. People v. Coltrin, 5 Cal.2d 649, 656, 55 P.2d 1161; People v. Morani, 196 Cal. 154, 236 P. 135; People v. Cook, 148 Cal. 334, 340, 83 P. 43; People v. Fehrenbach, 102 Cal. 394, 36 P. 678. Such evidence was calculated to rebut the innocent intent claimed by appellant. People v. Knight, 62 Cal.App. 143, 216 P. 96; People v. Turco, 29 Cal.App. 608, 156 P. 1001.

The judgments and the order appealed from are affirmed.

WOOD and McCOMB, JJ., concurred.



46 Cal.App.2d 762

SHEBLE v. TURNER.

Civ. 12509.

District Court of Appeal, Second District, Division 1, California.

Sept. 18, 1941.

1. Licenses ⇐39

A complaint for damages for breach of contract, providing that plaintiff was to act as defendant's agent in the erection of residences upon property owned by defendant, and in procuring loans from Federal Housing Administration by placing mortgages thereon, and in assisting in sale of the property, and that, in return for his services, net profit from sale was to be divided equally, failed to state a cause of action, in absence of an allegation that plaintiff was a duly licensed contractor under Contractors' License Law at all times during performance of the contract. Gen.Laws 1937, Act 1660, §§ 1, 2 (d), 3, 12.

2. Licenses ⇐11(5)

Under a contract providing that plaintiff was to act as defendant's agent in the erection of residences upon property owned by defendant and in procuring loans from Federal Housing Administration by placing mortgages thereon, and in assisting in sale of the property, and that, in return for his services, net profit from sale was to be divided equally, each party was a "contractor" within Contractors' License Law, even if contract could be construed as creating a joint

adventure. Gen.Laws 1937, Act 1660, §§ 1, 2(d), 3, 12.

See Words and Phrases, Permanent Edition, for all other definitions of "Contractor".

3. Joint adventures ⇐1

A contract entered into by plaintiff and defendant providing that plaintiff was to act as defendant's agent in the erection of residences upon property owned by defendant, and in procuring loans from Federal Housing Administration by placing mortgages thereon, and in assisting in sale of the property, and that, in return for his services, net profit from sale was to be divided equally, did not create a "joint adventure", but was merely a contract of "agency".

See Words and Phrases, Permanent Edition, for all other definitions of "Agency" and "Joint Adventure".

4. Contracts ⇐152

In construing a contract, weight must be allowed to language of parties.

5. Brokers ⇐82(1)

A complaint for damages for breach of contract providing that plaintiff was to act as defendant's agent in the erection of residences upon property owned by defendant, and in procuring loans from Federal Housing Administration by placing mortgages thereon and in assisting in sale of the property, and that, in return for his services, net profit from sale was to be divided equally, failed to state cause of action, in absence of an allegation that plaintiff was licensed to act as a real estate broker or real estate salesman at time alleged cause of action arose. Gen.Laws 1937, Act 112, §§ 1, 2, 20.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Ernest K. Sheble against Mabel Turner for damages for breach of contract. From a judgment dismissing complaint after demurrer had been sustained without leave to amend, the plaintiff appeals.

Affirmed.

Alfred E. Dennis, of Los Angeles, for appellant.

Kenneth A. White, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

This is an appeal from a judgment of dismissal entered upon the court's sustaining, without leave to amend, a complaint in which appellant sought to recover damages for an alleged breach of contract.

The written agreement between the parties, dated March 28, 1939, is set out in the complaint. In the preamble respondent is described as first party; appellant, as second party. The balance reads as follows:

"Whereas, Party of first part owns the following described real estate which is free and clear of all incumbrances: Lots 6, 7, 8, 9, 10, 11 and one half of Lot 12, of Block 1, Tract No. 5877 of the City of Burbank, Calif. A portion of which lies in Los Angeles County.

"It is the desire of the first party to erect residences upon these lots by placing F. H. A. mortgages thereon and to place same up for sale.

"Second party is to act as agent for first party in all matters pertaining to obtaining plans, arranging for placing of mortgages, supervision of construction, letting of subcontracts, payments thereof, assisting in sale of property and payments of commissions.

"First party will complete mortgages and other necessary documents, also to advance funds by notes or otherwise during construction and upon completion and sale of property if there is any money advanced over mortgages, same to be repaid to first party. The net profit remaining from sale of lots and residences is to be divided between parties equally upon sale of each residence.

"Witness Florence J. Swain	Mabel L. Turner, Party of first part
"Witness Ellena Braudner	Ernest K. Sheble, Party of second part."

It is alleged that plaintiff caused the lands to be surveyed, negotiated a contract which defendant signed whereby plans and specifications were prepared and delivered to the parties for buildings on certain of said lands, conferred with city officials concerning zoning of the property and prepared and presented plans therefor, attended meetings of a planning commission, assisted defendant in preparing applications for loans on the land from Federal Housing Administration, conferred with individuals concerning sale of said lands and the houses to be erected thereon, and with the defendant concerning the performance of their agreement, "and performed all acts required of plaintiff by said agreement up to the time hereinafter mentioned"; that is, the time when defend-

ant notified plaintiff that she would not proceed further to perform, and instructed plaintiff to render no further services pursuant to the agreement. Paragraph IV of the complaint is as follows: "IV. That defendant had said lots surveyed and mapped so that plaintiff and defendant could build eight houses on said seven lots. That plaintiff and defendant agreed to build eight houses on said lots. That at all times herein mentioned, the houses planned and intended to be built on said lots by the plaintiff and defendant could be built at a cost to them of from $3500.00 to $5500.00, according to the type and size planned, and each such house would have a market value, and could be sold for a sum of, approximately, $1500.00 in excess of its cost."

Since, according to these allegations, the gross profit on the eight buildings would amount to approximately $12,000, plaintiff claims damages in one-half that amount. He argues in his brief that such recovery is justified on the theory that he and respondent are joint-adventurers.

As supporting that theory he cites the case of Ingram v. Johnston, 38 Cal.App. 234, 176 P. 54, 55, in which the court recognized the equitable right of the plaintiff to a one-eleventh interest in unsold land and in the profits already realized from a land development. The contribution by the plaintiff to the enterprise had been in the form of his special knowledge of real estate values obtained from a long period of service as land agent for a railroad company, which knowledge, together with plaintiff's counsel and advice, was of advantage to the other parties who paid cash as their contribution to the venture. It should be noted that before Ingram brought this suit for an accounting his associates had recognized his contribution toward acquisition of the property of the enterprise by issuing in his favor a certificate for the one-eleventh interest, above mentioned, "conceded by defendants to have represented the interest of plaintiff in said property." For this and other reasons we do not consider the cited case persuasive to appellant's point of view.

[1, 2] The Ingram case was decided in 1918 and at that time the Contractors' License Law of California, which is of some interest in the present case, was not in effect. This law was passed originally in 1929, and, as Act 1660, appears in volume one, page 852 of Deering's General Laws 1937, in the amended form which was in force at the time the contract between the parties hereto was signed.

Section 12 of the act provides that: "* * * No person engaged in the business or acting in the capacity of a contractor as defined by section 3 of this act, shall bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this act without alleging and proving that such person was a duly licensed contractor at all times during the performance of such act or contract."

This proviso of the Contractors' License Law furnishes the first ground of the demurrer, stated in the following language: "That said complaint does not state facts sufficient to constitute a cause of action against the defendant in that there is no allegation by the plaintiff that he was a duly licensed contractor at all times during the performance of such act or contract mentioned in said amended complaint."

Section 1 of the act provides that: "It shall be unlawful for any person, firm, copartnership, corporation, association or other organization * * * to engage in the business or act in the capacity of a contractor within this State without having a license therefor as herein provided, unless * * * particularly exempted as provided in this act".

Section 2 provides among its exemptions in paragraph (d): "Owners of property, building or improving structures thereon for the occupancy of such owners, and not intended for sale".

The contract upon which this suit was brought contains as one of its clauses, "Whereas, Party of first part owns the following described real estate", and as another clause, "It is the desire of the first party to erect residences upon these lots". It also states that "Second party is to act as agent * * * *assisting in sales* of property", and provides for equal division of "the net profit remaining *from the sale* of lots and residences". (Emphasis added.) It is apparent from this language that the owner of this property contemplated improving it by constructing buildings thereon, not for her own occupancy, but intended for sale. Therefore, even if the contract could be construed as creating a joint-adventure, neither of the parties thereto would be entitled to exemption, but would be a "contractor" as that term is defined under sec-

tion 3 of the act: "A contractor within the meaning of this act is a person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, excepting licensed architects or registered civil engineers acting solely in their professional capacity, who in any capacity other than as the employee of another with wages as the sole compensation, undertakes or offers to undertake or purports to have the capacity to undertake or submits a bid, to construct, alter, repair, add to, subtract from, improve, move, wreck, or demolish any building, highway, road, railroad, excavation or other structure, project, development, or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith; including the eradication of or the processing against infestation by pests structurally injurious to buildings or structures; provided that the term contractor, as used in this act, shall include subcontractor or specialty contractor, but shall not include anyone who merely furnishes materials or supplies without fabricating the same into, or consuming the same in the performance of, the work of the contractor as herein defined."

[3, 4] We take the view, contended for by respondent, that the agreement between the parties did not create a joint adventure; that it was merely a contract of agency. The court said in construing a somewhat similar instrument in Title Insurance and Trust Co. v. Grider, 152 Cal. 746, at page 752, 94 P. 601, at page 603: "some weight must be allowed to the language of the parties themselves". In reading the present agreement, we note that the "second party is to act as agent for first party", who "owns the following described real estate", in two activities: the erecting of residences upon defendant's lots and assisting in the sale thereof. We note further that in the complaint the defendant is described as owner of the property involved and that the suit is not one in equity or to impress a trust upon the real estate. It asks damages for breach of contract, and does not refer to a joint-adventure. Whether or not arguments were made before the trial judge that the transaction constituted a joint enterprise does not appear, but that view is presented in appellant's brief ably and at length. Every case cited has been carefully examined, but still we are not convinced that either of these parties intended, at the time their agreement was signed, that it should be anything more than it purports to be, by the language used, or that it is in fact or legal effect anything other than an agency contract.

[5] The second ground of demurrer is similar to the first: "That said complaint does not state facts sufficient to constitute a cause of action against the defendant in that there is no allegation by the plaintiff that he was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose."

Section 1 of the California Real Estate Act, Deering's General Laws (1937), Act 112, reads as follows: "Engaging in business or acting without license unlawful. It shall be unlawful for any person, copartnership or corporation to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this State without first obtaining a license from the State Real Estate Division."

Section 20 of said act requires an allegation in any action in which a person seeks to collect compensation for the performance of any of the acts mentioned in section 2, that "such person * * * was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose". A reading of section 2 of the act satisfies us that the services which appellant undertook to perform, as agent for respondent in disposing of her property, are among those there listed, and, since the complaint contained no allegation that plaintiff was duly licensed as required by the act, that the second ground of demurrer, like the first, was valid. See Silverberg v. Baum, 95 Cal. App. 535, 273 P. 47, and cases there cited.

If appellant were actually in possession of a contractor's license "at all times during the performance of such act or contract", and of a real estate license "at the time the alleged cause of action arose", he conceivably might have amended his complaint to state a cause of action, but no such contention is made and, therefore, we conclude he is in no way aggrieved by the action of the court in precluding an amendment.

Judgment affirmed.

YORK, P. J., and DORAN, J., concurred.

46 Cal.App.2d 844

PEOPLE v. BLAIN.

Cr. 1774.

District Court of Appeal, Third District, California.

Sept. 25, 1941.

1. Burglary ⇐20

An information charging that defendant wilfully, unlawfully and feloniously entered a cabin belonging to a named person with intent to commit larceny sufficiently described offense of burglary within terms of statute and was not fatally defective for failure to designate particular cabin or cabins entered. Pen.Code, § 459; § 952 and as amended by St.1927, p. 1043.

2. Criminal law ⇐1032(5)

Complaint could not be made on appeal that an information charging burglary of a cabin was fatally defective for failure to designate the particular cabin or cabins entered, where no objection was made to the information by demurrer or otherwise. Pen. Code, § 459; § 952 and as amended by St. 1927, p. 1043.

3. Burglary ⇐41(4)

In prosecution for burglary of cabin, evidence was sufficient for jury to find that defendant entered cabin in question and was sufficient to sustain conviction. Pen. Code, § 459.

4. Criminal law ⇐938(1), 1156(3)

The granting or denying of a motion for new trial on the ground of newly discovered evidence rests largely in the sound discretion of the trial court, and that discretion will not be disturbed on appeal except in a case of manifest abuse.

5. Criminal law ⇐938(1), 1156(3)

Whether newly discovered cumulative evidence would have produced a different result had it been presented on the trial rests within the sound discretion of the trial court, and that court's discretion in granting or denying the motion will not be interfered with on appeal except for manifest abuse.

6. Criminal law ⇐941(1)

In burglary prosecution, the trial court did not abuse its discretion in denying a motion for new trial on the ground of newly discovered cumulative evidence corroborating defendant's version that he did not actually enter the building in question. Pen.Code, § 459.

Appeal from Superior Court of El Dorado County; George H. Thompson, Judge.

George Everett Blain was convicted of burglary in the second degree, and he appeals from the judgment of conviction and from an order denying his motion for new trial.

Affirmed.

McAllister & Johnson and O. F. Meldon, all of Sacramento, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

Defendant was tried upon two counts of an information for burglary. He was found guilty by a jury upon both charges, and appeals from the judgment of conviction of burglary in the second degree, and from an order denying his motion for new trial.

The first count reads as follows:

"Of having, on the 24th day of January, 1941, wilfully, unlawfully and feloniously entered a cabin belonging to one Walter Bidstrup with intent then and therein to commit the crime of theft, to-wit, larceny."

The second count is identical, except that the date is March 20, 1941.

The crime charged is defined by section 459 of the Penal Code as follows: "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, mine, or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary."

[1, 2] The testimony showed that Bidstrup was the owner of several cabins located on a ranch near the town of El Dorado. It is contended that the information was fatally defective for the reason that it failed to designate the particular cabin or cabins which were entered. We think that the information sufficiently complies with the requirements of section 952 of the Penal Code, in that it is "in the words of the enactment describing the offense". Furthermore, no objection was made to

the information by demurrer or otherwise. We can see no prejudice resulting from the failure to describe the particular building or buildings entered with more particularity. The cases relied upon by appellant are all based upon the last named section prior to the amendment thereof by Stats. 1927, page 1043. By that amendment the former rule which required the statement of more detailed facts in an indictment or information, was greatly modified, and the rules of criminal pleadings liberalized.

[3] It is next contended that the evidence fails to show the commission of the crime of burglary, in that the prosecution did not prove that defendant entered any building or other structure defined in section 459 of the Penal Code. In other words, it is contended that the crime, if any, was larceny and not burglary. We believe there is sufficient evidence from which the jury could reasonably infer that defendant entered at least one cabin. Referring to the first count, the owner of the premises testified that, prior to January 25, 1941, there were two Ford motors and a lot of machinery in a building known as "Tom's Cabin". There was also a box of nuts and bolts and valves in the place. He further testified that when he visited the cabin on the morning of said day, he found that the door had been knocked open by drilling off the lock, and that the articles mentioned were missing. On March 20th, the date of the second offense, the owner again visited his ranch. He testified that there were a number of other articles "missing from Tom's Cabin", including two magnetos, a drive-shaft which was standing in the corner of the building, and a rock-drill.

All the articles described above were found by the officers in the possession of a junk dealer in Sacramento, to whom they had been sold by appellant. The latter admitted that he took said articles from the premises of Bidstrup, but stated that they were sold to him by a man who was standing by the side of the road. Appellant testified that he asked the man if he had any junk, and that the latter led him to the cabins mentioned. Appellant testified he drove his truck to the vicinity of the cabins and loaded numerous articles. He denied having entered any buildings. This was on January 25th. On March 20th, according to his testimony, the act was repeated, and more articles taken from the premises. The stolen articles were in the buildings just prior to the visits of appellant to the premises. We believe that such evidence fully justified a finding that appellant entered the buildings in question. He admitted the taking and possession of the stolen articles. He was seen in the vicinity of the cabins a few days prior to the first offense. The jury evidently did not place much credence in his explanation. This may be due to the fact that he had been previously convicted of stealing government property—a felony—and also of another felony—stealing carpenter's tools. He was also impeached in his testimony respecting the manner in which he loaded his truck. He testified that he did not back up to within five feet of the cabins. A witness for the people testified that there were tire marks up to within five feet of the cabin. Such evidence would also tend to support an implied finding to the effect that appellant did enter one or more of the buildings. The case of the people goes much further than the mere possession of stolen property. Defendant admits the taking of the property from the premises. The evidence is sufficient to support the verdict and judgment.

[4-6] The motion for new trial was based upon newly discovered evidence. One Rennie James Younger, who gets his mail in Sacramento, made an affidavit in which he said that he was employed by appellant on March 20, 1941, to assist in hauling junk. The facts set forth corroborate the version of appellant. Younger said that neither Blain nor any of those present entered any building. Appellant filed an affidavit in which he explained the failure to produce Younger as a witness at the trial. He states that he searched for weeks to locate Younger, and finally found him after the trial. In 20 Cal.Jur. § 58, pages 81 and 82, it is stated:

"The rule that the decision of a motion for new trial rests largely in the sound discretion of the trial court, applies with full force to a motion on the ground of newly discovered evidence. The principal reason for this is that the trial judge is generally in a much better position to determine the value and effect of the evidence and, therefore, to exercise such discretion, than the appellate court. Accordingly the decision of a lower court upon a motion for new trial on the ground of newly discovered evidence is rarely interfered with; and it is settled that the exercise of its discretion in granting or deny-

ing a motion for new trial on that ground will not be disturbed except in a case of manifest abuse."

The proposed evidence is cumulative in character. In 20 Cal.Jur. § 62, pages 96 and 97, it is said: "The determination of the question whether newly discovered cumulative evidence is such as to have produced a different result if it had been presented on the trial, rests largely if not wholly in the sound discretion of the trial court; and whether the motion is granted or denied, such discretion will not, according to settled principles, be interfered with, except for manifest abuse."

We are not prepared to hold that the denial of the motion was an abuse of discretion upon the part of the trial court. We therefore do not feel at liberty to disturb the conclusion reached in denying the motion.

Other points are raised by appellant, but they lack any substantial merit.

The judgment and order are affirmed.



46 Cal.App.2d 814

Ex parte SWANSON et al.

Cr. 3504.

District Court of Appeal, Second District, Division 1, California.

Sept. 23, 1941.

1. Habeas corpus ⇐31

Where there was no showing in the record that any evidence of former jeopardy had been introduced before the trial court in a criminal prosecution, petition for writ of habeas corpus to the court of appeals on ground of former jeopardy was denied. Penal Code, § 1155, subd. 2.

2. Criminal law ⇐882

The section of the Penal Code providing for judgment on special verdict when plea of former conviction or acquittal of same offense is interposed is not applicable where no evidence is introduced in trial court either to prove or to disprove a plea of former jeopardy. Penal Code, § 1155, subd. 2.

3. Habeas corpus ⇐92(1)

Where record showed nothing done by trial court prejudicial to petitioners, conclusions contained in a petition to appellate court for writ of habeas corpus on ground of former jeopardy and in supporting affidavits drawn by attorney for petitioners, which were unsupported by any showing of evidence of former jeopardy, were required to be disregarded.

4. Habeas corpus ⇐31

In absence of any showing either by inference or otherwise that any evidence was introduced before trial court proving or disproving plea of former jeopardy, the appellate court is without power to issue writ of habeas corpus.

5. Habeas corpus ⇐31

Where judgment of conviction was rendered in superior court and defendants applied for writ of habeas corpus on ground of former jeopardy, and records called for by appellate court in accordance with court rule disclosed that no evidence was introduced on plea of former jeopardy, fact that superior court sitting without a jury found defendants guilty would in effect include an implied finding against defendants on question of former jeopardy. Rule 22, § 3, Rules of Supreme and District Courts of Appeal.

WHITE, J., dissenting.

Proceeding in the matter of the application of Allan Swanson and another for a writ of habeas corpus.

Application denied.

Anna Zacsek, of Los Angeles, for petitioners.

YORK, Presiding Justice.

[1-3] The petition for writ of habeas corpus is denied. There is no showing that any evidence of former jeopardy was introduced before the trial court; in fact, the record of the superior court which is before this court fails to show any such evidence. The date referred to in the petition upon which it is alleged the former jeopardy attached is on or about the date of the preliminary hearing had by petitioners. There is no provision in law for the doing of a useless act. The section relied upon by petitioners, i. e., subsection 2, section 1155, Penal Code, is not applicable where no evidence is introduced to either prove or disprove the plea of former jeop-

ardy. The conclusions contained in the petition and in the supporting affidavit which were drawn by the attorney for petitioners must be disregarded. An examination of the record fails to disclose that anything was done by the trial court to the prejudice of either petitioner.

We are not informed by the petition as to whether any evidence of any kind was introduced to sustain the plea of once in jeopardy. We are not informed as to whether the petition addressed to the superior court for a writ of habeas corpus has ever been finally determined by that court. The petition before this court alleges that no other application for a writ of habeas corpus has been made on behalf of petitioners, but the affidavit thereunto attached refers to a petition submitted "to the Honorable Judge Brand, sitting as presiding Judge pro tem in Department 41 of the Superior Court", and certain statements made by Judge Brand are included in the affidavit, but the strongest statement made as to whether or not it was passed upon is the following, "For this reason he declined to issue the Writ, and recommended that it be submitted to the District Court for their consideration." Whether said petition for a writ of habeas corpus was withdrawn, or whether the court made an order denying the same is not set forth. The affidavit in support of the writ signed by the attorney for petitioners states: "That the copy of the original Petition submitted as hereinbefore stated, is hereto attached and marked Exhibit 'A'." No such copy is either submitted or attached to the original petition or affidavit presented to this court.

[4] In the absence of any showing of any kind whatsoever, either by inference or otherwise, that any evidence was introduced before the trial court proving or disproving the plea of former jeopardy, this court is without power to issue the writ prayed for.

[5] The petition and the affidavit in support thereof being absolutely insufficient, this court before passing upon said petition and desiring "to obtain information concerning any matter of record pertaining to the case" (Rule XXII, section 3, Rules of the Supreme Court and District Courts of Appeal), requested the custodian of the record in the superior court to produce the same, and the same has been produced. Said record fails to disclose that any evidence was introduced on behalf of petitioners to either prove or disprove their plea of once in jeopardy. From the date shown in said record, it is apparent that petitioners are relying or attempting to rely upon their preliminary hearing in the municipal court at Long Beach, upon which hearing they were ordered held for hearing in the superior court. The judgment of conviction was rendered in said superior court, which is the judgment complained of in this petition for writ of habeas corpus. We are not here concerned with a situation where a petitioner presents and files a petition in his own behalf, but with one prepared by an attorney at law with a number of years of experience before the bar. At least, on a habeas corpus petition of the kind here presented, the fact that the court sitting without a jury found the petitioners guilty, as charged, would in effect include an implied finding against petitioners on the question of once in jeopardy.

The petition is denied.

DORAN, J., concurred.

WHITE, Justice (dissenting).

I dissent. An examination of the superior court file containing the proceedings had in connection with the trial therein of petitioners, and which examination is now authorized by section 3 of article XII, paragraph 1 of the Rules of the Supreme Court and District Courts of Appeal, clearly reveals that in said superior court action, when these petitioners were arraigned therein as defendants for plea, they specifically pleaded that they and each of them had been once in jeopardy for the offense charged against them in the Municipal Court of the City of Long Beach on March 4, 1941. This plea was entered in the minutes of the court. The cause proceeded to trial, and the record discloses that at the conclusion of the trial, which was had before a judge sitting without a jury, the court found the defendants guilty of the offense of conspiracy to commit theft, in violation of section 484 of the Penal Code, but made no finding whatsoever upon the plea of former jeopardy. By the provisions of subdivision 2 of section 1155 of the Penal Code it is specifically provided that "if the plea is a former conviction or acquittal of the same offense, the court must give judgment of acquittal or conviction, as the facts prove or fail to prove the former conviction or acquittal."

The judgment rendered in the superior court action not being in accord with the requirements of law, as appears from the

petition on file before us, together with the files of the superior court action, I am of the opinion that the petition for a writ of habeas corpus should be granted, to the end that due inquiry may be made as to the legality of petitioners' detention under the judgment rendered in the superior court action.



46 Cal.App.2d 809

CARDOZA et al. v. MACHADO et al.

Civ. 2794.

District Court of Appeal, Fourth District, California.

Sept. 22, 1941.

1. Tenancy in common ⇐11
Wills ⇐627(1)

Where children of testatrix received undivided interests in their mother's ranch, they became "tenants in common" and had right to enter upon and participate in possession of the common property.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenant in Common".

2. Tenancy in common ⇐14

An owner of an undivided interest in a ranch who by threats, and by forbidding his brothers and sisters who were co-owners in common, to come upon ranch, was guilty of an "ouster" which in law of tenancy is the wrongful dispossession, or exclusion, by one tenant in common of his cotenant, or cotenants, from the common property of which they are entitled to possession, and it differs from acts constituting ouster in other cases only in evidence by which it may be established.

See Words and Phrases, Permanent Edition, for all other definitions of "Ouster".

3. Tenancy in common ⇐14

An ouster by one tenant in common of another must be proved by acts of an adverse character such as claiming the whole for himself, denying title of his companion, or refusing to permit him to enter on the land.

4. Tenancy in common ⇐11, 14

Tenants in common of land are entitled to possess every part of land in common with each other, and prevention from entering upon the land, or any part thereof, is not excusable for reason that it was perpetrated by coproprietor.

5. Tenancy in common ⇐38(7)

In action to quiet title and to recover possession of ranch from which plaintiff co-owner had been ousted, wherein defendant in his answer denied title of plaintiff, answer made an issue of the title.

6. Tenancy in common ⇐38(8)

In action to quiet title and recover possession by co-owner of ranch, evidence was sufficient to support finding of an ouster of plaintiff by defendant co-owner.

7. Tenancy in common ⇐38(8)

In action to quiet title and recover possession by co-owner of ranch, evidence supported findings and judgment as to amount of damages caused by ouster of plaintiff from ranch by defendant co-owner.

8. Appeal and error ⇐1152

Where parties to action to quiet title and recover possession admitted, and findings established that defendants were co-owners with plaintiffs and entitled to undivided interest in ranch, but judgment failed to adjudicate on such issue, defendants were entitled to have judgment so modified as to establish such facts.

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action by Filomenia M. Cardoza and others against Joaquin Machado and others to quiet title to undivided interests in real property, to recover rent, for damages for ouster, and to be let into possession of real property. From judgment for plaintiff, Joaquin Machado appeals.

Modified and affirmed.

Fred A. Shaeffer, of Santa Maria, for appellant.

Nelson & Castro, of San Luis Obispo, for respondents.

MORTON, Justice pro tem.

This is an action to quiet title to undivided interests in real property together with damages for ouster.

By virtue of a three-year lease signed by the administratrix of the mother's estate and expiring October 31, 1936, appellant entered into and held exclusive possession of the Isom Ranch. The parties to this action are brothers and sisters, and through the probate proceedings of the said estate each acquired an undivided one-ninth interest in said ranch, except Roza Williams, who received two-ninths, thereby all becoming tenants in common of the property. Some of the heirs had objected to the making of the aforementioned lease. About October 29, 1936, respondent Filomenia M. Cardoza talked with appellant in San Luis Obispo and stated she would not rent her portion of the property to him after the lease expired and that she was going to rent it to someone else. Appellant replied: "I will pop your head off if you go out there." On November 5, 1936, appellant tendered by letter $44.44 to each respondent as one-half of the rent for the ranch for the year November 1, 1936, to October 31, 1937. Each respondent refused to accept said amount and refused to rent their interest in said ranch to appellant. Three of the respondents, knowing of the threat to shoot Filomenia M. Cardoza, wrote letters to appellant November 13, 1936, demanding to be let into possession of said ranch. These letters appellant received but did not answer. In subsequent conversations which certain of the other respondents attempted to have with appellant, he threatened violence if they attempted to come on the property. All of the respondents knew of the threats made by appellant if they interfered with his possession of the ranch. Appellant remained in sole possession of the ranch, except he did allow his two brothers, Frank Machado and Domingo Machado, to pasture cattle with his herd. These two brothers, named as defendants, disclaim and waive any and all interest in the action except they request the court to recognize the ownership of a one-ninth interest as to each. This situation continued for two years and then plaintiffs and respondents filed this action December 10, 1938; in the first cause to recover rent of defendant Joaquin Machado; the second cause to be let into possession of their respective interests and recover damages for withholding possession thereof; the third cause of action to quiet title as to each child's interest in the ranch.

After hearing the evidence the trial court found that each of the children was the owner and entitled to the possession of a one-ninth interest except that Roza Williams owned an interest of two-ninths until October 22, 1937, on which date she conveyed to Joe S. Lewis, Amelia Lewis Garner and Cecelia Serpa by deed an undivided one-ninth part of the Isom Ranch. Damages were awarded to the ousted owners as follows: to plaintiffs and respondents Filomenia M. Cardoza, Manuel Machado, Mary Mello and John H. Machado the sum of $283.33 each from defendant Joaquin Machado; to plaintiff and respondent Roza Williams the sum of $382.23 from said defendant Joaquin Machado.

[1, 2] The respondents as tenants in common had a right to enter upon and participate in the possession of the common property. The conduct and statements of the defendant Joaquin Machado were such as to prevent each of his coowners except Frank Machado and Domingo Machado from enjoying their interests in the property and from interfering in any way with his sole possession and use of the entire ranch. His threats of violence caused them to fear personal injury if they went upon the ranch premises for any purpose. It is true that some of the respondents attempted to talk with appellant regarding leasing the entire ranch to an outside individual, but appellant by his words clearly informed them he would not allow anyone to interfere with his enjoyment of the entire ranch. Appellant exceeded his rights in thus forbidding them to come upon the ranch.

"An ouster, in the law of tenancy in common, is the wrongful dispossession or exclusion by one tenant in common of his cotenant or cotenants from the common property of which they are entitled to possession. It differs from the acts constituting ouster in other cases only in the evidence by which it may be established." 62 C.J. p. 426, § 32.

[3, 4] Referring to the case of Carpentier v. Webster, 27 Cal. 524, at page 563, we find: "The result of the cases is well presented in 2 Greenleaf's Evidence, Sec. 318: 'An ouster in such case, therefore, must be proved by acts of an adverse character; such as claiming the whole for himself, denying the title of his companion, or refusing to permit him to enter, and the like.' * * * The defendant, by the rule of the relation, is entitled to possess the land, and every part of it, in common with the plaintiff; and the plaintiff has the right to possess the land, and every part of it, in common with him; but if either the one or the

other prevents his associate from entering upon the land, or any part thereof, he performs an act which the law of the relation forbids, and the wrong would be none the less a wrong for the reason that it was perpetrated by a coproprietor." See, also, Rego v. Van Pelt, 65 Cal. 254, at page 256, 3 P. 867; Tevis v. Hicks, 38 Cal. 234; Phelan v. Smith, 100 Cal. 158, at page 167, 34 P. 667.

[5, 6] Appellant in his answer denies the title of respondents, thus verifying his alleged attitude and making an issue of the title herein.

From the evidence it would appear that appellant was offended because respondents, his brothers and sisters, desired to rent the entire ranch to an outside party for $1,500 a year. It did not justify him in threatening to do violence to his sister or any of the other respondents if they came out to the ranch or interfered with his sole possession. Here the question of ouster was one to be determined by the court upon the evidence presented through the witnesses. The trial judge evidently placed little confidence in appellant's testimony that he had no objection to his brothers and sisters also enjoying possession of the ranch as to their respective shares. It would appear that the evidence and pleadings clearly establish an ouster.

As to the value of the use and occupation of the land, considerable testimony placed it at approximately $1,500 a year. Appellant did not deny this testimony, but his tenders to his cotenants would place his valuation at approximately $800 a year. From this evidence the trial court awarded damages in its judgment as follows:

"1. That each of the plaintiffs, Filomenia M. Cardoza, Manuel Machado, Mary Mello and John H. Machado, do have and recover of and from said defendant, Joaquin Machado, the sum of Two Hundred and Eighty-three and 33/100 ($283.33) Dollars.

"2. That the plaintiff, Roza Williams, do have and recover of and from said defendant, Joaquin Machado, the sum of Three Hundred and Eighty-Two and 23/100 ($382.23) Dollars."

[7] There is ample evidence to support the findings and judgment on this issue.

[8] The remaining portion of the judgment does not recognize the interests of defendants although admitted by the parties and the findings establish that each defendant is entitled to a one-ninth interest in said property. As the judgment fails to adjudicate and pass upon this material issue it must be modified here.

It is ordered:

That commencing with paragraph 3, the remaining portion of the judgment be stricken.

In lieu of the portion stricken the following is inserted:

"3. That plaintiffs, Filomenia M. Cardoza, Manuel Machado, Mary Mello and John H. Machado, and defendants Frank Machado, Domingo Machado and Joaquin Machado, were on November 1st, 1936, ever since have been and still are each the owner in fee and entitled to the possession of an undivided one-ninth part of that certain real property, situate in the County of San Luis Obispo, State of California, commonly known as the Isom Ranch.

"4. That plaintiff, Roza Williams, was on November 1st, 1936, ever since has been and still is, the owner in fee and entitled to the possession of an undivided two-ninths part of that certain real property, situate in the County of San Luis Obispo, State of California, commonly known as the Isom Ranch, subject to a conveyance by said Roza Williams of an undivided one-ninth part of said Isom Ranch, to Joe S. Lewis, Amelia Lewis Garner and Cecelia Serpa, dated October 22nd, 1937.

"5. That the respective titles of the said respective plaintiffs, Filomenia M. Cardoza, Manuel Machado, Roza Williams, Mary Mello and John H. Machado, be and they are hereby quieted against all claims of defendant, Joaquin Machado, and the said Joaquin Machado is hereby restrained and enjoined from asserting any right, title or interest in said real property, or any part thereof, adverse to said plaintiffs other than to his undivided one-ninth part thereof as tenant in common with the other parties hereto."

As so modified the judgment is affirmed. Neither of the parties will recover costs.

MARKS, Acting P. J., and GRIFFIN, J., concurred.

46 Cal.App.2d 768

PEOPLE v. SHAW.

Cr. 3486.

District Court of Appeal, Second District, Division 1, California.

Sept. 18, 1941.

1. Burglary ⇐42(1)

Mere possession of stolen property, unexplained by defendant, is not of itself and standing alone sufficient to justify a conviction of burglary, even though commission of the burglary by someone is established.

2. Burglary ⇐42(1)

Possession of stolen property is a circumstance which, when unexplained and taken in connection with other incriminating evidence in the case, may be considered by jury in determining question of guilt or innocence of defendant charged with burglary.

3. Burglary ⇐42(4)

A defendant, shown by evidence in burglary trial to have received stolen property shortly after theft, was bound to explain his possession thereof in order to remove effect of such possession as circumstance tending to show his guilt.

4. Burglary ⇐42(3)

Evidence supported conviction of burglary of the second degree, where it appeared that boxes of spark plugs taken in burglary were found in hotel room for which defendant had registered under an assumed name, and that defendant at the time was engaged in a series of transactions for sale of spark plugs under a name that would conceal his true identity.

5. Criminal law ⇐641(1)

The courts, as well as the people and Legislature, have at all times been zealous in guarding the right of a person accused of crime to have the aid of counsel to defend him.

6. Criminal law ⇐1166(8)

Each case must be judged by particular facts therein presented in determining whether defendant was prejudiced by trial court's ruling denying his motion for a continuance in order to prepare for trial.

7. Criminal law ⇐590(2)

In burglary prosecution, trial court's ruling denying defendant's motion for continuance to enable substituted counsel to familiarize himself with and prepare for defendant's defense was not an abuse of discretion, where no substitution of counsel on day of trial was made but, on contrary, defendant was represented not only by counsel who became of record on day of trial, but also by counsel who had represented him at time of his arraignment some two months before date set for trial.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Wendell W. Shaw was convicted of burglary of the second degree, and he appeals.

Affirmed.

Charles M. Kilpatrick, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

An information filed by the district attorney of Los Angeles county charged the defendant with the crime of burglary and alleged his prior conviction of a felony. The prior felony conviction was admitted by the defendant, and following his plea of not guilty to the burglary charge a trial by jury resulted in his conviction of the offense of burglary of the second degree. A motion for a new trial was denied. This appeal is from the judgment and the order denying him a new trial.

The pertinent facts necessary to a disposition of this case are that on the morning of March 21, 1941, it was discovered that the building occupied by the Standard Parts Company had been burglarized. The safe was opened and its contents strewn about, while all the desks in the office had been searched, and the metal rear door opening into the alley had been rolled back. The Standard Parts Company is a wholesale automobile parts concern situated in the city of Los Angeles. When the establishment closed its business on the night preceding the discovery of the burglary, there were in stock approximately 103 boxes of spark plugs, with ten spark plugs in each box. All of the merchandise just mentioned, with the exception of one plug, was missing. A Chevrolet pick-up truck, which was kept inside the building, was also gone, together with other property, including some headlight bulbs. It was testified that it was possible to drive the truck out through the rear

door into the alley. In addition to the property above described, it was testified that approximately eleven blank bank checks had been removed from the check book in the office of the company.

On March 19, 1941, two days before the burglary was discovered, the defendant registered at a hotel in Los Angeles under the name of "W. W. Smith". He paid the rent of his room for the 19th and again on the 20th, but did not advance room rent for the 21st. On the last-named date the janitor of the hotel locked the room so that the defendant could not re-enter unless he paid the rent therefor. On the morning of March 22d, the manager of the hotel discovered that defendant had not paid his room rent for the preceding night, and thereupon she and the hotel clerk went to defendant's room. Upon entering the room, the hotel manager testified, she found boxes of spark plugs stacked in the closet. This witness further testified that one of the boxes found on the floor of the closet was similar to a box previously identified by the owner of Standard Parts Company as having been lost in the burglary. The hotel manager further testified that six blank checks were found in a bureau drawer on top of a sweater in defendant's room, and which checks bore the name "Standard Parts Company". These checks were later identified by the manager of said company as being the checks taken from the checkbook in the company's office on the night of the burglary. The identification of the box containing ten spark plugs as being part of the stock missing after the burglary was established by the manager of Standard Parts Company through code numbers with which it was marked.

After visiting defendant's room as aforesaid and making the discoveries hereinbefore narrated, the hotel manager notified the police, and officer Ferguson testified he went to the hotel about eleven o'clock on March 22d and waited in defendant's room until the latter appeared. This officer testified that he made an examination of the room and discovered between 35 and 40 boxes of spark plugs in the closet and also the blank checks. He identified the checks introduced in evidence as the ones found by him in defendant's room.

A witness, Philip A. Thornton, testified that on the 21st and 22d of March he was operating a service station on West Sixth street in the city of Los Angeles; that on or about the 20th of March, in the afternoon, defendant came to his station, and on that occasion the witness purchased nine boxes of spark plugs for five dollars from the defendant. Following this transaction and on his way out, defendant picked up one of the business cards of the service station and told the service station operator that he would call him with reference to further sales of spark plugs, and that when he called he would give the name "Spot". On the following day defendant called the operator on the telephone and identified himself as "Spot", and in that telephone conversation offered to sell the operator 75 boxes of spark plugs. The operator told the defendant to call later, and subsequently on that same day the latter did call and was told by the operator what spark plugs to bring. The spark plugs last ordered were never delivered.

At the trial the defendant did not take the witness stand in his own defense, and the only witness offered by him was his mother, who testified to the effect that during the first part of the week in which the defendant was arrested he had resided at her home. As to the whereabouts of the defendant on the dates when it was testified he was registered at a downtown Los Angeles hotel, she had no knowledge.

As a first ground of appeal appellant urges that the evidence is insufficient to sustain the judgment and that the verdict of the jury is contrary to law and the evidence. In support of this contention it is argued that no direct connection is shown between defendant and the burglary; that during the day appellant was locked out of his room and three other people, viz., the hotel manager, the janitor and the police officer, had keys and access to the room, and that possession of the stolen property by appellant was not sufficiently shown. In the foregoing claim appellant cannot be upheld. He alone was registered at the hotel room from March 19th up to the time of his arrest on March 22d. On March 21st, when appellant left the room without paying for the preceding night's lodging, he was carrying a shopping bag which he said contained laundry, but which he declined to leave at the hotel laundry agency. He did not occupy the room that night and it remained locked. On the following morning the hotel manager inspected the room and discovered the stolen property. Thereafter a police officer remained in the room until 1:30 o'clock that day, when appellant returned, paid the room rent, entered his

room, and was arrested. These facts and circumstances justified the conclusion that appellant was in possession of the room and its contents and also that the stolen property discovered therein was left in the room by him when he departed therefrom on the morning of March 21st. Coupled with the foregoing is the further proven fact that at about the time of the burglary appellant was actively engaged in the sale of spark plugs, all of which tends largely to establish the exercise of dominion and control by him over the stolen property found in his room.

[1-4] While it is true, as claimed by appellant, that the mere possession of stolen property, unexplained by him, is not of itself and standing alone sufficient to justify a conviction of burglary even though the commission of the burglary by someone be established, nevertheless it is the law that such possession of stolen property is a circumstance which, when unexplained and taken in connection with other incriminating evidence in the case, may be considered by the jury in determining the question of the guilt or innocence of the defendant charged with burglary. People v. Golembiewski, 25 Cal.App.2d 115, 117, 76 P.2d 717, 718. As was said by this court in the case just cited: "If the court below believed from the evidence that the property mentioned in evidence was stolen from the premises described in the testimony, and, as in the instant case, received into the possession of the defendant shortly after being stolen, the failure of the defendant, to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with otner suspicious facts such as the evidence herein disclosed." In the case at bar we have not only several suspicious facts, but also certain incriminating circumstances which justified the jury in concluding that appellant was the guilty party in the burglary with which he was charged. For instance, it was proved that appellant was registered at the hotel under an assumed name; that he engaged in a series of transactions for the sale of spark plugs under a name that would conceal his true identity; that he was conducting such sales from his hotel room; that the spark plugs taken in the burglary were found in his room shortly after they were stolen. Finally, the direct connection of appellant with the burglary was further established by his possession of checks bearing the name of the corporation victim of the burglary and which were taken during the commission of such burglary.

Lastly, appellant contends that the trial court committed reversible error in refusing to allow him to substitute attorneys and in not granting a continuance to enable substituted counsel to familiarize himself with and prepare for appellant's defense. In this connection it appears that on April 11, 1941, appellant appeared in court and was represented by Attorney Sanford Sill, at which time the cause was set for trial on June 3d, with the knowledge and consent of both appellant and his counsel. On the morning of June 3d, when the case was called for trial, appellant appeared in court with Attorney Charles M. Kilpatrick, but his counsel of record, Attorney Sill, was absent. A continuance was thereupon requested on the ground that new counsel had just been brought into the case. The trial court refused to grant a continuance and directed the court clerk to telephone appellant's counsel of record, so that the trial might proceed. In the afternoon of the same day appellant's counsel of record appeared and moved the court that Attorney Kilpatrick be associated with him in the trial. This motion was granted. Thereupon the motion for a continuance was renewed on the ground that associate counsel had just entered the case and that neither counsel was prepared. This motion was denied. The cause thereupon proceeded to trial with both attorneys participating in the defense of appellant.

[5-7] Courts have at all times been zealous in guarding the right of a person accused of crime to have the aid of counsel to defend him. Such zeal has also been manifested by the people of this state, as well as the legislature, the former of whom have caused this fundamental right to be made a part of the Constitution of California, while the latter have inserted it in the Penal Code. Each case, however, must be judged by the particular facts therein presented, and from such facts it must be determined whether or not the defendant was prejudiced by the trial court's ruling denying his motion for a continuance in order to prepare for trial. The case of People v. Simpson, 31 Cal.App.2d 267, 88 P.2d 175, relied upon by appellant, does not hold that when a substitution of attorneys occurs on the day of the trial it is manda-

tory upon the trial court to grant a continuance. People v. McCann, 34 Cal.App. 2d 376, 378, 93 P.2d 643. What the court held in the Simpson case was that prejudice to the substantial rights of the defendant ensued where the court consented to a withdrawal of the public defender as defendant's counsel, agreed to the substitution of new counsel, and then denied reasonable time within which substituted counsel could prepare for trial. In the case now before us defendant was represented not only by counsel who became of record on the day of the trial, but also by counsel who had represented him at the time of his arraignment some two months before the date set for trial. We have examined the reporter's transcript in this case and find that both counsel appeared to be familiar with the case, and with considerable ability cross-examined witnesses. Also in the instant case we find that no substitution was made on the day of the trial, but on the contrary, appellant was represented by two attorneys, one of whom at least had been retained and remained as counsel, as heretofore pointed out, for some time prior to the date of trial. Under these circumstances, appellant cannot claim prejudice, and the trial court did not abuse its discretion in refusing a continuance under the facts presented in the case now before us.

To hold that a defendant charged with crime has an absolute right to counsel of his own selection, with unlimited right to insist upon continuances of his trial, would be subversive of the prompt administration and execution of the laws—upon which depends largely their effectiveness. It is at once apparent that the trial court must in the nature of things have some control over such matters, to the end that judicial business may be dispatched in an orderly manner; and if it has any discretion it is apparent to us that such discretion was not abused in this particular instance. Had any prejudice resulted to appellant in the instant case—and as heretofore stated we are of the opinion that none did, but that on the contrary appellant was ably defended—nevertheless, had he suffered prejudice, the responsibility for it might well be placed upon counsel who neglected to inform the court of his retirement from the case until the morning of the trial, or upon the defendant himself if the latter did not advise his counsel of the latter's discharge until the morning of the trial. The remarks made by the learned trial judge upon the hearing of the motion for continuance were well timed and pertinent. After informing counsel who appeared on the morning of the trial that he was not the attorney of record in the case and following the statement to the court by such counsel that defendant had discharged his other attorney, the trial judge said:

"That is something for which the defendant is responsible. If we were to permit a defendant on the eve of trial to discharge his lawyer, who was conversant with the case and then say, 'I want a continuance,' if that were a ground for continuance we would never get to trial. The proposition is such an old one there is not any question about it. The motion for continuance will be denied on the ground counsel making the motion is not counsel for the defendant, and further upon the ground under the conditions appearing to the court at the present time there is no ground for continuance."

The judgment and the order denying defendant's motion for a new trial are, and each is, affirmed.

YORK, P. J., and DORAN, J., concurred.



46 Cal.App.2d 875

PEOPLE v. JAYCOX.

Cr. 3487.

District Court of Appeal, Second District, Division 2, California.

Sept. 24, 1941.

Criminal law ⇐1182

Where order to show cause why appeal should not be dismissed was issued after time for filing briefs following the filing of transcript on appeal had expired, and no appearance either by brief or otherwise was made on behalf of appellant on return day of order to show cause, the judgment of trial court was affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Proceeding by the People of the State of California against Arthur Jerome Jay-

cox. From an adverse judgment, defendant appeals.

Judgment affirmed.

Arthur Jerome Jaycox, in pro. per., for appellant.

Earl Warren, Atty. Gen., for respondent.

PER CURIAM.

July 29, 1941, the transcripts on appeal were filed in this court. Thereafter, the time for filing briefs having elapsed, an order to show cause why the appeal should not be dismissed was issued, returnable September 24, 1941. On the latter date there was no appearance on behalf of appellant, either by brief or otherwise.

Therefore, pursuant to the provisions of section 1253 of the Penal Code, the judgment of the trial court hereby is affirmed.



46 Cal.App.2d 874

PEOPLE v. HOGUE.

Cr. 3474.

District Court of Appeal, Second District, Division 2, California.

Sept. 24, 1941.

Criminal law ⇐1182

Where transcripts on appeal were filed in the District Court of Appeal and thereafter, the time for filing briefs having elapsed, an order to show cause why appeal should not be dismissed was issued, returnable on certain date, and on such date there was no appearance on behalf of the appellant either by brief or otherwise, the judgment of the trial court was affirmed. Pen. Code, § 1253.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Proceeding by the People against Ruth Hogue. From an adverse judgment, defendant appeals.

Affirmed.

Samuel I. Barchas, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., for respondent.

PER CURIAM.

May 22, 1941, the transcripts on appeal were filed in this court. Thereafter, the time for filing briefs having elapsed, an order to show cause why the appeal should not be dismissed was issued, returnable September 24, 1941. On the latter date there was no appearance on behalf of appellant, either by brief or otherwise.

Therefore, pursuant to the provisions of section 1253 of the Penal Code, the judgment of the trial court hereby is affirmed.



46 Cal.App.2d 874

PEOPLE v. LUNSFORD.

Cr. 3465.

District Court of Appeal, Second District, Division 2, California.

Sept. 24, 1941.

Criminal law ⇐1182

Where transcripts on appeal were filed in District Court of Appeal on May 12, 1941, and thereafter, the time for filing briefs having elapsed, an order to show cause why appeal should not be dismissed was issued, returnable September 24, 1941, and on the latter date there was no appearance on behalf of appellant, either by brief or otherwise, judgment of trial court would be affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Proceeding by the People against Ray Lunsford. From an adverse judgment, the defendant appeals.

Affirmed.

Ray Lunsford, in propria persona.

Earl Warren, Atty. Gen., for respondent.

PER CURIAM.

May 12, 1941, the transcripts on appeal were filed in this court. Thereafter, the

time for filing briefs having elapsed, an order to show cause why the appeal should not be dismissed was issued, returnable September 24, 1941. On the latter date there was no appearance on behalf of appellant, either by brief or otherwise.

Therefore, pursuant to the provisions of section 1253 of the Penal Code, the judgment of the trial court hereby is affirmed.



46 Cal.App.2d 832

DOLLAR v. TOOLEY.

Civ. 11536.

District Court of Appeal, First District, Division 1, California.

Sept. 24, 1941.

As Modified on Denial of Rehearing Oct. 24, 1941.

Hearing Denied Nov. 17, 1941.

1. Wills ⇐743

An unsecured note, given by testator's widow as payment for payee's assignment of his legacy under will and fees as executor thereof in order to avoid litigation threatened by creditors of testator and corporation controlled by spouses over question whether their stock therein was joint tenancy stock or community property bequeathed to widow by will, was not void for want of consideration or as given under mistake of law or fact. Civ.Code, § 1605.

2. Wills ⇐743

Where controversy between testator's widow and creditors of testator and corporation controlled by spouses, as to whether their stock therein was community property constituting part of estate's assets or joint tenancy stock, arose after filing of executor's first inventory appraising value of estate at sum insufficient to pay claims against it and stock became part of such assets and was distributed as such, executor's assignment of his legacy under will to widow constituted good consideration for her execution of note to executor in amount of such legacy as against contention that legacy lapsed and adeemed and hence was worthless, as conditions existing when assignment and note were executed, rather than those prevailing when first inventory was filed, are controlling on question of consideration. Civ. Code, § 1605.

Appeal from a judgment of the Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action on a note by R. Stanley Dollar against Homer H. Tooley, as executor of the will of Mrs. Carrie M. Botts, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

Byron Coleman, Abraham Setzer, George C. Hadley, Carl E. Day, and Robert E. Hatch, all of San Francisco, for appellant.

Keith R. Ferguson, Robert E. Burns, and Brobeck, Phleger & Harrison, all of San Francisco, for respondent.

KNIGHT, Justice.

This is an appeal by defendant, as executor of the will of Mrs. Carrie M. Botts, deceased, from a judgment in plaintiff's favor in an action to recover on a promissory note executed by Mrs. Botts.

The note was dated November 1, 1935, and made payable to the plaintiff. It was given for the principal sum of $20,000, payable in monthly installments of $500, commencing November 1, 1941, without interest, and provided that in the event of the death of the maker the whole remaining unpaid balance was to become due and payable and from that date to bear interest at 6% per annum. Mrs. Botts died January 20, 1938, and plaintiff presented his claim for payment of the note to the executor of her will. It was rejected, and this action followed. The defenses interposed were that there was no consideration for the note, and that it was given by Mrs. Botts under a mistake of law or fact. The trial court found against defendant on both issues, and thereupon entered judgment for plaintiff for the principal of the note, interest and costs. The real question presented by the appeal is whether the evidence is legally sufficient to support the trial court's findings on those issues.

There is no dispute as to the essential facts, and for all the purposes of the appeal they may be stated as follows: James M. Botts and the deceased Carrie M. Botts were married in 1906; and Botts died on March 1, 1934. For many years prior to his death he and his wife were the president and secretary, respectively, of the American Marine Paint Company, owned practically all of its outstanding stock, and operated the business, Mrs. Botts taking

an active part therein. Botts left a will whereunder he bequeathed to his wife her community interest in his estate; to the plaintiff, who was a close friend of long standing, $20,000; to John Parker, for many years manager of the company, 20 per cent of the stock standing in Botts' name at the time of his death; and the balance of his estate to his brothers and sisters. He appointed plaintiff executor of his will, and plaintiff qualified and served as such until the estate was finally distributed. During the entire administration proceedings Mrs. Botts was represented by independent legal counsel, and throughout his administration of the estate plaintiff adhered strictly to the practice of never signing or approving any petition or claim without first having it approved in writing by Mrs. Botts.

At the time of Botts' death 1,953 shares of the capital stock in said company stood in the names of Botts and his wife in joint tenancy with the right of survivorship; and in August, 1934, plaintiff filed an inventory in the estate in which the assets were appraised at $1,969.92. None of the stock was included. Botts personally and the company were heavily in debt at the time of his death; and following the filing of the inventory a serious question arose as to whether the 1,953 shares of stock were community property or held in joint tenancy. The creditors were demanding payment of their claims and threatening litigation. Some of the heirs had already retained an attorney who had examined the company's certificate books and afterwards advised Mrs. Botts that his clients claimed that the stock was community property. In fact Parker, who became the president of the company upon Botts' death, testified that "there had already been an action just about started with the relatives as to the joint tenancy stock". It was also ascertained that stock certificates previously issued to Botts, covering some 1,700 shares of the 1,953 shares issued to Botts and his wife in 1933 in joint tenancy, had never been endorsed by him. Mrs. Botts became much alarmed over the situation. She was very desirous of maintaining control of the company, and on account of existing conditions she was fearful she would lose the stock. She so expressed herself to Parker. In this connection she stated to him that the stock would be jeopardized if it remained in joint tenancy; and on several occasions she discussed with him what might happen if the creditors "attacked the joint tenancy", stating that if they were successful she would be obliged to sell the stock; and finally in one of those conversations she told him "she was going to have the stock placed in the estate as community property". It also appears from the record that during the probate proceedings in her husband's estate Mrs. Botts filed a suit against the executor to determine that she was the owner in joint tenancy of all the property of the estate. The defendant filed an answer, but so far as the record here shows, no trial was ever had, nor any judgment entered. In any event, she proceeded to acquire the interests of all legatees (except Parker's) and the claims of all creditors. Large sums of money amounting to more than $59,000 were advanced to her by the company for that purpose, some of the assignments being made to the company, and to some of the parties she gave her note in payment. In that manner she acquired all outstanding interests against the estate except Parker's, and all of this was done under the advice and guidance of her counsel.

In dealing with plaintiff, Mrs. Botts first asked him if he would be willing to accept her note in payment for an assignment of his legacy and the amount of fees to which he would be entitled as executor; and he told her he would. Plaintiff testified that at that time he knew the value of the estate depended on whether the American Marine Paint Company stock was in joint tenancy or was community property; that Mrs. Botts showed him the company's records disclosing the unendorsed certificates covering the 1,700 shares; that before closing the transaction he referred the matter to his attorney for an opinion, and was advised that the stock was not held in joint tenancy. He also testified positively that he believed he would receive from the estate his legacy of $20,000; that he was "perfectly satisfied" in his own mind that his legacy "was perfectly good and was worth its value, its full face value", and that he understood that the legal effect of the transaction was that he was selling and transferring to Mrs. Botts all of his interest in the $20,000 legacy and in the fees he would receive as executor of the estate. The evidence also shows that the transaction with plaintiff relating to the execution of the note and the assignment was initiated by Mrs. Botts' attorneys, and was consummated after several consultations between Mrs. Botts, her attorneys, plaintiff, and his attorney. In this connection plain-

tiff's attorney testified that one of Mrs. Botts' attorneys informed him that Mrs. Botts desired to acquire all of the estate and would like to purchase the claims; and that in order to have all the estate assigned to her it would be necessary for her to pay for the claims and the legacies; that the terms of the note were discussed, and he informed Mrs. Botts' attorney that plaintiff would not insist upon any interest during the time other notes were being paid which she had given in payment of certain claims; that her attorney drew the note and the assignment; that he, plaintiff's attorney, received the assignment from Mrs. Botts' attorneys, presented it to plaintiff, who signed it, and returned it to Mrs. Botts' attorneys, who delivered to him the promissory note.

Several months after the note and assignment transaction was closed, and on May 12, 1936, plaintiff filed an amended inventory in which 1,749 shares of said stock were listed as community property (the remaining 204 shares as the separate property of Carrie M. Botts), and the estate was appraised at $206,509.18; on July 23, 1936, plaintiff filed his first and final account and petition for distribution, and on August 4, 1936, the decree of final settlement and distribution was entered. All of these documents were filed only after Mrs. Botts had approved the same on the advice of her attorney.

The petition for distribution set forth the community interest of Mrs. Botts in one-half of the property of the estate, including the 1,749 shares of said stock, the assignment of plaintiff's legacy of $20,000 to Mrs. Botts, and the assignment of his executor's fees to her. And the decree of final distribution set forth that all of the property in the estate was community property; that plaintiff was bequeathed a legacy of $20,000; that his legacy and his commissions as executor were assigned to Mrs. Botts; and that by reason of this and other assignments, Mrs. Botts was the sole distributee, except for the legacy to John Parker. The property of the estate was distributed as decreed, the executor was discharged, and no appeal was taken; moreover, at no time from November 1, 1935, the date of the note, up to the time of her death on January 20, 1938, did Mrs. Botts question the validity of the note or any part of the transaction had with plaintiff; nor did she return to him the legacy or executor's fees which he had assigned to her as consideration for the note; and in the present case there is no charge of fraud, undue influence or misrepresentation. The question of the validity of the note was raised after Mrs. Botts' death by the rejection of plaintiff's claim by the executor of her estate, the defendant herein, who had been the accountant for the James Botts estate.

[1] The facts above narrated amply support the trial court's findings and judgment in favor of plaintiff. Regarding the issue of consideration, section 1605 of the Civil Code provides: "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." As will be noted, said section reads in the alternative; that is, it declares that the consideration is good if the promise results either in a benefit to the promisor or a detriment to the promisee; and in the present case there is both. Mrs. Botts, as promisor, received the benefit of the assignment and afterwards the full measure of the property covered thereby. It is true that at the time she obtained the assignment there was a question as to whether the stock was community property. But at that time also litigation over the question was threatened by the heirs of her husband and numerous creditors of both Botts and the company; and in order to avoid such litigation and the uncertainty of the outcome thereof, and being motivated by a desire to retain control of the stock at all events, Mrs. Botts, under the advice of her counsel, took the initiative of protecting herself by inducing plaintiff to assign to her his rights as legatee in consideration for which she gave the note in suit. As a legatee, plaintiff would have had the same right as other parties taking under the will and the creditors to institute litigation against her as to the stock; therefore a settlement with him under such conditions constituted a perfectly binding and valid contract, requiring no other consideration. On the other hand, the detriment to plaintiff, as promisee, was the transfer by him to Mrs. Botts of his legacy under the will, which he and Mrs. Botts both considered good, and the assignment to her of his executor's fees, and the acceptance by him

in payment therefor of her unsecured note extending payment for a period of six years, or until her death.

[2] Defendant's contention that there was no consideration for the note is based upon the theory that at the time it was given the stock was not part of the estate; that the appraised value of the estate stood at only $1,969.92, as shown by the first inventory; that consequently such was the actual value of the estate; that this sum was insufficient to pay the claims against the estate, to say nothing of the legacies; and that therefore plaintiff's legacy lapsed and adeemed, and being worthless the assignment thereof did not constitute a good consideration for the execution of the note. As already pointed out, however, the first inventory was filed in August, 1934, and the transaction involving the giving of the assignment and the note did not take place until November 1, 1935; and subsequent to the filing of the first inventory and prior to the consummation of that transaction the controversy arose over the question of whether the stock was community property and hence constituted part of the assets of the estate. In determining the question of consideration, therefore, the conditions existing at the time of the execution of the assignment and the note are controlling rather than those prevailing at the time of the filing of the first inventory; and as shown thereafter the stock did become part of the assets of the estate and was distributed as such.

Appellant calls attention to the fact that since the filing of the briefs herein the federal court, in reviewing a decision of the U. S. Board of Tax Appeals, fixing the amount of taxes claimed to be due the government, held in part that said stock passed to Mrs. Botts as surviving joint tenant rather than through the decree of final distribution entered in the matter of her husband's estate. It would seem to require no comment to demonstrate that that decision has no bearing whatever on the issues involved in this appeal.

The facts above narrated serve also as a complete answer to defendant's remaining point that there was a mistake in law or fact. Plaintiff contends that there are other grounds upon which the trial court's decision may be properly sustained, among them being estoppel and the finality of the decree of distribution. But in view of the conclusion reached on the issues of consideration and mistake, it becomes unnecessary to inquire into the merits of the other grounds urged.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.



46 Cal.App.2d 876

PEOPLE v. EAVES.

Cr. 3491.

District Court of Appeal, Second District, Division 2, California.

Sept. 24, 1941.

Criminal law ⇐1182

Where transcripts on appeal were filed with District Court of Appeal, but there was no appearance of appellant either by brief or otherwise, when an order to show cause why appeal should not be dismissed was issued upon elapse of time for filing briefs, judgment of trial court was affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Proceedings between the People and Fred Eaves. From an adverse judgment, Fred Eaves appeals.

Affirmed.

Vernon R. Hamilton, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., for respondent.

PER CURIAM.

July 31, 1941, the transcripts on appeal were filed in this court. Thereafter, the time for filing briefs having elapsed, an order to show cause why the appeal should not be dismissed was issued, returnable September 24, 1941. On the latter date there was no appearance on behalf of appellant, either by brief or otherwise.

Therefore, pursuant to the provisions of section 1253 of the Penal Code, the judgment of the trial court hereby is affirmed.

46 Cal.App.2d 775

SANTA MARIA GAS CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13127.

District Court of Appeal, Second District, Division 1, California.

Sept. 19, 1941.

Rehearing Denied Oct. 14, 1941.

See 117 P.2d 951.

1. Workmen's compensation ⇐1939

The conclusion of the State Industrial Accident Commission on questions of fact is final where there is substantial evidence to support it.

2. Workmen's compensation ⇐2003

A change in an award of the Industrial Accident Commission cannot be predicated upon a mere change of opinion by commission as to correctness of its original decision.

3. Workmen's compensation ⇐2030

Medical reports submitted to Industrial Accident Commission after entry of awards fixing claimant's disability rating first at 35¾ per cent. and thereafter at 54½ per cent. constituted sufficient new evidence to warrant commission, under its continuing jurisdiction, to reopen and amend its previous award by increasing disability rating to 76 per cent. St.1937, p. 185, § 5803.

Proceeding in certiorari by the Santa Maria Gas Company to annul an award of the Industrial Accident Commission in favor of Eddie Huffman.

Affirmed.

LeRoy M. Edwards, of Los Angeles, C. P. Kaetzel, of San Luis Obispo, and O. C. Sattinger, of Los Angeles, for petitioner.

Everett A. Corten, of Los Angeles (Eldon B. Spofford, of Los Angeles, of counsel), for respondents.

DORAN, Justice.

Petitioner herein, self insured employer of respondent Eddie Huffman, sought a writ of review from the order of the Industrial Accident Commission amending a decision after a rehearing, which amendment increased the percentage of permanent disability as a result of which petitioner was required to pay Huffman $13.58 a week for 240 weeks and thereafter as compensation for permanent disability $3.34 per week.

The findings of fact following the first hearing by the commission reveal that as a result of an accident arising out of and occurring in the course of his employment, Huffman sustained a fractured vertebra. The accident occurred July 20, 1936. The findings and award of the first hearing were approved and filed August 25, 1937. Thereafter, in 1937, 1938 and 1939 additional hearings were had. In 1940 the gas company, petitioner herein, petitioned the commission to terminate liability. Following the hearing, the commission found as a fact that the percentage of Huffman's disability was 76; that "said employee is also entitled to lifelong medical, nursing, hospital and sanitarium care, including artificial support, as may be required to cure and relieve from the effects of said injury". Included in the order for compensation was a provision for the payment of "a life pension at the rate of $3.34 a week".

The first disability rating had been fixed by the commission at 35¾ per cent. Thereafter it was increased to 54½ per cent and finally, as above noted, to 76 per cent.

It is the contention of petitioner herein, that the action of the commission fixing the rating at 76 per cent was unwarranted because, as argued by petitioner "the commission did not have before it any competent, relevant evidence which had not theretofor been before it, and passed upon by it, which would warrant an increase in the permanent disability rating". It is further argued that "the medical reports submitted from time to time were merely cumulative of conditions theretofor described * * * and did not constitute any cause for increasing the award to 76%".

With regard to a request to alter an award, petitioner urges that "the power to grant such request should be exercised with great caution and only when fraud, inadvertence, mistake or excusable neglect are clearly shown". It is also urged that "an injury to the back such as sustained by Huffman in this case would not warrant the 76% rating". The foregoing are the major contentions of petitioner from which it is contended in conclusion that there is no basis for the increase of the rating above mentioned.

The record fails to support petitioner's contentions, but to the contrary sufficiently sustains the action of the commission. The judgment of the commission is not open to attack; the effect of evidence is not open to review.

[1] Petitioner's contention is based primarily on a disagreement with the conclusion reached by the commission in connection with which, as in many cases, there probably is opportunity for a difference of opinion. But the law is well settled that where there is substantial evidence to support it, the conclusion of the commission on questions of fact is final.

[2, 3] While it is true that a change in an award of the commission may not be predicated upon a mere change of opinion by the commission as to the correctness of its original decision (Merritt-Chapman & Scott Corp. v. Industrial Acc. Comm., 6 Cal.2d 314, 57 P.2d 501), the record herein indicates that it is not true that all of the conditions found to exist as a basis for the last permanent rating were known to exist and were rated in the previous awards. In view of the medical reports submitted after such awards were made it cannot be said that there was no new evidence sufficient to warrant the commission in reopening and amending its previous decision and award under the continuing jurisdiction vested in the commission by section 5803 of the Labor Code, St.1937, p. 185.

Other minor contentions are unimportant. The action of the commission was well within its authority under the law. A careful review of the record reveals no grounds for effectively disputing its jurisdiction in the circumstances.

The award is affirmed.

YORK, P. J., and WHITE, J., concurred.



47 Cal.App.2d 41

HODGES v. McCULLOM.

Civ. 6540.

District Court of Appeal, Third District, California.

Sept. 29, 1941.

1. Appeal and error ⇐931(1)

On defendant's appeal from judgment for plaintiff after trial without jury, District Court of Appeal was bound to accept as true all evidence tending to establish correctness of trial court's finding and to consider it in the most favorable aspect to plaintiff and to give plaintiff benefit of every inference that could reasonably be drawn in support of his claim.

2. Appeal and error ⇐1008(1)

In motorist's action for injuries sustained in automobile collision occurring at intersection of highways, where motorist was traveling on a through highway, and case was tried without jury, whether defendant breached a duty to yield right of way to motorist was a "question of fact" for trial court's determination. Vehicle Code, St.1935, p. 187, § 552, and St.1937, p. 413, § 82.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

3. Appeal and error ⇐1011(1)

Where evidence is conflicting, the District Court of Appeal is bound by trial court's findings of fact.

4. Automobiles ⇐206

A motorist traveling on a through highway had a right to believe that defendant would obey the law and stop before entering upon highway at an intersection, at which there was a "stop" sign, as regards defendant's liability for injuries sustained by motorist in automobile collision. Vehicle Code, St.1935, p. 187, § 552, and St.1937, p. 413, § 82.5.

5. Automobiles ⇐244(11, 36)

In motorist's action for injuries sustained in automobile collision occurring at intersection of highways, where motorist was traveling on a through highway, evidence warranted judgment for motorist on ground that defendant's failure to observe a "stop" sign was an act of negligence which was proximate cause of accident. Vehicle Code, St.1935, p. 187, § 552, and St.1937, p. 413, § 82.5.

6. Appeal and error ⇐994(3)

Where case was tried without jury, discrepancies in testimony of witnesses were exclusively for trial court.

7. Evidence ⇐589

In motorist's action for injuries sustained in automobile collision occurring at intersection of highways, where motorist was traveling on a through highway, motorist's testimony regarding accident was not so inherently improbable and so impeached by physical facts as to require that such testi-

mony be rejected in toto by trial court. Vehicle Code, St.1935, p. 187, § 552, and St.1937, p. 413, § 82.5.

8. Witnesses ⇐316

Discrepancies in testimony did not make it the positive duty of trial court, which heard case without a jury, to entirely disregard facts to which witnesses testified.

9. Evidence ⇐588

Where case was tried without jury, trial court was bound to reconcile conflicts in testimony and to sift from mass of divergent and conflicting facts the ultimate truth, so far as possible.

10. Damages ⇐130(3)

$1,276.40 for injuries consisting of three fractured ribs and injuries to hand and knee resulting in plaintiff being confined in hospital for eight days and losing the gripping power of fingers, and causing plaintiff to be unable to climb stairs except with difficulty, was not so excessive under the evidence as to raise a presumption that such amount was awarded plaintiff as result of passion, prejudice or corruption.

Appeal from Superior Court, Siskiyou County; James M. Allen, Judge.

Action by William Hodges against Elmer McCullom for personal injuries, medical expenses, and damages to plaintiff's automobile. From a judgment for plaintiff, defendant appeals.

Affirmed.

Samuel F. Finley, of Crescent City, and J. H. Carnahan, of Klamath Falls, Or. (J. Everett Barr, of Yreka, of counsel), for appellant.

Tebbe & Correia, of Yreka, and Thomas W. Chatburn, of Merrill, Or., for respondent.

TUTTLE, Justice.

This action was brought to recover for personal injuries, medical expenses, and damages to the automobile of plaintiff. After trial by the court, findings were entered in favor of respondent, and judgment for $1,276.40 entered against defendant, who now appeals therefrom.

There are, in reality, only two grounds urged for reversal, although they have been subdivided into six by appellant. The first is the insufficiency of the evidence to support the findings, and the second is that the damages are excessive.

[1] Taking up the first ground, it appears that the collision resulting in the injuries was the usual intersection case—a type of accident which is sometimes very difficult of solution. In detailing the facts, we must necessarily give plaintiff's version. We "must accept as true all evidence tending to establish the correctness of the finding or verdict, and it must consider it in the most favorable aspect toward the prevailing party, and give to him the benefit of every inference that can reasonably be drawn in support of his claim". 2 Cal.Jur., § 515, page 880. On October 27, 1937, at 7 a. m., plaintiff was driving his automobile in a southeasterly direction on State Highway No. 39, near Tulelake, Siskiyou county. It was daylight, and the weather was clear. He was approaching the intersection with the Old Merrill-Tulelake road (Third street), at about twenty to twenty-five miles an hour. Defendant was driving at about the same speed, approaching the intersection on Third street, and traveling in a southwesterly direction, the roads meeting at a right angle. At the northeast of the intersection there is a "stop" sign facing north, and toward the oncoming traffic moving toward Tulelake and all cars entering the intersection with Highway 39. There is a one-story building on the same corner as the "stop sign", a few feet from said sign. The fenced right-of-way for Highway No. 39 is 100 feet in width. The building of course, is off the right-of-way. The manner in which the collision occurred is thus testified to by plaintiff:

"A. Well, I seen his car coming. Of course, as I said awhile ago, back behind those buildings. Naturally, I figured he would stop. I was going on through Tulelake. I didn't make a stop there, and I figured he would stop naturally. The first thing I knew, when I come along by the cross-road there, you know, he come right on in front of me. He never stopped at the stop sign or nothing. He was perhaps 30 feet or closer when he come in front of me.

"Q. Who first entered the intersection of the road? A. Well, I think I did from where the cars hit. It showed that I had, anyway. I think I entered first.

"Q. That is, did you see where his car was with relation to the intersection when he entered the intersection? A. Well, he was coming right on the edge of the highway.

"Q. And where were you? A. I was just entering the intersection. He was nearly to the edge of the highway at that time.

"Q. At what rate of speed were you driving when you entered the intersection? A. Anywheres from 20 to 25 miles; not over 25."

In direct contradiction is the testimony of defendant:

"A. I got to the highway and stopped and glanced down the highway and Mr. Hodges was at the corner of the Case Machine Company's Building and I started right up and crossed—started across the highway. And when I was about in the middle of the highway, I glanced again and Mr. Hodges was in—well, I would say approximately 50 feet of me, and I seen that no matter what I was going to do, I was going to be hit. And I gradually pulled to the left a little on just a slight angle and stepped on the gas as hard as I could, and Mr. Hodges hit me."

As a result of the collision, the evidence shows plaintiff's knee to have been "all bruised up"; that he suffered three fractured ribs; that he was confined to the hospital for eight days; that he suffered pain in his hand, side, and knee during his confinement in the hospital; that he found it difficult to breathe; that the pain about the chest and difficulty in breathing continued for six weeks; that pain was constant for six weeks; that after his release from the hospital he was confined to bed for more than two weeks; that he was unable to walk when released from the hospital; that he suffered pain in his knee and was unable to put any weight on it; that he has never recovered from the pain in his knee; that due to his knee injury he is unable to climb stairs, and that his knee buckles when climbing stairs; that he has to keep a hand on his knee when climbing stairs to brace the knee; that he still suffers pain in his knee more than two years after injury; that he suffers pain in his right hand; that his knuckle was injured; that prior to the accident the gripping power of his right hand was good but now has none in two fingers.

The highway on which plaintiff was traveling was a "through highway" Vehicle Code, § 82.5, St.1937, p. 413. The duty of defendant, in entering such a highway, is laid down in section 552 of said code, St. 1935, p. 187, which reads as follows:

"The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway."

[2-4] Whether or not defendant breached such duty was a question of fact to be determined by the trial court, and where there is a conflict in the evidence respecting such facts, we are bound by its findings. If the trial court believed the testimony of respondent, the latter approached the intersection at a lawful rate of speed. He had a right to believe that defendant would obey the law and stop. In 2 Cal.Jur.Supp., section 227, pages 349, 350, it is said:

"Responsibility on the part of a driver is predicable of the fact that he did not arrest the movement of his vehicle at the entrance of an intersection at which a 'stop' sign had been erected, his opponent having driven into the intersection on the assumption that the former would bring his car or truck to a stop. The statute prescribes that the driver of a vehicle which, pursuant to legal requirement, has been stopped at an intersection of ways shall yield the right of way to the driver of a vehicle which is within or closely approaching the place of intersection. And, in a case of collision at an intersection, the force and effect of this requirement is that, although a vehicle may have approached the intersection from the right, yet responsibility may be chargeable to the driver because he failed to stop and yield the right of way to the vehicle approaching from the left, acting upon the assumption that the driver of a vehicle thus approaching would accord to him precedence crossing the intersection."

[5] After examining the record, including the exhibits, we are satisfied that there is ample evidence to uphold a finding to the effect that defendant was guilty of negligence, and that the failure of defendant to observe the stop sign was an act of negligence which contributed proximately to the accident.

[6, 7] Appellant's contention is largely one of argument upon the facts. He tes-

tified that he stopped at the "stop sign". Appellant insists that we ignore the testimony of respondent to the contrary, and concludes that there is "no evidence to support a finding that defendant failed to stop". Plaintiff testified that his speed did not exceed twenty-five miles an hour. Appellant insists that the damage to the automobile indicates that the speed was far in excess of that figure. Appellant also insists that a building obstructed the view of respondent so that he could not see whether or not appellant actually failed to stop at the "stop sign". We might point out, however, that defendant testified he halted at the stop sign, and he then saw plaintiff's car "at the corner of Case Machinery Company's building, and I started right up and started across the highway". This would seem to be a complete answer to the last contention. Both parties agree that one could see the other. Such matters obviously were exclusively for the trial court. Many discrepancies are pointed out in the testimony of respondent, particularly with reference to the speed at which he was moving and the distance from the intersection when he first saw appellant. Suffice it to say that we cannot agree with the contention of appellant that plaintiff's own testimony is so inherently improbable, and so impeached by the physical facts, that it should have been rejected in toto by the trial court.

[8, 9] Such discrepancies do not, as appellant would seem to urge, make it the positive duty of the trial court to entirely disregard the facts involved. It is the duty of the trial court to reconcile any conflicts, and to sift from the mass of divergent and conflicting facts, the ultimate truth, so far as that is humanly possible. If a witness testifies in direct examination that he was going at the rate of twenty miles per hour, and on cross-examination he fixes that speed at thirty miles per hour, the court may find that either is true. This is rather an elemental statement of the law, but it is often overlooked, and the functions of a trial court or jury treated as our problem.

[10] As to the matter of excessive damages, after reviewing the evidence, we cannot say that the recovery is "so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice and at once raise a presumption that it is the result of passion, prejudice or corruption, rather than honest and sober judgment". 8 Cal.Jur., par. 88, page 834.

The judgment is affirmed.

PULLEN, P. J., and THOMPSON, J., concurred.



46 Cal.App.2d 848

Ex parte GOETZ.

Cr. 468.

District Court of Appeal, Fourth District, California.

Sept. 25, 1941.

1. Habeas corpus ⇐30(1)

The complaint charging petitioner with anchoring a vessel in Newport harbor within jurisdiction of city of Newport Beach at an anchorage which had not been approved by harbor master of the city, verdict, judgment, and commitment, when read together, showed no fatal variances, so as to authorize discharge on habeas corpus.

2. Criminal law ⇐1001

Justice's and police courts on conviction for misdemeanor may grant probation summarily. Pen.Code, § 1203, and § 1203a, as added by St.1933, p. 1340.

3. Criminal law ⇐1001

When probation is granted, there is no finality to the proceedings, and the judgment may be modified or set aside by court under statute. Pen.Code, § 1203, and § 1203a, as added by St.1933, p. 1340.

4. Criminal law ⇐1001

An order placing a defendant, who was convicted of a misdemeanor in police court, on probation, even though it included as a condition a period of detention in the county jail, was not a judgment and sentence, nor was the imposition of a fine as a condition of probation a judgment imposing a fine. Pen.Code, § 1203, and § 1203a, as added by St.1933, p. 1340.

5. Habeas corpus ⇐30(3)

Where petitioner was convicted in police court of anchoring a vessel within jurisdiction of city at an anchorage which had

not been approved by harbor master, and thereafter police court entered an order adjudging that petitioner pay a fine in sum of $100 and serve 90 days in county jail, and jail sentence was suspended on good behavior, but it was directed that petitioner be imprisoned until fine was duly satisfied in proportion of one day's imprisonment for every $2 of the fine, there was no existing judgment and sentence against petitioner, and therefore petitioner could not secure a writ of habeas corpus. Pen.Code, § 1203, and § 1203a, as added by St.1933, p. 1340.

6. Habeas corpus ⇐50

A habeas corpus will not assist petitioner until legal time has been served.

7. Municipal corporations ⇐624

The power of a municipal corporation to adopt any reasonable mode for enforcement of payment of any fine that it is authorized to impose is clearly implied in power to impose the fine.

8. Habeas corpus ⇐30(3)

Where petitioner was convicted in police court of anchoring a vessel at an anchorage which had not been approved by harbor master of city and was fined $100, provision that fine was to be collected at rate of one day's imprisonment in county jail for each $2 of the fine or its unpaid portion was a reasonable mode for enforcement of payment of the fine, so that petitioner was not entitled to writ of habeas corpus to secure his release from county jail.

Proceeding in the matter of the application of Rudy Goetz for a writ of habeas corpus to secure release of petitioner from custody after judgment of conviction.

Petition dismissed and prisoner remanded.

N. D. Meyer, of Santa Ana, for petitioner.

George F. Holden, Dist. Atty., of Anaheim, and Roland Thompson, City Atty., of Santa Ana, for respondent.

MORTON, Justice pro tem.

Petitioner was found guilty of anchoring a vessel in Newport Harbor, within the jurisdiction of the City of Newport Beach, at an anchorage, which had not been first approved by the harbor master of the city. On appeal to the superior court of Orange County the judgment was affirmed. Subsequently, an application for a writ of habeas corpus in said superior court was denied. Being still dissatisfied, petitioner asks this court for his discharge on a writ.

[1] Attention is directed to certain alleged variances in the complaint, verdict, judgment and commitment. It is sufficient to say that when read together there are no fatal defects. People v. Ring, 26 Cal.App.2d Supp. 768, at 773, 70 P.2d 281; In re Tom Wong, 122 Cal.App. 672, at 674, 10 P.2d 797.

After the verdict of the jury in the police court, the following judgment was pronounced:

"Wherefore, it is by this Court ordered and adjudged that for said offense you, the said Rudy Goetz pay a fine in the sum of $100 and 90 days in the County jail and the jail sentence be suspended on good behavior and in case said fine not be paid by 9:00 o'clock A.M. of the 28th day of June, 1941, that you, the said defendant be imprisoned in the County Jail of Said County until the fine be duly satisfied in the proportion of one day's imprisonment for every two dollars of the fine, and on the payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed, that you, the said defendant be discharged from custody.

"Done in open Court this 24th day of June, 1941.

"Robert Gardner, City Judge."

After reciting the court proceedings the commitment was as follows: "Wherefore, it is by the court here ordered and adjudged that for said offense, you, the said Rudy Goetz do pay a fine in the sum of One Hundred Dollars, and be imprisoned in the County Jail of said County of Orange for the period of Fifty days until the said fine be duly satisfied, in the proportion of one day's imprisonment for every two dollars of said fine, and on payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed, said defendant be discharged from custody."

[2] Justice's and police courts may now grant probation summarily. Thus, by suspending the jail sentence the court granted the defendant probation. Referring to People v. Wallach, 8 Cal.App.2d 129, at page 132, 47 P.2d 1071, at page 1072, we find: "The only way in which a sentence can be legally suspended is by proceeding

under the provisions of the Probation Law (People v. Mendosa, 178 Cal. 509, 173 P. 998; Ex parte Slattery, 163 Cal. 176, 124 P. 856; In re Clark, 70 Cal.App. 643, 234 P. 109; In re Cohen, 198 Cal. 221, 244 P. 359; People v. Harvey, 137 Cal.App. 22, 29 P.2d 787), and the municipal court had implied power (since then expressly conferred by section 1203a of the Penal Code, [as added by St.1933, p. 1340]) to effect a suspension of the sentence by following, but only by following, the form and method prescribed in section 1203 of the Penal Code. While the order of the municipal court judge as it appeared on the docket is somewhat inartificial, no formal order was required for the granting of probation. People v. Sapienzo, 60 Cal.App. 626, 213 P. 274; In re Herron, 217 Cal. 400, 19 P.2d 4. In the Herron case the trial court, after imposing a sentence of 30 days following the defendant's conviction of petty theft, made the mere order, 'Sentence suspended,' and it was held that this was an order placing the defendant on probation for a term equal in length to the maximum period of imprisonment provided as the penalty for that offense."

[3, 4] When probation is granted there is no finality to the proceedings; the judgment may be modified or set aside by the court under the statute. An order placing a defendant on probation, even though it include as a condition a period of detention in the county jail, is not a *judgment and sentence*. Also, the imposition of a fine as a condition of probation is not a judgment imposing a fine. People v. Wallach, supra; People v. Roberts, 136 Cal.App. 709, 29 P.2d 432. "In this cause, although defendant was guilty and had been *convicted,* having been placed on probation in the first instance there was no *existing judgment* against him. Probation is not a judgment." In re Marquez, 3 Cal.2d 625, at 627, 45 P.2d 342, at 343; In re Herron, 217 Cal. 400, 19 P.2d 4.

[5, 6] In view of the decisions cited, it is clear that here we do not have a judgment that the defendant be imprisoned and that he pay a fine and if unpaid that he serve the equivalent of the fine in jail. Further, the petitioner is not in a position to complain of an excessive penalty. In the Matter of Glancy, 139 Cal.App. 766, 34 P.2d 834, the petitioner was convicted in a justice's court of disturbing the peace and sentenced to six months in the county jail. The court said, 139 Cal.App. at page 767, 34 P.2d at page 834: "While confined therein, and before the expiration of 90 days, the maximum legal imprisonment for such offense, he petitions, through his attorney, in habeas corpus to be released on the ground that the judgment is void. But the judgment is not void and habeas corpus will not assist him until the legal time has been served. In re Morck, 180 Cal. 384, 181 P. 657."

In considering this matter and the points presented by defendant, we have gone beyond the usual limits of habeas corpus. There has been no miscarriage of justice and on the question raised by the petition it clearly appears that the defendant has not been illegally deprived of his liberty.

The petition is dismissed and prisoner remanded.

MARKS, Acting Presiding Justice, and GRIFFIN, Justice (concurring).

In addition to the reasons given for remanding the petitioner in the foregoing opinion we wish to submit the following:

[7] Waiving the question of whether a judgment was pronounced on defendant in this case or probation was granted him, it seems that the facts bring it squarely within the rule announced in Ex parte Green, 94 Cal. 387, 29 P. 783, 784, where a sentence was pronounced on defendant for violation of a city ordinance. The sentence was in the same form as the one before us except that there was no attempt to grant probation. There the petitioner was convicted and was sentenced to imprisonment for ten days and fined $150 with the provision that if he failed to pay the fine he be imprisoned in the city jail of Pomona until the fine be collected at the rate of one day's imprisonment for each two dollars of the fine remaining unpaid. In upholding the legality of the sentence of imprisonment for ten days together with additional imprisonment to collect an unpaid portion of the fine, the Supreme Court, in remanding the petitioner, said:

"The power to impose fines is clearly conferred, but no mode is provided for their collection. We think in such a case it is clearly within the power of a municipal corporation to adopt any reasonable mode for the enforcement of the payment of any fine that it is authorized to impose. We think this power is clearly implied in the power to impose a fine. * * *

"We can conceive of nothing more necessary and proper for carrying out the provision empowering the board of trustees to impose fines for violations of ordinances, than a mode of enforcing the payment of them. Without the power of enforcing the payment of such fines, the imposition of them would be nugatory. The constitution of this state provides that 'any county, city, town, or township may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with general laws.' Const., art. 11, § 11. It is not claimed that the ordinance which petitioner was convicted of having violated conflicts in any manner with any general law. Therefore the power to enforce it is expressly conferred by the constitution, subject, of course, to the rule that the mode of enforcing it be a reasonable one."

Ex parte Green, supra, was distinguished from those cases in which sentences were pronounced after convictions for violations of the provisions of the Penal Code in People v. Brown, 113 Cal. 35, 45 P. 181.

[8] Under the authority of Ex parte Green, supra, petitioner must be remanded even though it be conceded, as he contends, that he was sentenced to ninety days in the county jail and a fine of $100 to be collected at the rate of one day's imprisonment for each two dollars of the fine or its unpaid portion, and was not given probation.



46 Cal.App.2d 873

LEHNHOF et al. v. WOOLEY et al.

Civ. 13104.

District Court of Appeal, Second District, Division 2, California.

Sept. 24, 1941

Appeal and error ⇐787

Where order to show cause why appeal should not be dismissed for want of prosecution was issued after filing of transcript in District Court of Appeal and expiration of time for filing briefs and there was no appearance for appellants by brief or otherwise on return date of such order, appeal was dismissed. Rules of Supreme Court and District Courts of Appeals, rule 5, section 3.

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action by Bill Lehnhof and others against A. D. Wooley and others. From an order denying defendants' motion for a change of venue, they appeal.

Appeal dismissed.

Bohnett, Hill, Cottrell & Boccardo, of San Jose, for appellants.

Andrew Renetzky, of San Luis Obispo, for respondents.

PER CURIAM.

April 25, 1941, the transcript on appeal was filed in this court. Thereafter, the time for filing of briefs having elapsed, an order to show cause why the appeal should not be dismissed for want of prosecution was issued, returnable September 24, 1941. On the latter date there was no appearance for appellants, either by brief or otherwise.

Therefore, pursuant to the provisions of rule V, section 3, Rules of the Supreme Court and District Courts of Appeal, the appeal hereby is dismissed.



46 Cal.App.2d 801

KROGER v. BAUR.

Civ. 12591.

District Court of Appeal, Second District, Division 1, California.

Sept. 22, 1941.

Hearing Denied Nov. 17, 1941.

1. Appeal and error ⇐919

On appeal from judgment dismissing complaint for failure to state a cause of action, allegations of complaint must be assumed to be true.

2. Brokers ⇐43(1)

Where alleged oral agreement of realty owner to pay commission to broker for effecting exchange of realty was void under statute of frauds, broker could not recover from

realty owner for fraud on ground that oral promise to pay commission was made without intention of performing it, and for purpose of inducing broker to waive written memorandum, since statute of frauds cannot be circumvented by predicating a tort action on invalid oral promise. Civ.Code, § 1624; Code Civ.Proc. § 1973.

3. Estoppel ⇐118
Frauds, statute of ⇐144

To establish an "estoppel" precluding reliance on statute of frauds as defense to action for breach of oral contract, essential terms of contract must be shown with reasonable certainty and it must be shown that representations were made that invalidity of contract would not be asserted, together with fact that party urging estoppel had thereby changed his position to his detriment, and that intention to make change was known at time by one making representations.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

4. Frauds, statute of ⇐144

To establish "estoppel" precluding reliance on statute of frauds as defense to action on oral contract, circumstances must clearly indicate that it would be a fraud for party offering inducements to assert invalidity of contract, and, unless conduct of that party amounted to an inducement to other to waive written contract in reliance on representation, there is an absence of fraud requisite to an estoppel.

5. Evidence ⇐65

A real estate broker must be deemed to know that the agreement for his commission must be in writing under the statute of frauds. Civ.Code, § 1624; Code Civ.Proc. § 1973.

6. Brokers ⇐43(1)

A broker could not recover on an alleged oral agreement to pay compensation for services in effecting exchange of realty in absence of evidence warranting conclusion that broker was fraudulently induced to alter his position or to suffer an unjust and unconscionable injury and loss. Civ.Code, § 1624; Code Civ.Proc. § 1973.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by P. H. Kroger against Eugene Baur on an alleged oral agreement to pay compensation for services in effecting the exchange of realty. From a judgment dismissing the action and from an order granting defendant's motion to exclude testimony, plaintiff appeals.

Purported appeal from order dismissed and judgment affirmed.

John Boyce-Smith, of Hollywood, for appellant.

A. E. McManus, of Los Angeles, for respondent.

WHITE, Justice.

By his complaint plaintiff alleged that he was a licensed real estate broker; that as broker for one Walter Gage, and with the latter's written authority, he offered to sell to defendant certain real property for $47,500; that defendant informed plaintiff that he desired to purchase the property provided Gage would accept certain real property of defendant as part of the purchase price and provided plaintiff would otherwise assist defendant to close the transaction; that with the knowledge of said Gage defendant employed plaintiff as his broker to effect an exchange of defendant's real property, valued at $17,500, together with cash and trust deeds amounting to $30,000, for the property offered by Gage, and that defendant "stated, represented and promised verbally to plaintiff that he would pay plaintiff One Thousand Seven Hundred and Fifty ($1,750.00) Dollars for his services in effecting such exchange * * *"; that plaintiff duly performed all conditions on his part, but that "defendant made the promises mentioned in the foregoing paragraph without any intention of performing the same, or either thereof, and said promises were made by defendant falsely and fraudulently and in bad faith and for the purpose of deceiving plaintiff and thereby inducing him to perform services of the reasonable value of $1,900 without any agreement in writing for payment thereof, and with knowledge on defendant's part that a contract for such services is required to be in writing, and with the intention of defrauding plaintiff of compensation for such services. That plaintiff believed said promises, and relied thereon and, relying thereon, was thereby induced to perform said services. That prior to the performance of said services, and again immediately upon the performance thereof, plaintiff requested defendant to execute a written memo-

randum of such promises, signed by him, but defendant fraudulently contrived to prevent plaintiff from insisting that said promises be put in writing and fraudulently persuaded and induced plaintiff not to insist upon a written agreement for payment of said $1,900 by assuring him that his, defendant's, word was as good as his bond and that he could trust him to carry out said promises without a writing".

The defendant did not demur, but filed an answer denying the charges and alleging that plaintiff throughout the transaction acted solely as agent of Gage.

At the opening of the trial defendant objected to the introduction of any evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action. The objection was sustained and the cause dismissed. From the judgment of dismissal plaintiff appeals to this court.

[1-4] An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission is invalid unless the same, or some note or memorandum thereof, is in writing, and subscribed by the party to be charged or by his agent. Civ.Code, sec. 1624; Code Civ.Proc., sec. 1973. Appellant contends that his action is not upon the invalid agreement, but is an action for damages for fraud, upon the theory that the oral promise to pay him a commission was made without any intention of performing it and for the purpose of inducing him to waive a written memorandum. If the law can be thus nullified by the transparent device of predicating a tort action upon the invalid oral promise on the ground that the promisor did not intend to perform it, then the section might just as well be stricken from the statute. To license such a circuitous procedure to evade the provisions of such legislation would be to nullify and destroy its wholesome effect and the protection it affords against fraud. Assuming, as we must, that the allegations of the complaint are true, nevertheless the hardship thus falling upon the plaintiff must be borne by him, as this situation is precisely that which the statute of frauds was designed to prevent. Without the protection of the statute, the defendant is called upon to meet the bald assertion of a promise to which he can interpose nothing but his simple denial. The various authorities cited by appellant do not support his position. They involve situations where, for equitable considerations wholly absent from the case at bar, it was held that a party had waived the statute or was estopped to set it up. In Albany Peanut Co. v. Euclid Candy Co., 30 Cal.App.2d 35, at page 38, 85 P.2d 471, at page 472, the elements of such estoppel are set forth. It is there said: "Before such an estoppel can arise the essential terms of the contract must be shown with reasonable certainty, and that representations were made by the opposite party that the invalidity of the contract under the statute would not be asserted, together with the fact that the party urging the estoppel has, pursuant to the terms of the contract, and induced by the representations and in reliance thereupon, changed his position to his detriment, the intention to make such change being known at the time to the one making the representations. The circumstances must clearly indicate that it would be a fraud for the party offering the inducements to assert the invalidity of the contract under the statute, and, unless the words and conduct of the party sought to be held amount to an inducement to the other to waive a written contract in reliance upon the representation that the person promising will not avail himself of the statute of frauds, there is an absence of fraud which is requisite to an estoppel. * * *"

[5, 6] Neither the complaint nor the offer of proof made by counsel for plaintiff at the trial present any facts warranting a conclusion that the plaintiff was fraudulently induced to alter his position or to suffer an unjust and unconscionable injury and loss. As pointed out by the trial judge, the situation between a licensed real estate broker and his alleged client is altogether different from that between persons who are unfamiliar with the statute of frauds or the law relating to such contracts. A real estate broker must be deemed to know that the agreement for his commission must be in writing. The plaintiff here alleges that he relied upon the word of a man who made repeated promises which both of them knew were unenforceable and that he so relied in the face of defendant's persistent refusal to bind himself by a written agreement.

The appeal from the order "granting defendant's motion to exclude the taking of

testimony" is dismissed. The judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.



BLANK v. COFFIN et al.

Civ. 11481.

District Court of Appeal, First District, Division 1, California.

Sept. 23, 1941.

Hearing Granted Nov. 17, 1941.

1. Automobiles ⇐242(6)

A doubt as to whether inference of permissive use of automobile by another than owner thereof has been repelled must be reasonable and arise from evidence, for law does not recognize fanciful or imaginary doubts, and contradictions and improbabilities in evidence introduced to repel such inference must be substantial.

2. Automobiles ⇐242(6)

In action for injuries to guest in automobile colliding with corporate defendant's automobile driven by individual defendant, corporate defendant's evidence *held* sufficient as matter of law to dispel inference arising from its ownership of automobile that individual defendant's use thereof was permissive.

3. Automobiles ⇐242(6)

In action for injuries to guest in defendant corporation's automobile driven by such corporation's employee, where corporation's branch office manager and such employee testified clearly and positively without contradiction that employee was instructed that corporation's employees were not permitted to use corporation's automobiles for their pleasure or personal use and was severely reprimanded, suspended from duty, and temporarily deprived of custody of automobile when his violation of such rule on prior occasion was discovered, omission of provision specifically prohibiting employees' use of corporation's automobiles for their own pleasure from corporation's manual of instructions to employees did not warrant inference that such personal use of corporation's automobiles by its employees was permitted.

4. Automobiles ⇐193(8)

An employer is not required to adopt or carry on minute system of checking total mileage of employer's automobiles, driven by employees, with number of gallons of gasoline, charged against employer by them in weekly reports, for purpose of discovering whether they are using automobiles otherwise than in employer's business, in order to protect himself from liability to others for injuries caused by employees' negligence while operating such automobiles without employer's permission.

5. Automobiles ⇐242(6)

In action for injuries to guest in automobile colliding with defendant corporation's automobile driven by such corporation's employee for his own pleasure, where it was admitted that corporation did not discover that employee was using automobile for another purpose than in corporation's business, no inference of his permissive use thereof was justified.

6. Automobiles ⇐245(30)

In action for injuries to guest in automobile colliding with defendant corporation's automobile driven by such corporation's employee, contradictions in testimony relating to happening of accident did not defeat corporation's right to directed verdict on issue of employee's permissive use of automobile.

7. Evidence ⇐43(1)

It is matter of common knowledge that rarely, if ever, is a case involving a collision between two automobiles tried before a jury without presenting conflict in two drivers' testimony as to speed, movement or operation of their respective automobiles.

8. Automobiles ⇐245(30)

In action for injuries to guest in automobile colliding with defendant's automobile driven by codefendant, the effect of jury's verdict against driver on issues of negligence, proximate cause of injuries, and measure of damages cannot be considered in determining correctness of trial court's prior ruling granting defendant owner's motion for directed verdict on issue of driver's permissive use of automobile.

9. Automobiles ⇐243(5)

In action for injuries to guest in automobile colliding with defendant corporation's automobile driven by such defendant's employee, testimony that employee drove one of corporation's automobiles with its permission in attending sessions of court trying

criminal charge growing out of accident was properly excluded as irrelevant on issue of his use of automobile involved in accident with corporation's permission, especially in absence of offer by plaintiff to show that conditions of employment after accident were the same as before.

10. Automobiles ⇐242(6)

The disputable statutory presumptions that person is innocent of crime or wrong and that law has been obeyed are inapplicable in action to recover damages for injuries to guest in automobile colliding with corporate defendant's automobile driven by such corporation's employee, on theory of his implied permissive use thereof, in absence of any intent to deprive corporation of title to automobile, which was in such employee's lawful possession at all times.

11. Automobiles ⇐245(30)

In action for injuries to guest in automobile colliding with corporate defendant's automobile driven by such corporation's employee, trial court had right to grant corporation's motion for directed verdict on ground that evidence dispelled inference of driver's permissive use of automobile, though such evidence consisted only of testimony of corporation's branch office manager and driver.

PETERS, P. J., dissenting.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Carol Blank against Ian Coffin and the Mercantile Acceptance Corporation of California, for personal injuries sustained in a collision between an automobile in which plaintiff was riding and an automobile driven by individual defendant and owned by defendant corporation. From a judgment for defendant corporation on a directed verdict after a verdict for plaintiff against individual defendant, plaintiff appeals.

Affirmed.

James R. Agee, of Oakland, for appellant.

Hagar, Crosby & Crosby, of Oakland, for respondent.

KNIGHT, Justice.

This is an action to recover damages for personal injuries sustained in a collision between two automobiles. At the time of the accident the plaintiff, Mrs. Carol Blank, was riding as a guest in a car owned and driven by Lester F. Kain; and she brought the action against Ian Coffin, the driver, and the Mercantile Acceptance Corporation of California, the owner of the other car. The defendant owner moved in its behalf for a directed verdict and the motion was granted. Thereafter the jury returned a verdict against Coffin for $7,500, and this appeal was taken by plaintiff from the judgment entered in favor of the owner pursuant to the directed verdict.

The collision occurred a few minutes before four o'clock on a Sunday morning, on Webster street in Alameda, about 600 feet south of the southerly entrance to the Posey Tube, connecting Alameda and Oakland. Coffin was driving a Chevrolet coupe northerly toward the entrance to the tube, and was accompanied by a friend named Chamberlain. The Kain car was a two-door Chevrolet sedan, and was travelling southerly, having just emerged from the tube. It was occupied by nine persons. Kain, his wife, and Emory Jacobsen were riding in the front seat, and Mr. and Mrs. Langlands, the appellant Mrs. Blank, Mrs. Betty Hurley, Harry Haldeman, and a Mr. Lund, in the tonneau. There are two traffic lanes through the tube, which upon leaving the tube branch into four lanes; and both cars were travelling at an estimated speed of thirty to thirty-five miles an hour. The evidence shows that Coffin's car struck Kain's on the right hand side, between the hood and the door. Kain claimed that as the Coffin car approached his, the Coffin car first swerved to the left, clear across the highway, then back again to the right. The tube is well lighted, and motorists, while passing through it, are required to drive with their lights turned off; and Coffin claimed that he was travelling along the inner lane; that Kain did not turn on his lights upon emerging from the tube, but delayed doing so until the cars were within 100 feet of each other and that as he turned them on, he swerved over the middle line to the left, in front of his, Coffin's car; that, being blinded by the lights, he hit Kain's car on the right side. As the result of the impact Mrs. Kain and Jacobsen were killed, and all of the others in both cars, except Haldeman and Mrs. Hurley, were injured, some, including Mrs. Blank, more severely than others.

At the time of the accident Coffin and Chamberlain were proceeding to their

homes in Berkeley. They had been attending a social affair in Alameda given by a sorority, and after having driven their young lady companions home, they started for their residences in Berkeley. The evidence shows that during the evening Coffin had taken but one drink of intoxicating liquor, and Chamberlain admitted having taken four or five; and later during the evening they were served with a buffet supper and coffee. Kain was employed as bartender at the Riptide Hotel in Alameda. He went off duty at two o'clock that morning, and shortly afterwards drove his wife, Mr. and Mrs. Langlands, and Jacobsen to a Chinese restaurant in Oakland. There they were joined by Mrs. Hurley, Mrs. Blank, Haldeman and Lund, and after they had finished dining, all entered Kain's car and started to drive back to the Riptide Hotel. Some of them lived at the hotel, and others nearby. Several of the Kain party had taken intoxicating drinks during the evening, but Kain testified that he drank nothing intoxicating that night, and there is no evidence showing otherwise.

[1-3] It appears from the allegations of the complaint that appellant sought to charge respondent with liability for the accident on two theories, the first being that Coffin was employed by respondent and at the time of the accident was "acting within the course and scope of said employment with and for the business" of respondent; and secondly, that the automobile was being driven by Coffin "by and with the consent and permission" of respondent. In her briefs, however, appellant states that the only issue is that of permissive use; and that she makes no contention that Coffin was on the business of his employer. The question presented by the appeal is, therefore, whether the trial court was justified in holding as a matter of law that the evidence introduced by respondent dispelled the inference of permissive use arising from the fact of ownership; and after having examined the evidence bearing on that issue, and the contentions made by appellant regarding the same, it is our conclusion that no ground for reversal has been shown.

The main facts relating to that issue, as established by the evidence, were these: Respondent was engaged in the business of financing automobile loans, and maintained a branch office in Oakland. It was in charge of a manager named Stuperich, and about three months prior to the accident Stuperich hired Coffin as "field man", whose duties consisted chiefly of examining, checking, and repossessing automobiles. His territory embraced much of the San Francisco Bay area, and in order to perform his duties he was assigned the use of a company car, which he garaged at his home. He had no fixed hours of employment, and was through with his work about seven or eight o'clock in the evening. He never worked Sundays. On the Saturday preceding the accident he finished his work about 4 p. m. and had no further duties to perform until the following Monday morning. At the time Stuperich hired Coffin he carefully instructed him, not only as to the nature of his duties, but also as to the restricted use of the company's car. In this regard Stuperich testified that he told Coffin he was "never to use the car for pleasure or personal uses", but only in connection with the company's business; and Coffin testified to the same effect. Also at the same time Stuperich furnished Coffin with a mimeographed manual of instructions, which he explained to Coffin in detail. Among the instructions contained therein relating to the use and care of the company's automobiles were the following: "Each field man or collector will be supplied with a company owned car. The employee to whom the car is assigned must see that it is kept in excellent condition at all times at a minimum expense. Please note the following instructions: * * * The company does not allow employees operating company cars to pick up riders or carry passengers unless they are employed by the company. * * * Purchase only standard grades of motor oil and gasoline and always get a paid receipt. * * * Company owned cars must not be used by employees on their vacations." In violation of the oral and written instructions so given, Coffin on several occasions used the company's car for his own pleasure, but he carefully concealed having done so from his employer, and there is not the slightest evidence from which the inference may be drawn, nor does appellant contend that Coffin's employer ever learned of his having done so except on one occasion; and upon that occasion Stuperich severely reprimanded him for having done so, told him he would be discharged if he did it again; furthermore, as a punishment for such violation Coffin was laid off his job for a week or more during which period the company's car was assigned to the use of another field man. This took place within the month

immediately preceding the accident. All of the foregoing facts were established by the testimony of Stuperich and Coffin, and the testimony so given by them is clear, positive, and uncontradicted; and that being so, the trial court's ruling is fully supported by the decisions rendered in the following cases: Crouch v. Gilmore Oil Co., Ltd., 5 Cal.2d 330, 54 P.2d 709; Maupin v. Solomon, 41 Cal.App. 323, 183 P. 198; Fahey v. Madden, 56 Cal.App. 593, 206 P. 128; Bourne v. Northern Counties T. Ins. Co., 4 Cal.App.2d 69, 40 P.2d 583; Brown v. Chevrolet Motor Co., 39 Cal.App. 738, 179 P. 697; Martinelli v. Bond, 42 Cal.App. 209, 183 P. 461; Rock v. Orlando, 100 Cal. App. 498, 280 P. 377; Hammel v. Keehn, 18 Cal.App.2d 387, 63 P.2d 1165; McCammon v. Edmunds, 114 Cal.App. 36, 299 P. 551; Hanchett v. Wiseley, 107 Cal.App. 230, 290 P. 311; Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 77 P.2d 1059.

Appellant concedes that the testimony so given by Stuperich and Coffin was clear, positive, and uncontradicted, but it is contended that said testimony and the additional evidence introduced by respondent to repel the inference of permissive use, was open to doubt, and weakened by contradictions and improbabilities, and that therefore the trial court was without power to grant respondent's motion for a directed verdict. Such a doubt must, however, be reasonable, and arise from the evidence in the case, for the law does not recognize doubts that are fanciful or imaginary; and the contradictions and improbabilities must be of substantial character. In granting the motion for directed verdict the trial court held in effect that the points relied upon by appellant did not measure up to the foregoing legal standards. The record fully supports the trial court's conclusion. One of the contentions made by appellant is that since the manual of instructions contained no provision specifically prohibiting employees from using company cars for their own pleasure, an inference arises from the omission that such personal use was permitted. But in advancing this contention appellant entirely disregards the clear, positive and uncontradicted testimony of the two witnesses that at the time Coffin was employed he was instructed that under no circumstances were employees permitted to use company cars for their pleasure or personal use, that on the one occasion when it was discovered that he had violated that rule he was severely reprimanded, suspended from duty for a week or more, and deprived of the custody of the car during the period of suspension; also the rule embodied in the manual expressly and definitely prohibiting employees from carrying passengers unless they were employed by the company. Appellant points to a variance between the testimony of Stuperich and Coffin as to just when and how Stuperich discovered that Coffin had used the car for his own personal use. The undisputed fact remains, however, that such discovery was made, and that as a result thereof Coffin was reprimanded for such violation and threatened with dismissal if he repeated the violation, all of which is corroborated by the further fact that he was penalized therefor by a suspension from work.

[4, 5] Respondent's employees to whom cars were assigned were obliged to turn in weekly reports showing the total mileage travelled and the amount of gasoline and oil consumed for which reimbursement was sought by the employe. They were not required to set forth in said reports where or between which points the car had been driven, and Coffin carefully avoided making any charge against the company for gasoline and oil which he might have consumed for his own pleasure. Appellant argues in effect that nevertheless it would have been feasible for the company to have ascertained the number of miles per gallon of gasoline the coupe made and then to have checked the total mileage as shown by the weekly report with the number of gallons of gasoline charged against the company and that if it had done so it could have discovered that Coffin was using the car for some purpose other than in the company's business. But admittedly this was not done; and no such discovery was made; nor has appellant called attention to any statutory or judicial rule requiring an employer, in order to protect himself from liability in cases of this type, to adopt or carry on any minute checking system of the kind here suggested. Therefore, since admittedly no such discovery was made, there is nothing upon which to base an inference of permissive use.

[6, 7] Appellant also calls attention to the fact that the testimony given by Coffin as to the circumstances attending the happening of the accident was contradictory to that given by Kain, and that the jury in returning a verdict against Coffin must necessarily have disbelieved his testimony.

Appellant has cited no authority, however, from within or without this jurisdiction, indicating that contradictions in the testimony relating to the happening of the accident are such contradictions as will defeat the right of an owner to a directed verdict based entirely upon the issue of permissive use. And obviously, to hold that they are controlling factors would operate not only to deprive an owner, in practically all cases, of the legal right to move for a directed verdict on the ground mentioned, but also to abolish the right of the trial court to entertain and grant such a motion, for it is a matter of common knowledge that rarely, if ever, is there a case tried before a jury involving a collision between two automobiles which does not present a conflict in the testimony between the two drivers as to the speed, movement or operation of their respective cars. Moreover, if such were the rule governing owners whose liability is limited, it would apply necessarily with equal force to cases where the relationship of principal and agent or master and servant exists between the defendant owner and the driver, wherein the liability is unlimited.

[8] It is likewise obvious that where as here the owner's motion for directed verdict is granted upon the issue of permissive use, the effect of the verdict subsequently rendered against the driver which involves only the issues of negligence, proximate cause and measure of damages, cannot be considered in determining the correctness of the trial court's ruling, for it must be borne in mind that the motion for directed verdict is made and ruled upon prior to the submission of the cause to the jury on the remaining issues in the case. In this regard the situation here is wholly different from the one presented in Bushnell v. Yoshika Tashiro, 115 Cal.App. 563, 2 P.2d 550, which is strongly relied upon by appellant, for there the trial court denied the motion for directed verdict; and that being so, on appeal, the effect of the jury's verdict, which was against the defendants, was a matter that could be properly considered in support of the conclusion reached by the jury on all factual issues, including the one of permissive use.

The remaining points made by appellant in furtherance of her contention that the testimony introduced by respondent is legally insufficient to dispel the inference of permissive use are not of sufficient importance to call for discussion. Nor do we deem any of the cases cited by appellant controlling for the reason that they involve facts essentially different from those here presented. For example, in the case of Bushnell v. Yoshika Tashiro, supra, while the driver of the truck testified that he had not obtained permission to drive the same on the particular Sunday on which the accident happened, the evidence showed that during the four years of his employment the owner had customarily allowed him to use the truck on Sundays for his own pleasure, and the driver testified that the only reason he did not obtain permission on this single occasion was that he believed the owner was in church. Here all of the testimony given in the case on that subject was that under no circumstances and at no time was Coffin allowed to use the car for his own pleasure.

[9] Coffin resumed his employment with the respondent company about two months subsequent to the accident, and it appears that thereafter he was required to attend court on a criminal charge, evidently growing out of the accident; and appellant sought to show that in attending the sessions of court he drove one of the company's cars with its permission. There was no error in the trial court's ruling excluding the testimony, especially in view of the fact that appellant made no offer to show that the conditions of the employment subsequent to the accident were the same as they were before.

[10] In a supplemental brief appellant urges a new point. It is based on the decision rendered by the District Court of Appeal, Second District, Division Two, in the recent case of Lanfried v. Bosworth, Cal.App., 114 P.2d 406, wherein it appears to be held, among other things, that the disputable presumptions enumerated in section 1963 of the Code of Civil Procedure to the effect that a person is innocent of crime or wrong, and that the law has been obeyed, apply in cases such as this which are brought on the theory of implied permissive use of automobiles. The authority given for the application of such presumptions is section 503 of the Vehicle Code, St.1935, p. 174, which reads in part: "Any person who drives or takes a vehicle not his own, without the consent of the owner thereof and in the absence of the owner, *and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle,* whether with or without intent to steal the

same * * * is guilty of a felony." (Italics ours.) Appellant argues therefore that as held in Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529, 534, "* * * when the rules applicable to nonsuit and directed verdict come into operation, and we have a showing on behalf of the plaintiff of the facts and circumstances of the case and the presumption relied upon, on the one hand, and the evidence offered on behalf of the defendant, the evidence produced by the defendant and favorable to his cause is eliminated from consideration for the purpose of the ruling of the court". There are several reasons, however, why that portion of the decision in Lanfried v. Bosworth, supra, upon which appellant relies, is not here controlling. In the first place, as will be noted, in order to establish the offense declared by said vehicle code section it must be shown not only that the vehicle was taken and driven, but that it was taken and driven "with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle"; and here admittedly there was no intent at any time to deprive respondent of the title to the car; and at all times it was in the lawful possession of Coffin. In this connection it may be here stated that the case of People v. Cuevas, 18 Cal.App.2d 151, 63 P.2d 311, cited by appellant, is not at all in point, for there, as declared in the opinion, the car was stolen by the defendant and he kept the same in his possession for more than four years before the owner recovered it. Furthermore, that portion of the decision in the Lanfried case dealing with presumptions was unnecessary to the disposal of the appeal because as shown by the decision therein the record was entirely barren of any evidence to dispel even the inference of permissive use. Then again that portion of the decision referred to is in conflict with the well reasoned decision rendered in Bradford v. Sargent, 135 Cal.App. 324, 27 P.2d 93, on the same point. It is also to be noted that the Bradford case is not cited in the Lanfried decision; but it has been cited approvingly in several other cases.

[11] At the time the appeal was argued appellant apparently took the position that in no case of this type should the trial court have the right to grant a motion for directed verdict where the evidence dispelling the inference of permissive use, however strong, clear, positive and uncontradicted it might be, consisted alone of the testimony of the owner of the car or the driver or both; that such dispelling evidence must be furnished by other witnesses or at least be corroborated by independent facts established by other witnesses. The basic ground for appellant's position seems to be that the owner and driver are interested parties. No sound reason has been offered, however, why on motion for directed verdict in a case of this kind the testimony of an interested party should by judicial doctrine be arbitrarily rejected or even placed under the ban of suspicion, any more so than in any other class of cases. The owner is brought into court burdened with the inference of permissive use because of his ownership of the car; and that being so, the law justly affords him the right to dispel such inference by competent evidence. Ordinarily he is the only one who has knowledge of the facts sufficient to dispel such inference; and certainly because the party seeking damages from him may not be in a position to introduce testimony contradicting the dispelling evidence serves as no reason why the owner may not have his testimony considered by the trial court in support of the defense which in most cases is the only one available to him. In any event, the legal doctrine for which appellant seems to contend is not the law, nor can it be adopted without distorting the rule laid down in the Engstrom case into an incongruous shape and also without overruling or disapproving a number of previous decisions rendered by the Supreme Court and District Courts of Appeal, among them being Crouch v. Gilmore Oil Co., Ltd., supra; Maupin v. Solomon, supra; Martinelli v. Bond, supra; Rock v. Orlando, supra, wherein the only testimony in the case to dispel the inference consisted of that given by interested parties. The decisions in those cases have been followed for many years as the established law of this state, and even though this court possessed the power to repudiate them, no sufficient reason has been assigned why this should be done.

The judgment is affirmed.

WARD, J., concurred.

PETERS, Presiding Justice (dissenting).

I dissent.

The majority opinion holds that where the evidence is of such a nature that an inference of permissive use arises, an inference which admittedly is sufficient to establish a prima facie case, such infer-

ence is rebutted as a matter of law by the uncorroborated testimony of the employer and employee contradicting the inference. These two witnesses are the defendants in the action. They are witnesses who have a financial interest in the outcome of the case. To hold that the inference is rebutted as a matter of law under such circumstances, in my opinion, violates fundamental principles applicable to a jury trial. If the rule be as announced in the majority opinion, what becomes of the fundamental concept that the jury is the sole judge of the credibility of witnesses? What becomes of the elementary rule that the jury, under proper circumstances, may disregard uncontradicted evidence? (See annotation 8 A.L.R. 796.) The rule as announced by the majority opinion means that by merely swearing that the employee did not have permission to use the car for personal purposes, as a matter of law, the inference is rebutted. Such a rule places the plaintiff at the mercy of the defendant. As long as the defendant employer and employee are willing to swear that the employee was not given express or implied permission to use the car for personal purposes, the trial court must grant a directed verdict. The injured plaintiff, in the very nature of things, cannot directly contradict their testimony. Whether such permission was or was not granted usually rests solely in the knowledge of the employer and employee. The best that the plaintiff can do is to do what was done in this case—show that the car, from the very inception of the employment, was constantly and habitually used by the employee for personal purposes and impeach the witnesses on other matters. Yet in the face of this evidence (and the other evidence to which reference will hereafter be made), which corroborates the inference, the majority opinion holds that because two interested witnesses swore that personal use of the car was prohibited by the employer, the inference and the corroborating evidence, as a matter of law, go out of the case. Can mere swearing have this legal effect? Are all the reasonable probabilities to be thus disregarded?

In support of its conclusion the majority opinion relies on such cases as Engstrom v. Auburn Automobile Sales Corp., 11 Cal. 2d 64, 77 P.2d 1059, and Maupin v. Solomon, 41 Cal.App. 323, 183 P. 198, and the other cases cited, which announce the same rule. These cases are not necessarily in conflict with the many cases holding that the jury is the sole judge of the credibility of witnesses, and that an inference is sufficient to create a conflict in the evidence. If the fundamental principles involved are kept clearly in mind the apparently irreconcilable cases are seen to be not necessarily in conflict. These fundamental concepts are three in number.

1. In the first place, the jury is the exclusive judge of the credibility of a witness. This is expressly so declared by statute. § 1847, Code of Civ.Proc.; see cases collected 27 Cal.Jur. 182, § 156. While the same section declares that a "witness is presumed to speak the truth", it also declares that "this presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony * * * or his motives, or by contradictory evidence * * *". In passing on credibility the jury, among other things, is entitled to take into consideration the interest of the witness in the result of the case. See cases collected 27 Cal.Jur. 180, § 154, f. n. 20. Provided the jury does not act arbitrarily, the jury may reject in toto the testimony of a witness, even though that testimony be uncontradicted. Hinkle v. Southern Pacific Co., 12 Cal.2d 691, 87 P.2d 349; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371; Burke v. Bank of America, etc., Ass'n, 34 Cal.App.2d 594, 94 P.2d 58; People v. La Fleur, 42 Cal.App.2d 50, 108 P.2d 99; Van Der Veer v. Winegard, 41 Cal. App.2d 518, 107 P.2d 97; People v. Menne, 4 Cal.App.2d 91, 41 P.2d 383; cases collected 27 Cal.Jur. 184, § 156, f. ns. 3 and 4; see, also, annotation 8 A.L.R. 796. The rule is thus stated in Market Street R. Co. v. George, 116 Cal.App. 572, 576, 3 P.2d 41, 43, where there was involved the rule that upon proof of ownership of an automobile by an employer and that an employee was driving it, the inference arises that the employee was acting in the course and scope of his employment at the time of the accident, in a case where the "uncontradicted" evidence of the employee was that he was then on a personal errand: "It has always been the rule that courts and juries are not bound by mere swearing no matter how positive, unless it be credible swearing. It may bear within itself the seeds of its own destruction, as where it is inherently improbable, or its destruction may be wrought from without, as where the person swearing is in

some manner impeached. In either case court and jury are entitled to disbelieve the testimony if they choose, and, if they do refuse it credence, it is of no more effect than if it had not been given. It disappears from the case and the inference opposed to it is no longer contradicted."

It was held, therefore, that the jury could disbelieve the testimony of the employee that he was on an errand of his own. See, also, Wagnitz v. Scharetg, 89 Cal.App. 511, 265 P. 318; Perry v. A. Paladini, Inc., 89 Cal.App. 275, 264 P. 580; Poncino v. Reid-Murdoch & Co., 212 Cal. 325, 298 P. 818.

2. In the second place, an inference is evidence—indirect evidence, it is true, but, nevertheless, evidence. An inference is declared to be indirect evidence, Code of Civ.Proc. § 1957, and is partially defined by § 1958 of that Code as: "An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect." This partial definition is somewhat clarified by the provisions of sec. 1960 of the Code of Civil Procedure, which provides: "An inference must be founded:

"1. On a fact legally proved; and,

"2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature." An inference has also been defined as "a conclusion drawn by reason from premises established by proof; a deduction or conclusion from facts or propositions known to be true." Grand Lodge A. O. U. W. v. Miller, 8 Cal.App. 25, 28, 96 P. 22, 23, quoting Bouvier's Law Dictionary.

Whether a particular inference *can be drawn* from certain evidence is a question of law, but whether the inference *shall be drawn,* in the particular case, is a question of fact for the determination of the jury. 10 Cal.Jur. 738, § 60. They are sufficient, except in unusual circumstances, to create a conflict in the evidence. 10 Cal.Jur. 740, § 61.

3. To these well-settled rules there is a common sense limited exception which is aimed at preventing the jury from running away with the case. This exception is that the jury may not indulge in an inference when that inference is rebutted by clear, positive, uncontradicted evidence which is not subject to doubt. The jury may not believe impossibilities. When the rebutting testimony is of such a nature that it is not subject to doubt in the minds of reasonable men, when the minds of reasonable men cannot differ on the subject, then the jury is not and should not be permitted to indulge in the inference. If there is any reasonable doubt as to whether the inference as a matter of law has been rebutted, that doubt should be resolved in favor of submitting the question to the jury. To grant a directed verdict, under such circumstances, would be an interference with the proper functions of the jury. It is this exception which was applied in the Engstrom case, supra, and the other cases cited in the majority opinion. But it must be kept in mind that the rule of those cases is an exception to the general rule. The difficulty with the majority opinion is that it treats the exception as if it were the general rule, and treats the general rule as if it were the exception.

The instant case offers an excellent illustration of both the general rule and the exception thereto. It is the settled rule in this state that upon proof that an automobile is owned by an employer and was being operated by an employee at the time of an accident, an inference arises sufficient to establish a prima facie case that the automobile was being operated by the employee under the authority of the employer and within the scope of the employment. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Pozzobon v. O'Donnell, 1 Cal.App. 2d 151, 36 P.2d 236; Bushnell v. Yoshika Tashiro, 115 Cal.App. 563, 2 P.2d 550; McWhirter v. Fuller, 35 Cal.App. 288, 170 P. 417; Brown v. Chevrolet Motor Co., 39 Cal.App. 738, 179 P. 697; Wagnitz v. Scharetg, supra. This is, in reality, a double inference. Upon proof of ownership in the employer, and that the person driving is an employee, the first and broadest inference is that the employee was acting within the scope of his employment. Included within that inference is the more limited inference that the employee, at the time of the accident, was driving with the permission of the employer. The distinction between the two is that the first inference would support an unlimited judgment against the employer, while the second would support a verdict only up to $5,000, as provided by § 402 of the Vehicle Code.

In the present case, upon proof that Coffin was employed by respondent, and that the automobile was owned by it, both inferences arose. However, clear, positive and uncontradicted evidence which was not open to doubt was introduced by both plaintiff and defendants that demonstrated that the accident occurred at 4 A. M. in the morning while Coffin was returning home after attending a party in no way connected with his employment. That evidence did not depend solely on the credibility of Coffin. It was corroborated by many non-interested witnesses. It was of such a nature that no other conclusion was reasonably possible but that Coffin was not acting within the scope of his employment when the accident occurred. The inference that he was so acting, therefore, was rebutted, as a matter of law, under the exception to the general rule announced in the Engstrom and other cases cited in the majority opinion. Appellant concedes that this is so. But the same cannot be said as to the inference of permissive use. It is true that both Coffin and Stuperich testified that at the time of the employment Stuperich told Coffin he was not to use the car for personal purposes. Both also testified as to the Santa Cruz incident recounted in the majority opinion. There is no corroboration of their testimony at all in these respects by any independent non-interested witness, or by any circumstance. Both were interested witnesses. Had the case gone to the jury, could not the jury, from their manner of testifying, from the fact of interest, from the reasonable probabilities, have refused to believe this testimony? If the jury had brought in a verdict for plaintiff would we have not held the jury was justified in so finding, even though there were no other factors casting doubt on the credibility of these two witnesses? That is the test that must be applied in passing on the propriety of a directed verdict. In re Estate of Flood, 217 Cal. 763, 21 P.2d 579; In re Estate of Lances, 216 Cal. 397, 14 P.2d 768. Under such circumstances, the general rule above discussed is applicable.

In the instant case, we are presented with a factual situation much stronger in favor of appellant than the facts heretofore assumed. We are not merely faced with the inference on one side and the testimony of the defendants contradicting the inference on the other. There is evidence in the record which throws sufficient doubt on the alleged uncontradicted evidence of the defendants to make the question of their credibility a jury question.

The evidence shows that at the time of the accident Coffin had been in the employ of the respondent for about three months. At the time of the employment he was assigned the automobile involved in this accident. He had the exclusive use of that car, and was permitted to keep it in his garage in Berkeley, for which he charged his employer nothing. The evidence shows that from the inception of his employment down to the very time of this accident he did use the car for his personal purposes, although there is no direct evidence that his employer knew this. He, as well as the many other employees similarly employed, was required to give the company weekly reports concerning both mileage traveled, as taken from the speedometer, and gasoline consumption. He testified that each week he reported the total mileage coverd, including mileage covered for his personal use, but that he only reported total gasoline purchased on company business; that if he used the car for personal trips, which he frequently did, he did not include within the report the gasoline purchased for such trips. The company, therefore, had in its possession the information from which it could easily have been determined that Coffin was using the car for personal purposes. Could not the jury have inferred the company had such knowledge?

The evidence also showed that at the time of his employment, Coffin, as were the other employees, was furnished with a mimeographed manual of instructions. Several pages of this book were devoted to rules governing the use of company automobiles by the employees. These rules were quite comprehensive and detailed. However, there was not one word in those rules prohibiting employees from using the cars for their personal use, except rule 7 which reads: "Company owned cars must not be used by employees on their vacations." The evidence shows that these rules had several times been revised, but at no time did the written rules prohibit employees from using the cars for personal purposes, except that they were prohibited from using them on their vacations. From this testimony the jury could have inferred that if the company did desire that the employees should not use the cars for personal purposes (other than on

vacations) it would have so provided in the rules.

The majority opinion places some reliance on rule 3 contained in the manual of instructions, which provides: "The company does not allow employees operating company cars to pick up riders or carry passengers unless they are employed by the company." Admittedly Coffin was accompanied by a friend not employed by respondent at the time of the accident. If Coffin in fact had permission to use the car for personal purposes the mere fact he was violating rule 3, supra, would not bar the appellant, as a matter of law, from recovery against respondent. The fact that Coffin at the time of the accident was carrying a passenger in violation of the company rule might be of some relevancy if the passenger were injured and he had knowledge of the rule (Albers v. Shell Company, 104 Cal.App. 733, 286 P. 752) but such fact has no relevancy where a third person is injured. Gibbons v. Naritoka, 102 Cal. App. 669, 283 P. 845; Nord v. West Michigan Flooring Co., 238 Mich. 669, 214 N. W. 236; Wright v. Maddox, Tex.Civ.App., 288 S.W. 560.

There is another factor of some importance. When the trial court granted the motion for a directed verdict Coffin had been impeached in many respects. The witnesses for appellant had directly contradicted Coffin as to how the accident occurred. The trial judge knew that this was so. He also knew that it was for the jury to determine who was telling the truth on this issue. He also knew that if the jury should disbelieve Coffin on this issue (as it subsequently did by bringing in a substantial verdict against him), that it could disbelieve his testimony on the issue of permissive use. Section 2061, subd. 3, Code of Civil Procedure, provides: "That a witness false in one part of his testimony is to be distrusted in others." With this conflict in Coffin's testimony, how can it be said that his testimony on the issue of permissive use was clear, positive and uncontradicted and not subject to doubt?

The same reasoning applies to the testimony of Stuperich on this issue. Not only was he impeached by the testimony concerning the mileage and gasoline reports mentioned above, from which the jury could have inferred that the company had actual knowledge of the fact that Coffin was using the car for personal purposes, but both Coffin and Stuperich testified that Stuperich discovered, prior to the accident, that Coffin had used the car to go on a week-end to Santa Cruz; and that Stuperich severely reprimanded Coffin, and told him if he ever used the car for personal purposes again he would be discharged. The stories of the two witnesses as to the circumstances under which Stuperich discovered this trip are in direct conflict. Coffin testified that some third person told Stuperich, while the latter testified that Coffin drove up in front of the company office with a girl in the car and upon questioning Coffin disclosed that he had been to Santa Cruz for a week-end. Certainly, the jury in weighing the evidence and passing on the credibility of these two witnesses could have considered this conflict. Stuperich and Coffin both testified that Stuperich severely reprimanded Coffin on this occasion and told him if he ever used the car again for personal purposes he would be fired. The record shows that thereafter Coffin continued to use the car for personal purposes and admittedly the company made no attempt to check up on Coffin's use of the car. The evidence also shows that after the present accident the company retained Coffin in its employ and did not discharge him. All of these matters are factors that the jury was entitled to consider in passing on the credibility of these two witnesses.

The respondent places its greatest reliance on the Engstrom case, supra. Even if that case be given the very broadest interpretation, it was error to grant the directed verdict in the present case. In that case the person driving the car at the time of the accident was a prospective purchaser from the Auburn Automobile Sales Corporation, the owner. The uncontradicted evidence showed that the prospective purchaser was given permission by the owner to drive the car for but two hours after 5 P.M. on the day in question. He did not return the car until 4 P.M. of the next day, the accident having occurred shortly prior thereto. The evidence also showed, without contradiction, that the owner, upon the expiration of the two-hour period, had made efforts to locate the car, and in fact had finally reported the car to the police as stolen. The plaintiff relied solely on the inference of permissive use growing out of proof of ownership of the car. The Supreme Court sustained a judgment in favor of the owner entered upon the granting of its motion for a directed verdict. It held that the inference of permissive use was re-

butted as a matter of law by the testimony above-summarized. In so holding the court stated the applicable rules as follows [11 Cal.2d at page 70, 77 P.2d at page 1063]:

"On the other hand, an *inference* [as distinguished from a presumption] is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side. [Citing cases.] Of course, if the opposition evidence is conflicting, vague, or uncertain, or is weakened by contradictions or improbabilities, an inference is not dispelled as matter of law." The same rule was applied in Crouch v. Gilmore Oil Co., Ltd., 5 Cal.2d 330, 54 P.2d 709; see, also, opinion of Supreme Court in denying a hearing in Maupin v. Solomon, supra.

It must be apparent, from the analysis above set forth, that the record here presented is not one where we can say, as a matter of law, that the evidence rebutting the inference is "clear, positive and uncontradicted evidence which is not open to doubt", but rather a case where it must be held that the rebutting evidence is "conflicting, vague, or uncertain" and is "weakened by contradictions or improbabilities", and is "open to doubt".

It should also be mentioned that it has been held that, when a person is driving the car of another at the time of the accident, a disputable presumption, as distinguished from an inference, arises that he has permission to drive the car. Lanfried v. Bosworth, Cal.App., 114 P.2d 406. This disputable presumption is predicated upon the provisions of § 1963, sub. 1, which provides that it is presumed "that a person is innocent of crime or wrong". The majority opinion devotes considerable space to showing that it is not a crime for a person lawfully in possession of an automobile to use it for a non-permitted purpose. I do not agree with the conclusion stated in the majority opinion that if Coffin did not have permission to use the car for personal purposes he was not guilty of a crime, but, whether it was a crime or not, is beside the point. The presumption to which reference has been made not only applies to crimes but also to a "wrong". Certainly, Coffin was guilty of a "wrong" against his employer if he used the car for personal purposes without permission. Since this is so, if the reasoning of the Lanfried case, supra (in which the Supreme Court denied a hearing), is sound, then a disputable presumption arose that Coffin did not commit a wrong against his employer. That is tantamount to saying that a disputable presumption arose that Coffin had permission to use the car for personal purposes—otherwise, he would be committing a wrong. If such a presumption arose, then under the doctrine of Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529, it created a conflict in the evidence, and it was error to grant the motion for a directed verdict.

For these various reasons, and particularly for the reasons first advanced, it is my opinion that the judgment should be reversed.



46 Cal.App.2d 859

PEOPLE v. ALBA et al.

Cr. 1775.

District Court of Appeal, Third District, California.

Sept. 26, 1941.

1. False pretenses ⇐49(6)

Evidence sustained conviction of grand theft accomplished by procuring a pretended loan of money by means of false representations. Pen.Code, § 484.

2. False pretenses ⇐49(2)

In prosecution for grand theft accomplished by obtaining $300 in money by means of false representations, evidence that the money was accepted by accused at the full value was sufficient to establish that the money was of the actual value of $300 so as to sustain the conviction. Pen.Code, §§ 484, 487.

3. False pretenses ⇐38

In prosecution for grand theft accomplished by obtaining $300 in money as a purported loan, by means of false representations, it was not necessary to prove specifically that the loan of $300 "in money" was actually worth that sum, nor was it necessary to prove that it was paid in coin or currency or what the denomination of the separate pieces of money were. Pen.Code, §§ 484, 487.

4. False pretenses ⇐32

In prosecution for grand theft accomplished by obtaining $300 in money as a purported loan, by means of false representations, the use of the word "money", under circumstances of the case, implied that it was a circulating medium of the United States with a fixed measure of value. Pen.Code, §§ 484, 487.

See Words and Phrases, Permanent Edition, for all other definitions of "Money".

5. False pretenses ⇐49(2)

Proof that defendants procured by means of fraud the sum of $300 in money, established fact that the "money" was circulating medium of the United States of that specified value and that the offense amounted to "grand theft". Pen.Code, §§ 484, 487.

See Words and Phrases, Permanent Edition, for all other definitions of "Grand Theft".

6. False pretenses ⇐16

"Grand theft" is accomplished by fraudulently procuring a sum of money in excess of $200 from the owner by means of artifice, trickery, or misrepresentations, even though it is obtained as a pretended loan, if it appears to be the intention of accused at the time of the transaction not to repay the money. Pen.Code, §§ 484, 487.

7. False pretenses ⇐51

In prosecution for grand theft by fraudulently procuring a sum of money in excess of $200, the question of intent with which the money is procured is for the jury. Pen. Code, §§ 484, 487.

8. Criminal law ⇐43

Fact that party from whom accused fraudulently procured money by means of false representations subsequently recovered judgment against accused in a civil action and satisfied the judgment did not relieve accused from prosecution and conviction of grand theft for feloniously procuring pretended loan of money by means of false representations. Pen.Code, §§ 484, 487.

9. Criminal law ⇐41

A voluntary repayment of money after crime of grand theft has been committed will not relieve accused from criminal liability.

10. False pretenses ⇐9

The crime of theft accomplished by means of false representations may not be consummated when the owner of the money or property knows the statements are false, or even when he parts with his money or property without relying on the false representations, since the very "gist" of the offense is the procuring of the property by means of false representations, except for which the owner would not part with his possession of it. Pen.Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "Gist".

11. False pretenses ⇐49(5)

Evidence established that lender relied on false representations of accused in intrusting lender's $300 to accused who were purportedly borrowing the money for a few hours, and who left with lender, as security, metal which was represented as being gold but which in fact consisted of particles of brass, so that conviction of accused for grand theft accomplished by means of false representations was sustained. Pen.Code, §§ 484, 487.

12. Criminal law ⇐829(1)

Refusal of instructions which were fully covered by others which were given was not reversible error.

13. False pretenses ⇐52

Instruction that theft by trick and device may be accomplished by obtaining property by both words and acts on part of accused, which are known to be false and fraudulent and are made with intention of inducing owner of property to be deceived, and when the owner relying on such deception thereby consents to the transfer of the possession of his property to the accused, was properly given. Pen.Code, § 484.

14. Criminal law ⇐730(15)

The reference by district attorney to accused who were charged with grand theft by means of false representations as "rats", in the course of his argument to the jury, even if constituting misconduct, did not require reversal where objection to the language was sustained and there was no miscarriage of justice in the conviction of the accused.

Appeal from Superior Court, Yolo County; J. G. Bruton, Judge.

Joe Alba and others were convicted of grand theft accomplished by means of fraud, and they appeal.

Affirmed.

Percy Napton, of Woodland, for appellants.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., and Thos. J. MacBride, of Sacramento, for respondent.

THOMPSON, Justice.

The defendants were convicted of the crime of grand theft accomplished by means of fraud as provided by section 484 of the Penal Code. Charles Martini was also charged with a prior conviction of another felony and pleaded guilty thereto. From the judgment which was accordingly rendered this appeal was perfected.

It is contended the verdicts and judgment are not supported by the evidence for the chief reason that there is a lack of proof that the "three hundred dollars *in money*", which was fraudulently procured, was of that actual value. It is further asserted the defendants are not guilty of grand theft because the amount of the stolen money was subsequently recovered by the prosecuting witness by sale of an attached automobile in a civil action to satisfy a judgment for that sum, and for the further reason that he did not part with his money, relying on the defendants' alleged fraudulent representations, but, on the contrary, that he acted on his own judgment regarding the genuineness of the metal which was pledged to him as security for the loan. It is also claimed the court erred in giving and in refusing to give to the jury certain instructions, and that the district attorney was guilty of prejudicial misconduct in referring to the defendants as "rats" in his argument to the jury.

The fraud by means of which the defendants obtained three hundred dollars from the prosecuting witness consisted of entrusting to him a canvas bag containing particles of brass which they falsely represented to be free gold to be held by him as a pledge to secure the repayment of a loan of that sum. George Palamidesi is an Italian by birth. He operated a lunch counter and bar called the "Hideaway Cafe", adjoining the highway near Sacramento.

Several days prior to the alleged theft two of the defendants, Alba and Martini, called at his place of business, representing themselves to be fellow countrymen. They said they came from Los Angeles and that they were seeking a location for a saloon and that they were also engaged in buying and selling gold. They often visited the Hideaway Cafe during that period of time, and, by their conduct and false statements, ingratiated themselves in the confidence of Palamidesi. He had absolute faith in their honesty. February 28, 1941, they told their victim that they were about to purchase from a friend a quantity of free gold. In his presence they then called on the telephone the other defendant, Charles Busata, whom Palamidesi had not previously met, and requested him to bring the gold to the Hideaway Cafe. Within a few moments he appeared, carrying a brief case in his hand. He was introduced to the proprietor, and they spent some time together in friendly conversation and in drinking at the bar. Joe Alba, who went by the assumed name of John Barney, then asked Mr. Palamidesi if they could use his dining room to negotiate the purchase of the gold. He acquiesced and they all repaired to the dining room, where Busata took a small canvas bag from his portfolio and poured onto a piece of paper placed on the table some particles of yellow metal which looked like gold. He said that it was gold. Alba asked him if it was the same quality of gold they had previously purchased from him. He replied that it was. Alba asked him how much gold he had in the sack. He said that the sack contained twenty-four hundred dollars worth of gold. Alba told him he had "brought too much gold"; that he had only seventeen hundred dollars with which to purchase gold. After considerable conversation, intended to deceive Palamidesi into believing that it was a valid transaction to purchase genuine gold, Alba asked the proprietor if he could loan them seven hundred dollars for a few hours to complete the bargain. Alba said they would leave the gold with him as security until they raised the balance of the purchase price, which they could do in a couple of hours, and that they would then repay him and redeem the gold. Mr. Palamidesi, relying upon their representations, said that he did not have so much money at hand, but offered to loan them three hundred dollars, which he promptly procured from his safe and handed to Alba. It does not appear whether the money consisted of coin or currency. Alba handed it to Busata, together with a purported roll of bills which he represented to be the seventeen hundred dollars they previously possessed. The wife of the proprietor testified she saw a twenty-dollar bill wrapped around the outside of that roll. Evidently that roll did

not contain genuine currency, with the exception of the twenty-dollar bill with which it was enclosed, for after the subsequent arrest of the defendants they were found in possession of a large quantity of false currency called "stage money". The three hundred dollars was accepted and acknowledged by the defendants to be of the value of that sum of money, for they represented that the sack contained twenty-four hundred dollars' worth of gold and Busata credited three hundred dollars in addition to the seventeen hundred dollar roll of bills as payment of two thousand dollars toward the purchase price, for the defendants then said they would have to raise four hundred dollars more to consummate the purchase. The defendants then delivered the canvas sack with its contents to Mr. Palamidesi, saying they would go to Sacramento and raise seven hundred dollars, the balance of the purchase money, and return within two hours and repay him his three hundred dollars and redeem the sack of gold. The proprietor placed the sack in his safe and patiently waited for their return. Naturally, the defendants failed to come back. After two days Mr. Palamidesi took the sack of metal to a metallurgist to be assayed. It was then discovered that it contained no gold. It proved to consist of mere particles of brass. The defendants were subsequently apprehended and upon that evidence they were convicted of grand theft.

[1, 2] There is ample evidence that the defendants were guilty of grand theft under section 484 of the Penal Code for stealing from George Palamidesi the sum of three hundred dollars in money, of that full value, by means of artifice, trickery and fraud. They were charged with the theft of "three hundred dollars, lawful money of the United States". The record is replete with evidence that they procured "three hundred dollars *in money*", by means of fraud. Palamidesi took that sum "of money" from his safe and handed it to them as a temporary loan in part payment of a quantity of metal represented to consist of twenty-four hundred dollars worth of gold. The loan was accepted at that full value for they agreed that only four hundred dollars of the purchase price remained unpaid. That furnishes sufficient evidence that the loan consisted of money of the value of three hundred dollars which fulfills the requirement of section 487 of the Penal Code.

[3, 4] Moreover, it was not necessary to specifically prove that the loan of three hundred dollars "in money" was actually worth that sum. Nor was it necessary to prove that it was paid in coin or currency, or what the denomination of the separate pieces of money were. The appellants suggest that, in the absence of evidence to the contrary, the reference to "three hundred dollars *in money*" might reasonably refer to Italian lira, German marks or Mexican dollars. We think not. It is clear the witnesses referred to the "three hundred dollars" and to "the money" which was procured by false pretenses, as circulating medium of the United States. The use of the word "money", under the circumstances of this case, implies that it is a circulating medium of this country with a fixed measure of value. People v. Hatch, 163 Cal. 368, 375, 125 P. 907. In 4 Restatement of the Law of Torts, page 572, section 911, it is said with relation to the value of money, "The value of money is assumed to be constant in actions for money tortiously taken". In the following paragraph of the same section it is further said, "Money as used herein means only *domestic* currency". In the case of People v. Lammerts, 164 N.Y. 137, 58 N.E. 22, 23, it is said with reference to the meaning of the term "money" that "'Dollars' and 'cents' have a well-recognized meaning as commonly used. The common definition is, the unit of money *by which values * * * are measured.*" In holding that an information stated a good cause of action for money obtained by false pretenses, which merely alleged that the defendant procured "the sum of twenty ($20.00) dollars" in that manner, without stating any value thereof, it is said in State v. Ryan, 34 Wash. 597, 76 P. 90, that: "But appellant claims that it should have alleged that the $20 was money and of some value. We think it would be difficult to define the meaning of the words 'twenty dollars' *if they do not mean that sum of money.* Everybody in this country knows that the word 'dollar' means a certain amount of money."

It has been uniformly held that the use of the word "dollar", when applied to United States circulating medium, means a fixed and definite value of one hundred cents. McDonald v. State, 2 Ga.App. 633, 58 S.E. 1067, 1068; Maxwell v. State, 9 Ga. App. 875, 72 S.E. 445; People v. Dillon, 1 Cal.App.2d 224, 228, 36 P.2d 416; People v. Hill, 2 Cal.App.2d 141, 148, 37 P.2d 849; 13

Words and Phrases, Perm.Ed., p. 240. In the case of Newlove v. Mercantile Trust Co. of San Francisco, 156 Cal. 657, at page 664, 105 P. 971, at page 975, the court says: "The dollar is the legal unit of money in the United States, and, whenever figures are used to denote a sum of money, 'such figures must, of course, be understood to represent "dollars," unless a different intention is clearly expressed.'"

[5] We conclude that the proof in the present case that the defendants procured by means of fraud from George Palamidesi the sum of "three hundred dollars in money", establishes the fact that the money was circulating medium of the United States of that specified value, and that the offense therefore amounted to grand theft.

[6, 7] Grand theft is accomplished by fraudulently procuring a sum of money in excess of two hundred dollars from the owner by means of artifice, trickery or misrepresentations even though it is obtained as a pretended loan if it appears to be the intention of the accused person at the time of the transaction not to repay the money. People v. Weibert, 18 Cal.App.2d 457, 464, 64 P.2d 169; In re Clark, 34 Cal. App. 440, 167 P. 1143; 15 Cal.Jur. 905, secs. 11 and 12; 32 Am.Jur. 922, sec. 32. The question of the intent with which the money is procured is a matter for the determination of the jury. People v. Edwards, 72 Cal.App. 102, 117, 236 P. 944. In the present case there is no doubt the defendants had the intention to permanently deprive the owner of his money, and to never repay it, at the time when they fraudulently procured it by false representations as a pretended temporary loan.

[8, 9] The fact that George Palamidesi subsequently recovered judgment against the defendants in a civil action, and satisfied the judgment by an execution sale of their automobile, does not relieve them from prosecution and conviction of grand theft for feloniously procuring a pretended loan of the money by means of false representations. Not even a voluntary repayment of the money after the crime was committed would relieve them from criminal liability. 36 C.J. 915, sec. 504; 32 Am. Jur. 1029, sec. 117.

The appellants contend that the judgment should be reversed for failure to affirmatively prove that Palamidesi relied on the alleged false representations in loaning his money to them. The false representations which induced the proprietor of the Hideaway Cafe to part with his money consist of Alba's promise that if he would loan defendants three hundred dollars "for a couple of hours", they would raise the balance of the purchase price of the gold and repay him and redeem their sack of gold, and also that the sack contained genuine gold and not mere particles of brass. Clearly the defendants then intended to thereby permanently defraud him of his money. He could not have possibly known they did not intend to repay him. He repeatedly testified positively that he relied upon them and their false statements that the sack contained twenty-four hundred dollars' worth of genuine gold. He had no special knowledge of the character of the metal in the sack. He did not even examine it. He merely saw them at a distance pour some of the particles on a sheet of paper and heard them discussing it as genuine gold. They repeatedly called it gold. Regarding his reliance upon their false statements he testified:

"Joe Alba told me * * * we will go down town and in a couple of hours we will bring you the money and we will leave the gold for security. * * *

"Q. Did you believe that that was gold in the canvas bag? A. Sure I believed it. * * * He told me it was gold. * * *

"Q. Then you loaned him the three hundred dollars because you thought it was gold, didn't you? A. Yes. * * *

"Q. You decided is was gold, didn't you? A. That it what they told me.

"Q. You decided what they told you was all right? A. I believed them, sure. * * *

"Q. You did not try to find out whether it was gold or not? A. No. I just figured on trusting them. * * *

"Q. And you relied on his statement that it was gold? A. Yes."

[10] It is true that the crime of theft, accomplished by means of false representations, under section 484 of the Penal Code, may not be consummated when the owner of the money or property knows the statements are false, or even when he parts with his money or property without relying on the false representations. The very gist of that offense is that the property is procured by means of the false representations except for which the owner would not part with his possession of it. 12 Cal.Jur. 750, sec. 29. However, in civil suits, in the absence of evidence to the

contrary, proof of false representations which are calculated to deceive one and which are made with the intent to defraud one of his property, raises the presumption they did actually induce him to do so. Under such circumstances it is necessary for the defendant to prove as an affirmative defense that the injured party did not rely on the false representations. Pohl v. Mills, 218 Cal. 641, 652, 24 P.2d 476; Troy Laundry Machinery Co. Ltd. v. Drivers' Independent Laundry Co., 14 Cal.App. 152, 155, 111 P. 121. In the Pohl case, supra, quoting with approval from the case of De Garmo v. Petitfils Confiserie, 93 Cal.App. 261, 270, 269 P. 692, 695, it is said in that regard: "The representations made to appellant were ones calculated to induce him to buy the stock, and he did, in fact, make the purchase; therefore the presumption is that the representations induced him to do so, and, in order to take away his right to relief on the ground of fraud, it must be shown *that he did not rely upon said representations.*"

[11] In the present criminal case, notwithstanding the fact that false representations were made which were calculated to induce the owner to part with his property, it is not necessary to determine that the burden shifted to the defendants to show that he did not rely on those fraudulent representations. There is an abundance of evidence to affirmatively prove that he did rely on those false representations in entrusting his three hundred dollars to the defendants.

[12, 13] We find no error in the challenged instructions which were given to the jury or refused. The refused instructions were fully covered by others which were given to the jury in the charge of the court. All of the necessary elements constituting theft accomplished by means of fraudulent representations were fully stated in the court's charge to the jury. We are of the opinion the jury was very fully and fairly instructed regarding the necessary elements of the crime with which the defendants were charged. The jurors were told that the misrepresentations which were made must have been known to the defendants to be false; that they were made with the intention of fraudulently inducing the owner to part with his money; that he relied upon the statements as true, and that he was thereby induced to and did part with his money on that account. At the request of the prosecution, the following instruction was properly given to the jury in that regard: "Theft by trick and device may be accomplished by obtaining the property both by words and acts on the part of the accused, which are known by him to be false and fraudulent and which are made by him *with the intention of inducing the owner of the property to be deceived, and* [when the owner] *relying on such deception thereby consents to the transfer of the possession of his property to the accused.*"

[14] We are of the opinion the reference of the district attorney to the defendants as "rats", in the course of his argument to the jury, does not constitute reversible error. We do not justify the use of such epithets in the argument of a prosecuting officer, directed toward an accused person in the course of his trial. It is evidence of indiscretion and an excess of zeal. No doubt the jurors recognized it as such. We assume that the language was used because the appellants' brief so states. But the argument of the district attorney does not appear in the transcript. However, the appellants concede that an objection to that language was sustained, and we assume the court properly instructed the jury to disregard it. It is stated by the appellants that the court reprimanded the prosecuting officer for using the language. Assuming that it constituted misconduct, it is not reversible error for the reason that there was not a miscarriage of justice in the conviction of the defendants. The crime of which they were convicted is most reprehensible, and there appears to be no doubt of their guilt. None of the defendants took the witness stand in his own behalf.

The judgment and the order are affirmed.

PULLEN, P. J., and TUTTLE, J., concurred.

HANLEY v. MARSH & McLENNAN–J. B. F. DAVIS & SON, Limited, et al.

Civ. 11498.

District Court of Appeal, First District, Division 1, California.

Sept. 22, 1941.

Rehearing Denied Oct. 22, 1941.

Hearing Denied Nov. 17, 1941.

1. Appeal and error ⇐927(3)

On plaintiff's appeal from judgment of nonsuit, all inferences and every favorable presumption fairly arising from evidence adduced must be considered as facts proved in plaintiff's favor.

2. Insurance ⇐105

In insurance broker's action against other brokers to recover brokers' commissions on fire policies, which covered public school properties, after commissions had been paid to defendants who had been employed by Board of Education to place insurance, evidence did not authorize recovery on theory that there was an express or implied contract between plaintiff and board whereby plaintiff was entitled to place all insurance secured by board and that defendants knew of plaintiff's so-called "right" to insurance business in controversy and could not lawfully retain commissions on such business. School Code, § 6.2.

3. Insurance ⇐105

The mere fact that plaintiff, an insurance broker, was employed by board of education to place specific insurance policies covering school buildings, gave plaintiff no right to demand that other policies be placed through him, and by employing plaintiff as broker for placing of specific policies the board in no way restricted itself from employing other brokers for future policies. School Code, § 6.2.

4. Insurance ⇐102

The agency created by employing an insurance broker to secure a specific policy of insurance terminates when such insurance has been secured and accepted.

5. Insurance ⇐105

The fact that plaintiff, an insurance broker, brought to attention of board of education the board's duty to insure school properties against fire and that plaintiff conferred with board respecting fire insurance and submitted plans and secured rates regarding insurance did not create any contract between plaintiff and board that if insurance were secured it would be placed through plaintiff and formed no basis for an action in form of a common count for money had and received to recover commissions on policies from other brokers employed by board to place insurance. School Code, § 6.2.

6. Insurance ⇐105

As regards broker's right to compensation, the mere fact that a prospective customer requests proposals regarding insurance from an insurance broker places the customer under no obligation to accept a proposal when made, since request for proposals is merely a call for an "offer", and broker makes the offer by submitting his proposal.

See Words and Phrases, Permanent Edition, for all other definitions of "Offer".

7. Insurance ⇐105

Where a prospective customer requests proposals regarding insurance from an insurance broker and the broker submits a proposal to customer, a contract does not come into existence until customer accepts proposal, and customer is not bound to accept proposal and may reject proposal without reason.

8. Insurance ⇐105

That the board of education elected to employ defendant insurance brokers to place fire insurance on school properties after plaintiff, a broker, had advised and consulted with board respecting insurance, did not permit plaintiff to recover commissions on policies from defendants, who allegedly knew of plaintiff's efforts to secure insurance business for himself, where there was no obligation by board to procure insurance through plaintiff. School Code, § 6.2.

9. Evidence ⇐450(1)

In insurance broker's action against other brokers to recover brokers' commissions on fire policies after commissions had been paid to defendants, where a rule of an insurance broker's exchange, of which plaintiff and defendants were members, provided that where insurance business passed from one member to another all return commission on such business should be assumed and paid by new broker, plaintiff's proffered testimony that rule, as interpreted by members, meant that a broker who had initiated insurance was entitled to commission thereon although insurance was actually placed by another broker, was properly excluded, since testi-

mony was offered, not to interpret the rule, but to vary its terms.

10. Insurance ⇦105

A rule of an insurance broker's exchange providing, "In all cases where insurance business passes from one member to another member all return commission on such business thus passing shall be assumed and paid by the new broker", applies where a customer changes brokers after insurance has been placed and policy is then canceled, in which case refund due customer on commission paid to first broker must be paid by new broker, and such rule cannot be interpreted as meaning that when one broker initiates insurance by making an offer to a customer and customer elects to accept offer of a second broker, the second broker must then pay his commission to first broker.

11. Customs and usages ⇦11

In insurance broker's action against other brokers to recover brokers' commissions on fire policies after commissions had been paid to defendants, who had been employed by customer to place insurance, refusal to permit plaintiff to testify as to existence of alleged custom among brokers that broker who first initiates insurance was entitled to commissions was proper where plaintiff did not plead or offer to prove the fact that such custom, if it existed, had binding force of a contract.

12. Customs and usages ⇦11

Usage and custom may be introduced as an instrument of interpretation but may not be used to create a contract. Code Civ. Proc. § 1870, subd. 12.

13. Appeal and error ⇦1056(6)

Refusal to permit plaintiff to introduce certain evidence was not prejudicial where plaintiff would not have proven a cause of action against defendants even if evidence had been introduced.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Herbert Hanley against Marsh & McLennan-J. B. F. Davis & Son, Limited, and others, to recover brokers' commissions on fire insurance policies. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

James M. Hanley and Herbert Chamberlin, both of San Francisco, for appellant.

Orrick, Dahlquist, Neff & Herrington, Herbert O. Hepperle, Justin M. Jacobs, and Garret McEnerney, II, all of San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment of nonsuit. Plaintiff and defendants are insurance brokers operating in the San Francisco area. The present action was brought to recover brokers' commissions on certain fire insurance policies on the public school properties of San Francisco. The commissions on such policies, with the exception of $815, were paid to defendants. Plaintiff contends that he, rather than defendants, was entitled to these commissions. The trial court ruled that he had established no legal or equitable basis upon which he was entitled to the commissions, and granted defendants' motion for a nonsuit.

The amended complaint contains four counts. Common to each count are allegations that plaintiff and defendants are insurance brokers, and that defendants receive certain commissions to which plaintiff is entitled. The first cause of action is in the form of a common count for money had and received in the sum of $10,642.42. Payment of $815 is alleged, leaving an alleged unpaid balance of $9,827.42. The second cause of action also is in the form of a common count for money had and received, this cause of action alleging an unpaid balance of $5,952.81. These two causes of action are predicated upon the fact that on September 1, 1934, cover notes were obtained by the San Francisco Board of Education insuring school properties in the amount of $5,000,000. On December 1, 1934, additional insurance in the form of cover notes was obtained by the Board in the amount of $10,000,000. On May 7, 1935, these cover notes were replaced by policies in the total amount of over $15,000,000, which policies expired June 30, 1937. Brokers' commissions on this insurance amounted to $16,595.23, of which but $815 was paid to plaintiff. In the first two causes of actions he seeks to recover from defendants the difference, or $15,780.23—$9,827.42 plus $5,952.81.

The third cause of action seeks recovery of the $15,780.23 on the theory that there was a binding rule of the Insurance Brokers Exchange of San Francisco, of which plaintiff and the defendants are members, under which plaintiff as the one who "initiated" such insurance, is entitled to the commis-

sions. The fourth cause of action seeks to recover the commissions on the basis of a custom alleged to prevail among insurance brokers in San Francisco that the broker who first "initiates" the insurance is entitled to the commissions.

[1] In view of the fact that a nonsuit has been granted, we are presented on this appeal with the question as to whether plaintiff has presented evidence which, regardless of conflicts, would support a judgment in his favor. In discussing the evidence all inferences and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of plaintiff. Mitchell Camera Corp. v. Fox Film Corp., 8 Cal.2d 192, 64 P.2d 946. Tested by these standards the record shows the following facts:

School properties in San Francisco are under the control of a school district, the governing board of which is the Board of Education of the City and County of San Francisco. This district is an entity separate and distinct from the City and County. Esberg v. Badaracco, 202 Cal. 110, 259 P. 730. Until 1934 the Board failed to place any fire insurance on its many school properties. Since 1881 there has been a statutory duty imposed on such boards to insure their properties. Sec. 6.2 of the School Code; Sec. 1608 of the Political Code, formerly Sec. 1617 of that Code.

Appellant, an insurance broker, attended all meetings of the Board where insurance was discussed during the years 1934 to 1937. On several occasions members of the Board requested his presence at meetings. The minutes of the Board frequently mention the fact that he was present and that he made various suggestions and presented information. On many different occasions he acted as broker for the Board, placed considerable insurance for the Board, and received the appropriate commissions. Early in 1934 appellant became aware of the fact that the school buildings in San Francisco were uninsured against fire, and that Sec. 6.2 of the School Code required that such insurance be carried. He thereupon started upon a program to induce the Board to secure fire insurance, and, of course, to secure the business of placing such insurance for himself. At a meeting of the Board on March 13, 1934, he called to the attention of the members that it was their statutory duty to insure the various school properties against fire. The whole fire insurance problem was discussed by the Board at that meeting. At about this time the Board was rebuilding some sixteen schools for the purpose of making those schools earthquake proof. The Board employed plaintiff to secure for it so-called "reconstruction" insurance on these sixteen schools. As broker for the Board appellant secured such insurance, and collected the appropriate commissions. He was, of course, desirous of securing the business of insuring all of the school properties. To this end, at the request of the Board, he secured an opinion from the city attorney confirming his statement that it was the statutory duty of the Board to insure its properties. The Board authorized him to secure rates from the Board of Fire Underwriters, and such rates were secured by appellant. He attended meetings of the Board, he met with the insurance committee of the Board, he made many suggestions concerning insurance, he presented a comprehensive plan for insurance on all school properties. In every reasonable and proper way he attempted to secure the business of writing this insurance for himself. In August of 1934 a fire occurred at the Girls High School, one of the buildings covered by the reconstruction insurance. Appellant acted as broker in adjusting this loss and received a formal vote of thanks from the Board for his services. In November, 1934, a fire occurred at the Lowell High School, which was also covered by the reconstruction insurance. Again appellant acted on behalf of the Board in adjusting the loss.

The August fire at the Girls High School apparently caused the Board to realize the risk involved in not carrying insurance. On September 1, 1934, the insurance committee of the Board secured temporary insurance in the form of cover notes in the sum of $5,000,000. The action of the insurance committee was approved by the Board at a meeting held on September 4, 1934. The minutes of the Board do not disclose that appellant had anything to do with placing this insurance. Appellant testified that, from his meetings with the Board, and particularly with the chairman of its insurance committee, he knew that this insurance was to be placed through Finn and Elbow, general agents; that he informed that firm that such insurance was to be placed through that firm. However, there was no evidence offered by appellant other than his own conclusion that he "placed" this insurance. According to his testimony, the chairman of the insurance committee telephoned to Mr. Cleary, then

chief administrative officer of the city, and Mr. Cleary, at the request of the Board, placed the insurance with Finn and Elbow by telephoning them. The evidence clearly shows that this temporary insurance was placed without any arrangement involving an insurance broker. This insurance was placed with ten insurance companies picked by Cleary, in lots of $500,000 each. It was intended as temporary coverage while rates and building values were worked out.

As already pointed out, a fire occurred at Lowell High School, one of the buildings covered by the reconstruction insurance, early in November, 1934. The Board again took action. On November 7, 1934, it authorized an additional $5,000,000 of fire insurance, and later the same month, after a fire in another school not covered by the reconstruction insurance, but covered by the cover notes of September 1, 1934, it authorized its insurance committee to place whatever additional insurance was required until such time as definite figures could be worked out. On November 30, 1934, the Board authorized an additional $5,000,000 of fire insurance. On that date the chairman of the insurance committee wrote to Mr. Brooks, then purchaser of supplies for the city, and directed him to secure cover notes for this additional insurance. Mr. Brooks secured, on behalf of the Board, cover notes in the total sum of $10,000,000, dated December 1, 1934. The actions of the chairman of the insurance committee, and of Mr. Brooks, were approved by the Board on December 4, 1934. This temporary insurance was not placed by any brokers, but was placed by Mr. Brooks.

In the letter to Mr. Brooks above-referred to, the Board recognized that it needed the assistance of brokers to work out rates, valuations of its properties, and to work out a proper form of policy. Although not required to purchase its insurance through the city purchasing department, it being an independent entity, it nevertheless determined to use the facilities of that office in securing the insurance. The Board expressly appointed Mr. Brooks its agent to select the broker or brokers who should negotiate the permanent insurance required. The letter states in part: "We will appreciate it, if you will, further, at a very early date select the insurance brokers who are to be named the official brokers of record for contacting the Board of Fire Underwriters, in order that they may confer with the Board of Fire Underwriters for development of rates, form of general policy, etc., for submittal to our insurance committee as to the determination of final basis for these policies." Appellant was present at the meeting of December 4, 1934, when this letter and the actions of the insurance committee and of Mr. Brooks were approved by the Board.

Mr. Brooks, acting pursuant to the power thus conferred, first employed respondent Marsh & McLennan as broker to arrange for the final form of this insurance. A short time thereafter Mr. Brooks designated respondent Johnson and Higgins as co-broker, and, about the middle of December, 1934, he designated respondent Cosgrove and Company as a co-broker. The three respondents were employed as brokers for the Board with respect to both the five million and the ten million dollars of insurance, and were instructed to merge that insurance into a general plan. On December 18, 1934, Brooks wrote to the Board of Fire Underwriters informing that board that the three respondents had been appointed "to act as our Insurance Brokers and to represent us in all matters pertaining to insurance." The letter also stated: "This authority supersedes all former appointments and/or all letters of record or authorization."

After the cover notes had been secured, the respondents, together with an engineer employed by the Board of Education, performed the usual services rendered by brokers of working out rates, valuations, form of policy, etc. When this work was completed by respondents the temporary cover notes were canceled, the amount of insurance was increased to $18,400,000, and actual policies were written on May 7, 1935.

There is evidence that, after the issuance of the cover notes, and, after the appointment of respondents as brokers, Cleary and Brooks dictated, to some extent at least, the various fire insurance companies in which the insurance was ultimately placed. Each of the three respondent brokers undertook its employment with the understanding that other brokers were to participate in the commissions, and it is a fair inference from the record that it was understood that Cleary was to make the allocation of commissions between the brokers. The commissions, less $815, which was paid to appellant, were paid to respondents in various percentages.

This constitutes a fair summary of the evidence introduced by appellant. So far

as his first two causes of action based on common counts are concerned, he does not clearly define the theory upon which he claims he is entitled to recover the commissions paid to respondents. Throughout his briefs appellant refers to himself as "insurance broker" for the Board, and contends such relationship continued until terminated by the letter of December 18, 1934, to which reference has been made. He does not claim that he had a written contract of employment as insurance broker for the Board during the period in question, nor that any resolution was passed employing him generally as insurance broker. It seems to be his theory that, because over a period of time the Board employed him as broker to place specific insurance such as the reconstruction and other insurance, and, because of his other activities abovementioned, a contract, apparently one implied in fact, arose under which he was entitled to place all insurance secured by the Board of Education. He urges that, as broker for the Board, he was entitled to place the $5,000,000 insurance represented by the cover note of September, 1934, and the $10,000,000 represented by the cover note of December, 1934. The thought that appellant suggests is that, although the Board and its members are not made parties to this action, the placing of this insurance otherwise than through appellant constituted a breach of the Board's employment of appellant as the Board's broker. Predicated upon this basic premise, it seems to be his theory that he can recover from respondents for the breach of contract by the Board, because the respondents knew of his "right" to this insurance business, and that respondents cannot lawfully retain commissions on business which should have gone to appellant. It is urged that if respondents are permitted to retain the commissions, they will be "unjustly enriched", and that the common count form of action was invented for the very purpose of preventing unjust enrichment.

[2-7] The basic fallacy in appellant's argument is his assumption that the evidence, or the permissible inferences therefrom, would support a finding that he was employed by the Board, expressly or impliedly, to place all of the Board's insurance, or to place this insurance in particular. There is no evidence, or no inference from the evidence, that would support such a conclusion. The mere fact that he was employed by the Board to place the reconstruction and other specific policies of insurance gave him no right to demand that any other policy be placed through him. By employing appellant as broker for the placing of specific policies of insurance the Board in no way restricted itself from employing other brokers for future policies. The law is clear that an insurance purchaser may employ a new broker at any time. Erlin v. National Union Fire Ins. Co., 217 Cal. 374, 18 P.2d 660; Clinchy v. Grandview Dairy, 283 N.Y. 39, 27 N.E.2d 425. The agency created by employing a broker to secure a specific policy terminates when that insurance has been secured and accepted. Stevenson v. Sun Insurance Office, 17 Cal.App. 280, 119 P. 529; Leon Irwin & Co. v. Board of Com'rs of New Orleans, 176 La. 13, 145 So. 123; Hermann v. Niagara Fire Ins. Co., 100 N.Y. 411, 3 N.E. 341, 53 Am.Rep. 197. The fact that appellant brought to the attention of the Board its duty to insure, the fact that he conferred with the Board about fire insurance, the fact that he submitted various plans, secured rates, etc., did not create any contract, express or implied, between him and the Board, that if such insurance were secured it would be placed through him. All of his activities were attempts to secure that business for himself—proper attempts on his part to solicit that business. The mere fact a prospective customer requests proposals from a broker places the customer under no obligation to accept the proposal when made. The asking for proposals is a mere call for an offer, and it is the broker that makes the offer by submitting his proposal. No contract comes into existence unless or until the prospective customer accepts that offer, and he is under no duty to accept. Any and all proposals may be rejected for any reason or without any reason. Every broker in soliciting business assumes the risk of being able to persuade his prospective customer to deal through him. These principles are well-settled and need not be elaborated upon. See, Cronin v. National Shawmut Bank, 306 Mass. 202, 27 N.E.2d 717, where the problem is discussed at length; see, also, Esterly-Hoppin Co. v. Burns, 135 Minn. 1, 159 N. W. 1069. The mere fact that appellant may have "initiated" the insurance in the sense that he discovered the need therefor and called it to the attention of the Board and performed the other acts already set forth, created no obligation on the Board to secure the insurance thus "initiated" through appellant. Cronin v. National Shawmut Bank, supra; Dinning v. Zeller-

bach Paper Co., 15 Cal.App.2d 623, 59 P.2d 880.

[8] Under these elementary and fundamental principles there is no possible theory under which appellant could recover as against respondents on the first two causes of action. Reduced to its simplest terms, the case is simply one where the appellant worked diligently and hard to secure this business. The Board, for reasons that do not appear, and none is necessary, decided to employ respondents to write this insurance. They did employ respondents and respondents did place the insurance. The facts that respondents may have out-maneuvered the appellant, or that the Board considered it more politic or expedient to employ respondents, or that it might have been fairer to employ appellant, are all immaterial. That is one of the risks involved in such a competitive business. The point is that the Board was a free agent, and for any good reason, or no reason at all, was legally entitled to employ whomsoever it desired to place this insurance. It elected to employ respondents, and appellant has no legal ground to complain.

[9, 10] Appellant's next theory, embodied in his third cause of action, is that he is entitled to recover under a rule of the Insurance Broker's Exchange of San Francisco, of which appellant and respondents are members, which rule, it is urged, has the force of a contract. The rule reads as follows: "In all cases where insurance business passes from one member to another member all return commission on such business thus passing shall be assumed and paid by the new broker." Appellant contends that this rule, as interpreted by members of the exchange, means that a broker who has "initiated" insurance is entitled to the commission thereon although it is actually placed by another broker. He sought to offer testimony, his own, of this interpretation of the rule. The court excluded the proffered testimony on the ground that the language of the rule would not admit of such an interpretation. This ruling of the trial court was correct. It is obvious that the rule in question applies to the situation where a customer changes brokers after insurance has been placed, and then the policy is canceled. The refund due the purchaser on the commission paid to the first broker must be paid by the new broker. The reason for such a rule is obvious. Where the second broker induces the customer to cancel an existing policy, it is done usually for the purpose of substituting one of his own. Under such circumstances, the second broker should pay the refund of the commission due the customer. But such a rule cannot be distorted into a rule that when one broker "initiates" insurance by making an offer to the customer, but the customer elects to accept the offer of a second broker, that then the second broker must pay his commission to the first. It is obvious that under such circumstances, no "insurance business passes from one member to another member." Until the offer has been accepted by the customer there is no insurance business to "pass" one to the other. The proffered testimony was not offered to interpret the rule, but to vary the terms of that rule. Parol testimony is not admissible for that purpose.

[11, 12] The fourth cause of action is based on the theory that there is a custom among brokers in San Francisco that the broker who first "initiates" insurance is entitled to the commissions. The trial court refused to permit appellant to testify as to the existence of the alleged custom. This ruling was correct. This is so for at least two reasons. In the first place, what appellant must establish in order to prevail on this theory is not only that such a custom exists, but also that such custom has the binding force of a contract between all insurance brokers. Appellant neither pleaded nor offered to prove the fact that, if such custom did exist, it had the binding force of a contract. In the absence of such pleading, or offer of proof, it is quite clear that whether such a custom exists or not is immaterial. Unless it had the binding force of a contract, such a custom would lie in the field of ethics and not in the field of contracts. In the second place, usage and custom may be introduced as an instrument of interpretation but may not be used to create a contract. This thought is thus expressed in section 1870 of the Code of Civil Procedure as follows: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * * 12. Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation; * * *". See, Rottman v. Hevener, 54 Cal.App. 485, 202 P. 334. The rule is generally recognized throughout United States. Great Lakes Coal & Dock Co. v. Seither Transit Co., 8 Cir., 220 F.

28; Thompson v. Riggs, 5 Wall. 663, 72 U. S. 663, 18 L.Ed. 704.

[13] Appellant complains that the trial court erroneously precluded him from introducing evidence on some of the issues involved. Thus, appellant sought to prove his activities in placing other insurance policies for the Board and in adjusting certain losses under those policies. He also sought to prove the procedure followed by the Board in placing insurance, and other matters. Appellant was not prejudiced by these rulings. Had all the evidence offered been introduced, appellant would not have proven a cause of action against respondents. The point is that, under the facts as disclosed by the record, including the rejected testimony, there is no possible theory upon which appellant may recover against respondents.

The judgment appealed from is affirmed.

KNIGHT, and WARD, JJ., concurred.



46 Cal.App.2d 875

PEOPLE v. STEVENS.

Cr. 3485.

District Court of Appeal, Second District, Division 2, California.

Sept. 24, 1941.

Criminal law ⇐1182

Where time for filing briefs elapsed and an order to show cause why appeal should not be dismissed was issued and on date set for hearing there was no appearance on behalf of appellant, either by brief or otherwise, judgment was affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Proceeding by the People against Clark Stevens. From an adverse judgment, defendant appeals.

Affirmed.

Clark Stevens, in propria persona.

Earl Warren, Atty. Gen., for respondent.

PER CURIAM.

On July 17, 1941, the transcripts on appeal were filed in this court. Thereafter, the time for filing briefs having elapsed, an order to show cause why the appeal should not be dismissed was issued, returnable September 24, 1941. On the latter date there was no appearance on behalf of appellant, either by brief or otherwise.

Therefore, pursuant to the provisions of section 1253 of the Penal Code, the judgment of the trial court hereby is affirmed.



46 Cal.App.2d 823

STATE ATHLETIC COMMISSION OF CALIFORNIA et al. v. MASSACHUSETTS BONDING & INS. CO.

Civ. 11415.

District Court of Appeal, First District, Division 1, California.

Sept. 24, 1941.

1. Theaters and shows ⇐3

The judgment on a bond given to State Athletic Commission by boxing promoter which, exclusive of interest, was in excess of judgment recovered against promoter, was erroneous. Civ.Code, § 2809.

2. Principal and surety ⇐66(2)

The obligation of surety must be neither larger in amount nor in other respects more burdensome than that of principal, and, if in its terms it exceeds it, it is reducible in proportion to principal obligation, and, where judgment has been entered against principal, greater amount may not be recovered from surety in subsequent action brought against him. Civ.Code, § 2809.

3. Appeal and error ⇐173(2)

In action against surety on bond given to State Athletic Commission by boxing promoter to recover amount of judgment against promoter in favor of unpaid fighter and manager, record did not support contention that surety at trial abandoned the point that surety could not be held liable for an amount greater than that fixed by judgment fixing

promoter's liability as principal. Civ.Code, § 2809.

4. Pleading ⇐376

In action against surety on bond given to State Athletic Commission by boxing promoter to recover amount of judgment against promoter in favor of unpaid fighter and manager, it was not necessary to introduce evidence to establish amount of judgment where amount was admitted by pleadings. Civ. Code, § 2809.

5. Pleading ⇐122

Allegations of facts which are of public record must be deemed admitted by failure directly to deny such allegations, and a denial thereof based on information and belief raises no issue.

6. Theaters and shows ⇐3

A surety company, sued on bond given to State Athletic Commission by boxing promoter to recover amount of judgment against promoter in favor of unpaid fighter and manager, was entitled to have applied, in reduction of its liability on bond, cash deposited with commission by promoter on night of fight for express purpose of paying fighters. Civ.Code, §§ 2845, 2849, 2850.

7. Principal and surety ⇐173

As between principal and surety, principal is primarily liable and the surety who is called on to pay the debt of his principal may seek reimbursement. Civ.Code, § 2845.

8. Garnishment ⇐32

Money deposited by a boxing promoter with the representative of the State Athletic Commission for express purpose of paying fighters for services on particular program, was trust money to be used for a specific purpose and hence was not subject to garnishment.

9. Theaters and shows ⇐3

The rights of surety company, sued on bond given by boxing promoter to State Athletic Commission to recover amount of judgment against promoter for sum agreed to be paid fighter for contest, to apply, in reduction of liability, money deposited by promoter with representative of commission at time of contest for purpose of paying fighters, could not be defeated by levy of attachment on such money by fighter and manager in suit for breach of contract by failure to hold second contest. Civ.Code, §§ 2845, 2849, 2850.

10. Theaters and shows ⇐3

A surety company, sued on bond given by boxing promoter to State Athletic Commission to recover amount of judgment for sum agreed to be paid fighter for contest, was not precluded from applying, in reduction of liability, money deposited by promoter with representative of commission at time of contest for purpose of paying fighters, on ground that promoter exercised control over money after it was delivered to representative, where all that promoter said to representative was, "We will not pay off either one of the main event fighters tonight", but made no reference whatever to money deposited. Civ.Code, §§ 2845, 2849, 2850.

11. Theaters and shows ⇐3

In action against surety on bond given to State Athletic Commission by boxing promoter to recover amount of judgment against promoter in favor of unpaid fighter and manager, record did not support contention that surety was not entitled to have applied, in reduction of its liability on bond, money deposited with commission by promoter on night of fight for purpose of paying fighters on ground that such money was subject to claims of others who were not parties to action.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by the State Athletic Commission of California and others against the Massachusetts Bonding & Insurance Company to recover money claimed to be due from defendant as surety on a bond, wherein defendant filed a cross-complaint. From a judgment for plaintiffs, defendant appeals.

Reversed with directions for entering a new judgment for plaintiffs.

For prior opinion, see 113 P.2d 720.

See, also, 117 P.2d 80.

Charles V. Barfield, of San Francisco, for appellant.

Earl Warren, Atty. Gen., F. Walter French, Deputy Atty. Gen., and Robert E. Hatch, of San Francisco, for respondents.

KNIGHT, Justice.

The plaintiffs sued to recover a sum of money claimed to be due from the defendant as surety on a bond. Judgment was given for plaintiffs, and defendant appeals. Defendant does not deny liability on the

bond, but contends that the judgment was awarded for an amount in excess of its liability, and that as against the correct amount it was entitled to have credited the sum of $1,200 theretofore paid in cash by the principal to the obligee, and since held by the obligee for the purpose for which defendant became surety on the bond. We are of the opinion that both points are well taken.

The events which led up to and brought about the controversy are as follows: Rule 19 of the State Athletic Commission requires that "Every club making application for a professional boxing or wrestling license must furnish a surety bond to the State Athletic Commission for 70 per cent of the capacity of the house. This bond is to guarantee payment of boxers, wrestlers, timekeeper, announcer, club physician and referee, exclusively." And rule 139(a) required that "all payment of purses shall be made immediately after the contest or exhibition". Leo Levitt was a promoter of boxing contests, doing business under the name of East Bay Athletic Club; and for several years, in conformity with the requirements of rule 19, kept on file with the Commission a bond furnished by defendant in the sum of $4,000, which the Commission deemed adequate in amount to protect those participating in the ordinary programs put on by the club. On November 9, 1938, Levitt entered into a written contract with a pugilist named Gan (known professionally as "Small Montana") and his manager, Sidney Wolfe, whereby Levitt agreed to stage a fight between Gan and another pugilist known as "Little Dado" in Oakland on November 30, 1938, for the "world's flyweight championship". Under the terms of that contract Gan and Wolfe were to receive $2,750 and three round trip transportations from New York to San Francisco. At the same time the parties entered into a second written contract calling for a return match between the same pugilists, to be held on March 29, 1939, in which contract Levitt agreed that in the event he did not produce "Little Dado" for that fight he would pay Gan and Wolfe $2,500. Shortly prior to the November 30th contest the commission notified Levitt that according to the estimated gross receipts the amount of the bond posted by him was insufficient to protect all ten fighters who were engaged to participate on the program that night, and that consequently he would have to furnish an additional bond or the program would not be allowed to go on. In response to such demand Levitt informed the chairman of the commission and the chief inspector, Shields, that he would not have time to obtain a surety bond, but agreed to deposit cash with the commission in an amount the commission deemed sufficient. In consummation of this agreement Shields went over to Oakland the night of the fight, and about an hour before the program started Levitt's cashier took $1,200 from the box office receipts and handed it to Shields, for which Shields gave a receipt reading: "11/30/39. Rec'd. the sum of Twelve Hundred Dollars to pay fighters from B. Guthertz at 11:30 P.M. D. J. Shields"; but at 11:30 o'clock Levitt told Shields: "We will not pay off either one of the main event fighters tonight". The reason for withholding payment was, as subsequent events showed, that a dispute had arisen as to travelling expenses. However, that night all of the other fighters were paid, and the next morning Levitt paid "Little Dado". On the following day Gan and Wolfe complained to the commission that they had not been paid; whereupon considerable effort was made to straighten out the matter. Shields phoned Levitt, and the latter indicated that he would pay Wolfe if he would come to Oakland. Wolfe went to Oakland, accompanied by Shields, but Levitt refused to pay. The same day the commission demanded that the bonding company pay Gan $1,550, which as will be noted was the difference between the amount of Gan's guarantee of $2,750 and the $1,200 theretofore given by Levitt to Shields to pay the fighters. That same day also Wolfe, accompanied by Shields and a man named Kent, called on the representative of the bonding company and Wolfe stated to him that the commission was willing to pay the $1,200 and he inquired when they could get the $1,550. However, it appears that Kent claimed to have an assignment from Wolfe; consequently payment by the bonding company was withheld for the purpose of ascertaining to whom the money should be lawfully paid. The result was that Gan and Wolfe were not paid by anyone, and on December 12, 1938, Shields obtained a certified check for the $1,200 which he sent to Sacramento, and it was deposited in the "cash trust account" of the commission. Gan and Wolfe then commenced an action against Levitt for the $2,750 guarantee for Gan's participation in the November 30, 1938, fight, and

on March 13, 1939, judgment was entered in their favor for $2,630.32 and interest. The matter of travelling expenses became a disputed issue in the case, which accounts for the lesser amount being awarded.

The return match set for March 29, 1939, failed to materialize; and on May 10, 1939, Gan and Wolfe brought a second action against Levitt for the recovery of the $2,500 guarantee agreed to be paid under the second contract; whereupon they levied an attachment on the $1,200 held by the commission. Thereafter and on May 15, 1939, the State Athletic Commission joined with Gan and Wolfe in bringing the present action against the bonding company for the recovery of $2,630.32, interest and costs, which was the amount of the judgment theretofore awarded in favor of Gan and Wolfe in the action brought against Levitt. By cross-complaint the defendant alleged, among other things, the payment by its principal on the night of the contest to the obligee, the commission, of $1,200 for the payment of the fighters, the failure of the obligee to apply said sum to such payment, and the retention of said sum by the commission; and prayed judgment that Gan and Wolfe be decreed to have no rights in or lien upon said $1,200 by virtue of said attachment, and that the commission be directed to apply said sum against any liability found to be due from defendant. The relief sought by the cross-complaint was denied, and judgment was awarded in favor of plaintiffs for $2,750, interest and costs, which as will be noted was $119.68 in excess of the judgment theretofore recovered by Gan and Wolfe against Levitt.

[1, 2] As to the first point, it is obvious that since the judgment against Levitt, the principal, was for $2,630.32, plus interest, the liability of the surety, exclusive of interest, cannot exceed that amount. "The obligation of a surety must be neither larger in amount nor in other respects more burdensome * * * than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation" (sec. 2809, Civ.Code; Alexander v. Bosworth, 26 Cal.App. 589, 596, 147 P. 607); and where judgment has been entered against the principal a greater amount may not be recovered from the surety in a subsequent action brought against him. United States v. Allsbury, 4 Wall. 186, 71 U.S. 186, 18 L.Ed. 321; 1 Freeman on Judgments [5th ed.] p. 1026, sec. 466; 21 R.C.L. 1085, 1091; 5 A.L.R. 594, note; 50 Corpus Juris, 93.

[3-5] Respondents contend that inasmuch as neither side introduced in evidence the judgment fixing Levitt's liability as principal in the sum of $2,630.32, the amount of that judgment was not here legally established; moreover, that at the trial of the present action appellant abandoned the point that as surety it could not be held liable for an amount greater than that fixed by said judgment. The latter contention is not supported by the record; and as to the former, it was unnecessary to introduce evidence to establish the amount of the Levitt judgment because that fact was admitted by the pleadings. In this respect the record shows that respondents themselves alleged in their complaint that judgment was entered against Levitt for $2,630.32, interest and costs; they also alleged the date of the judgment, the title of the court and cause, and the number of the action in which the judgment was rendered; and there was no direct denial of those allegations in the answer. The denial was general and based on information and belief; and it is well settled that facts which are of public record must be deemed admitted by failure directly to deny the same; that a denial thereof based on information and belief raises no issue. Santa Barbara Lumber Co. v. Ross, 183 Cal. 657, 192 P. 436; Mulcahy v. Buckley, 100 Cal. 484, 35 P. 144; Marxen v. Herron, 129 Cal. App. 479, 18 P.2d 1002; 21 Cal.Jur. p. 150. Furthermore, it is nowhere claimed by any of the parties that the judgment against Levitt was rendered for any different amount. On the morning of trial the complaint was amended in certain particulars, but the allegations above mentioned were not affected thereby.

[6, 7] As to the issue of the $1,200, the undisputed evidence shows that at Levitt's request and with the approval of the commission the inspector took from the box office $1,200 for the express purpose of paying the fighters that night. The receipt given by Shields for the money plainly so stated. It was cash that the promoter would have used to pay the fighters that night; and Shields would have used it that night to pay Gan for his participation in the fight if a dispute had not arisen. Under well settled legal principles, therefore, the defendant surety company is entitled to have this cash applied in reduction of its liability on the bond. As shown, the deposit

was made with funds of the principal; as between the principal and surety the principal is primarily liable; and the surety who is called upon to pay the debt of his principal may seek reimbursement. Section 2845, Civil Code, provides: "A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety can not himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced"; furthermore, section 2850 of the same code declares: "Whenever property of a surety is hypothecated with property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation." And section 2849 of the Civil Code provides: "A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not." See 37 A.L.R. 1262, note, right of surety or his privies to require creditor to resort to security given by principal before enforcing security given by surety. These code sections are the enactment of rules developed in equity to give relief from the common law doctrine which permitted the creditor to enforce remedies against the surety without reference to his rights against the principal. See 21 R.C.L. 1124–1128; 50 C.J. 230–235; 23 Cal.Jur. 1071. In the present case the surety gave its personal obligation in the form of a bond and the principal delivered to the commission as the obligee of the bond a sum of money to be applied to the specific purpose for which the bond was given. The surety filed a cross-complaint in which the commission, Gan, Wolfe, and M. H. Myers & Co. (assignee of Gan and Wolfe, and substituted as plaintiff for them), were made cross-defendants. In said cross-complaint all of the facts relating to the transaction and particularly those pertaining to the payment to the commission of the $1,200 were appropriately alleged; and part of the relief prayed for was "that cross-defendant, State Athletic Commission, be required and directed to pay and apply said sum of Twelve Hundred Dollars ($1,200.00) and interest thereon in pro tanto exoneration of the liability of this cross-complainant upon its said bond * * *." There is no sufficient reason, therefore, why, in the present action, the commission may not be required to apply the $1,200 so taken by it to the specific purpose for which it was taken, namely, the payment of the fighters, and thus reduce the monetary liability of the surety upon which the commission is now suing.

Respondents contend that the $1,200 was taken and should be treated only as collateral security for the $4,000 bond, and therefore can be resorted to only in the event the $4,000 bond proves to be insufficient. But the undisputed facts show that such was not the purpose of the payment or acceptance of the money. As shown by the receipt given by Shields and by his testimony at the trial, it was delivered to and accepted by him for the purpose of paying the fighters therewith; moreover, the transactions which took place afterwards, in attempting to straighten out the matter, show beyond question that all of the parties, including the commission, understood that the money was being held by the commission for that specific purpose. Therefore under the legal principles above set forth the surety is entitled to have the money applied to the purpose for which it was paid and accepted.

[8, 9] Nor do we find any merit in respondents' contention that Gan and Wolfe acquired paramount rights to the $1,200 by virtue of the levy of attachment, for the reason that at the time of the levy it was not Levitt's money. As already pointed out, Levitt paid the money to and it was accepted by Shields as the duly authorized representative of the commission, for the express purpose of paying the fighters therewith that night for the services rendered by them on that particular program. If it had not been so paid, the commission would not have allowed the show to open. The moment the money was paid to and accepted by Shields, it became trust money to be used for a specific purpose, and hence not subject to garnishment. Van Orden v. Anderson, 122 Cal.App. 132, 9 P.2d 572. Stated another way, since the money was taken officially by the commission for the definite purpose of paying the fighters on that particular program, one of whom was Gan, the law will not permit him to defeat the rights of the surety to have the money applied to that purpose by attaching it for breach of contract for failure to hold the second contest.

[10] Respondents' assertion that Levitt exercised control over the money after it

was delivered to Shields is not supported by the record. All that Levitt said to Shields that night was, "We will not pay off either one of the main event fighters tonight", but he made no reference whatever to the $1,200.

[11] The appeal is now before the court on rehearing, which was granted on petition of respondents in order to give consideration to a contention made therein that the $1,200 was subject to the claims of other persons not parties to this action. In this connection it was stated that "prior to the trial" of the present action "Levitt was adjudicated a bankrupt"; that "This appears during the cross-examination of Levitt"; and that "his trustee in bankruptcy lays claim to the return of this $1,200". An examination of the record proves, however, that there is nothing whatever in the pleadings or the evidence to substantiate respondents' statement. In fact respondents now concede that Levitt was not adjudged a bankrupt until February 28, 1940, which is more than four months subsequent to the trial of the present action and more than three months after the entry of the judgment. Even though it be assumed, as respondents say (although there is nothing whatever in the record so showing), that subsequent to the bankruptcy adjudication in February, 1940, the trustee did lay claim to the $1,200, which admittedly was paid to the commission on the night of November 30, 1938, the situation herein is not altered for the simple reason that after Levitt delivered the money to the commission for the specific purpose of paying the fighters therewith, it was no longer Levitt's property. The other persons referred to by respondents as claimants to the money are the other participants of the November 30, 1938, program. But respondents have evidently overlooked not only the positive, uncontradicted testimony given by the commission's chief inspector, Shields, that all others had been paid and that he held receipts from them, but also the affirmative finding of the trial court that "on or before Dec. 1, 1938, all boxers participating in said boxing show of Nov. 30, 1938, were fully paid by said Levitt, except the said Gan and Wolfe".

In accordance with the views above expressed it is ordered that the judgment appealed from be and the same is hereby reversed; and that a new judgment be entered directing the commission to pay the $1,200 now held by it to M. H. Myers & Co. as assignee of Gan and Wolfe; and that respondents do have and recover of and from the appellant bonding company the difference between the amount of the judgment rendered against Levitt, to-wit, the sum of $2,630.32, and the sum of $1,200, with interest on the net amount from November 30, 1938, and costs of suit. Appellant will recover costs of appeal.

PETERS, P. J., and WARD, J., concurred.



46 Cal.App.2d 839

STATE ATHLETIC COMMISSION OF CALIFORNIA et al. v. MASSACHUSETTS BONDING & INS. CO.

Civ. 11605.

District Court of Appeal, First District, Division 1, California.

Sept. 24, 1941.

1. Theaters and shows ⇐3

A bond given to State Athletic Commission by a boxing promoter to guarantee payment of fighters participating in contests held by promoter did not cover liability of promoter for damages for breach of contract to hold a contest, and hence surety on bond was not liable to a boxer's assignee for damages allegedly caused by promoter's breach of contract in failing to hold a contest in which boxer was to participate. Civ.Code, § 2836; Gen.Laws 1937, Act 6129, § 11(h).

2. Principal and surety ⇐59

A surety cannot be held for any liability beyond the express terms of the contract of suretyship. Civ.Code, § 2836.

3. Theaters and shows ⇐3

A bond given to State Athletic Commission by a boxing promoter to guarantee payment of fighters participating in contests held by promoter, and conditioned that if promoter paid persons participating in such contests the bond should be void, was limited to payment of participants in contests for services performed and did not cover promoter's default in failing to perform all of his undertakings and obligations as a licensed promoter. Gen.Laws 1937, Act 6129, § 11(h).

4. Theaters and shows ⇐3

Where boxing promoter and fighter simultaneously entered into two contracts whereby promoter agreed to stage a fight in which fighter was to participate and a subsequent return match, the fact that contracts were executed at same time and that fighter participated in first fight did not make fighter a "participant" within provisions of promoter's bond given to State Athletic Commission to guarantee payment of fighters engaging in fights held by promoter and conditioned that if promoter paid persons participating in such fights the bond should be void, and hence surety on bond was not liable to fighter's assignee for damages for alleged breach of contract by promoter in failing to hold return match. Gen.Laws 1937, Act 6129, § 11(h).

See Words and Phrases, Permanent Edition, for all other definitions of "Participant".

5. Theaters and shows ⇐3

Even if a bond given by a boxing promoter to State Athletic Commission to guarantee payment of fighters engaging in fights conducted by promoter could be construed to cover promoter's liability for damages for alleged breach of contract with a fighter to hold a return match on March 29, 1939, the surety on bond was not liable to fighter's assignee for damages for breach of contract by promoter in refusing to hold return match where fighter breached contract, which was made on November 9, 1938, and provided that fighter would not engage in other contests until he had performed contract, by engaging in other fights before March 29, 1939, and it was immaterial that contract was postdated March 9, 1939, and that fights in which fighter participated were prior to latter date. Gen.Laws 1937, Act 6129, § 11(h).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the State Athletic Commission of California and others against the Massachusetts Bonding & Insurance Company. From an order of nonsuit, plaintiffs appeal.

Affirmed.

Robert E. Hatch, of San Francisco, Earl Warren, Atty. Gen., and F. Walter French, Deputy Atty. Gen., for appellants.

Charles V. Barfield, of San Francisco, for respondent.

KNIGHT, Justice.

This is an action to recover against a surety on a bond. The defendant bonding company moved for a nonsuit, and the motion was granted. From the order made in that behalf plaintiff appeals.

The bond is one which the State Athletic Commission requires to be given for the benefit of persons participating in boxing contests. The commission therefore is a nominal party plaintiff. Its coplaintiff, M. H. Myers & Co., is the assignee of a boxer named Gan and Sidney Wolfe, his manager. One of the grounds upon which the nonsuit was granted was that the alleged breach on the part of the principal for which plaintiffs sought to hold the surety liable was not covered by the terms of the bond. The trial court's ruling should be sustained.

The facts out of which the controversy arose are these: Leo Levitt, the principal named in the bond, was a promoter of boxing contests doing business under the name "East Bay Athletic Club". On November 9, 1938, he entered into a contract with Gan and his manager to stage a fight between Gan and another fighter known as "Little Dado" in Oakland on November 30, 1938. At the same time the parties entered into a second contract calling for a return match between the same fighters, to be held on March 29, 1939, in which contract Levitt agreed that in the event he did not produce "Little Dado" for the return match he would pay Gan and Wolfe $2,500. The second contract was executed on November 9, 1938, but it was post-dated March 9, 1939, and it contained this provision: "It is understood and agreed that Benjamin Gan will not engage in any other boxing contest or exhibition at any place in the world until he has performed this contract. This bout is for the flyweight championship of the world." The first contest was held as scheduled on the night of November 30, 1938; but thereafter Gan, under Wolfe's management, engaged in three other contests, each with a different fighter. The first took place on December 19, 1938, the second on January 2, 1939, and the third on March 3, 1939, in which latter fight Gan was the victim of a "technical knockout". Consequently, shortly afterwards Levitt cancelled the contest to be held in Oakland on March 29, 1939, and so notified Gan and Wolfe. Because of the cancellation of said contest plaintiffs sought to hold the surety liable on the bond.

[1] However, the bond does not cover liability of the principal for damages for breach of contract to hold a contest, but is limited to the payment of boxers for services performed in a contest. This is apparent not only from the terms of the bond itself, but also from the statutory provisions regulating contests and the rules and regulations promulgated by the commission pursuant to which promoters are required to furnish bonds. In this respect section 11(h) of the Boxing and Wrestling Act expressly prohibits the payment of any contestant before he has performed in a contest, Act 6129, Deering's General Laws; Stats.1925, p. lxxxix. Rule 19 of the State Athletic Commission provides: "Every club making application for a professional boxing or wrestling license must furnish a surety bond to the State Athletic Commission for 70 per cent of the capacity of the house. *This bond is to guarantee payment of boxers, wrestlers, timekeeper, announcer, club physician and referee, exclusively.*" And Rule 139(a) provides that "all payment of purses shall be made immediately *after* the contest or exhibition". The bond in question recites: "Whereas, under the rules promulgated by the Obligee, payment to the persons *performing* in said boxing, sparring and wrestling contests, matches and exhibitions cannot be made until *after* said contests, matches and exhibitions, and must be made *afterwards* in accordance with the agreement covering such compensation made between the Principal and the *Performer,* for each contest, match and exhibition, in accordance with a schedule filed with the Obligee before the date set for said contests, match or exhibition * * *." And the condition of the bond is: "* * * if the said principal shall well and truly pay or cause to be paid to each and all persons *participating* in any boxing, sparring and wrestling contests, matches and exhibitions *given* by the Principal under the license above referred to during the term of said license, such sums of money as shall be due said *participants,* under the terms of the agreement for *compensation* above referred to, then this obligation shall be void * * *." (All italics ours.)

[2, 3] It is well settled that a surety cannot be held for any liability beyond the express terms of the contract, Civ.Code, sec. 2836, and interpreting the words of the bond above italicized according to their ordinary meaning and in the light of the commission's rules pursuant to which the bond was given, it is clear that the bond is limited to the payment of the participants in such contest after the contest is over, that is, to the payment of the contestants for services they have performed; and that it does not cover the default of the principal for failure to perform all of his obligations and undertakings as a licensed promoter. In other words, general liabilities may not be read into the coverage of the bond.

[4] Appellants contend that Gan should be deemed a participant within the meaning of the bond because both contracts were executed at the same time and he participated in the contest of November 30, 1938, called for by the first contract. There is no merit in the contention. The contest of November 30, 1938, was an entirely different engagement covered by a separate and distinct contract, and the services performed by him in that engagement were made the subject of a separate action, the appeal in which has this day been decided. State Athletic Commission et al. v. Massachusetts Bonding & Insurance Co., Cal. App., 117 P.2d 75.

[5] Even assuming that the bond in suit could be construed in accordance with appellants' view as one covering liability of the principal for damages for breach of contract to hold the second contest, the nonsuit was nevertheless properly granted, for the reason that Gan and Wolfe themselves breached the second contract by engaging in three other separate boxing contests prior to the date set by the second contract for the holding of the second contest. Appellants argue that there was no such breach because the second contract was post-dated March 9, 1939, and all three contests in which Gan participated at other places were held prior to that date. The argument is not sound because the second contract expressly provided that he would "not engage in any other boxing contest or exhibition at any place in the world *until he has performed this contract*", which called for the bout to be held on March 29, 1939. (Italics ours.)

The order appealed from is affirmed.

PETERS, P. J., and WARD, J., concurred.

18 Cal.2d 688

PEOPLE v. STANGLER.

Cr. 4359.

Supreme Court of California.

Oct. 3, 1941.

1. Criminal law ⇐742(1)

In prosecution for statutory rape, credibility of prosecutrix' testimony was for the jury. Pen.Code, § 261.

2. Criminal law ⇐1159(2, 6)

An appellate tribunal cannot disturb the findings of the triers of fact unless it is made clearly to appear that upon no hypothesis is there sufficient substantial evidence, circumstantial or otherwise, to support the conclusion reached in the lower court.

3. Criminal law ⇐31

In prosecution for statutory rape, where among several acts of sexual intercourse the acts relied on by the prosecution were those occurring about four days before the Fourth of July and on Friday before the opening of school on September 9th, and defendant did not attempt to prove an alibi as respects such dates his complaint that inconsistencies in prosecutrix' testimony concerning dates of acts of sexual intercourse deprived him of opportunity to establish an alibi was without merit. Pen.Code, § 261.

4. Criminal law ⇐742(1)

In prosecution for statutory rape, confusion or discrepancies as to dates is not alone sufficient to support a characterization of prosecutrix' testimony as incredible as a matter of law. Pen.Code, § 261.

5. Criminal law ⇐742(1)

In prosecution for statutory rape, whether prosecutrix' confusion as to dates affected her credibility was for jury. Pen.Code, § 261.

6. Criminal law ⇐772(4)

In prosecution for statutory rape on about four days before the Fourth of July and on Friday before the opening of school on September 9th, instruction that proof of a charge committed on or about a certain date is sufficient if it be shown to have been committed within the three-year period of limitations was not error, particularly where court further instructed jury that where several acts were relied upon, proof of the first two acts must be presumed to be the acts relied upon by the prosecution. Pen.Code, § 261.

7. Criminal law ⇐1173(2)

In prosecution for statutory rape where testimony of prosecutrix was not inherently improbable and there was some circumstantial evidence which tended to corroborate it, failure of court to give without request a cautionary instruction was not prejudicial under the evidence. Pen.Code, § 261.

8. Criminal law ⇐1166½(12)

In prosecution for statutory rape, fact that trial court, in discussing in presence of jury whether spectators should be excluded, designated the case as a "smutty" one was not prejudicial to defendant. Pen.Code, § 261.

9. Criminal law ⇐878(3)

In prosecution for statutory rape and for violation of section 288 of the Penal Code, where only acts proved were acts of rape, the fact that jury acquitted defendant of violation of section 288 of the Penal Code did not amount to an acquittal of rape charged, since the offenses are separate and jury could have convicted defendant of either offense. Pen.Code, §§ 261, 263, 288, 954.

10. Criminal law ⇐200(7)

A conviction of statutory rape was a bar to conviction for violation of section 288 of the Penal Code. Pen.Code, § 954.

11. Criminal law ⇐866

A verdict of guilty on some counts and not guilty on others in a similar case does not necessarily give rise to the suspicion that the action of the jury was a compromise.

12. Criminal law ⇐866

The fact that jury had a choice of finding the defendant guilty of statutory rape or of lewd and lascivious acts against prosecutrix and convicted defendant of statutory rape alone did not indicate a compromise verdict, particularly where the acts proved were acts of statutory rape. Pen.Code, §§ 261, 263, 288, 954.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Rudolph Stangler was convicted of statutory rape, and he appeals.

Judgment affirmed.

For prior opinion, see 111 P.2d 397.

Walter C. Harbert, S. C. Stoner, and Stanley Visel, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson and Bayard Rhone, Deputy Attys. Gen., for respondent.

SHENK, Justice.

The defendant was charged in two counts with statutory rape, Pen.Code, § 261, and in two additional counts with violation of section 288 of the Penal Code. A jury found him guilty on the first two charges, recommending imprisonment in the county jail, and not guilty on the other charges. He has appealed from the judgment of conviction and from the order denying his motion for a new trial.

The defendant, born in Hungary, was 56 years of age at the time of the trial, and had become a naturalized citizen of the United States. The prosecutrix was a girl of ten years who lived with her widowed mother and two brothers in the same block in Los Angeles where the defendant, his wife and daughter, maintained their residence. The prosecutrix' mother operated a beauty shop near her residence. The defendant a carpenter and cabinet maker, was not continuously employed and spent part of his time working about his own place.

The information charged an act of rape upon the prosecutrix on or about July 1, 1940, another similar act on or about September 17, 1940, and acts of lewdness on the same dates. The prosecutrix testified that ten or eleven acts had been committed in a similar manner; that the defendant had invited her to come in and see his new rugs, or his new furniture; that he took or shoved her through the front door and into a bedroom and placed her crosswise on a double bed; that he exposed himself and placed her feet on his shoulders, the defendant remaining in a standing position "sort of bent over"; that he "kind of laid on her", and that he hurt her. Her childish vocabulary descriptive of further details indicated sufficient penetration to support the charges of rape. § 263, Pen.Code. He told her not to tell her mother. The prosecutrix further testified that on one occasion fixed by her as four days before the Fourth of July, 1940, the defendant had given her a five cent piece; that on another occasion, fixed as the Friday before the opening of the fall term of school on September 9, 1940, he had given her fifty cents, and that she spent the money and did not tell her mother. The prosecutrix received other gifts from the defendant, including old clothes and old rugs. The prosecutrix' mother knew that these gifts had come from the Stanglers, but was unaware of any improper conduct on the part of the defendant. The prosecutrix made no complaint to her mother or to anyone else and confided in no one except one of her young girl friends who had since moved from the neighborhood. No blood or other evidence on her clothes or otherwise was ever noticed by the prosecutrix or by her mother. The defendant admitted having seen the prosecutrix and her little brother and other children around his place frequently; that he gave the prosecutrix some old clothes and old rugs and gave her and other children "different little articles"; but he denied any acts of misconduct or the gift of any money to the prosecutrix or any other children. He testified that he saw the prosecutrix with other children on July 1st, but that his wife was home on her vacation from July 1st to 15th. He accounted for his whereabouts during Monday and Tuesday, September 9th and 10th, but offered no testimony as to his whereabouts on the preceding Friday. There is evidence that the defendant's wife on two occasions chased the prosecutrix off the premises and told her to keep away, but that nevertheless the prosecutrix and other children returned frequently. The medical testimony was that the prosecutrix' hymen was ruptured and dilated but not sufficiently to permit complete penetration.

[1, 2] The defendant contends first that the testimony of the prosecutrix was so inherently improbable, incredible and incongruous as to require a reversal of the order denying his motion for a new trial. He relies on the case of People v. Ogden, 41 Cal.App.2d 447, 457, 107 P.2d 50, 55, and the following language quoted therefrom: "Before we are authorized to say that the testimony of the prosecutrix herein bears upon its face the brand of inherent improbability and is unbelievable per se, we must be warranted in concluding that what she testified to would seem impossible to have taken place under the circumstances described by her." He contends that the prosecutrix' description of what took place was a physical impossibility, rendering her testimony incredible as a matter of law. However, the jury and the trial court had the defendant and the prosecutrix before them. Any doubt as to whether the acts described were physically impossible was resolved against the

defendant by the jury and by the trial court on the motion for a new trial. It was also said in People v. Ogden, supra, citing People v. Newland, 15 Cal.2d 678, 104 P.2d 778, and People v. Gidney, 10 Cal.2d 138, 73 P.2d 1186, that an appellate tribunal cannot disturb the findings of the triers of fact unless it be made clearly to appear that upon no hypothesis is there sufficient substantial evidence, circumstantial or otherwise, to support the conclusion reached in the lower court. In that case the judgment of conviction and the order denying a new trial were affirmed. As summed up by the trial court on the denial of the motion for new trial in the present case, there was neither evidence nor display of ill feeling between the Stanglers and the prosecutrix' family, and any unusual circumstances described by the prosecutrix could, in the minds of the jurors, tend to add to rather than detract from her credibility as a witness.

[3-6] The defendant also relies on some inconsistencies and contradictions in the prosecutrix' testimony relating to the dates of the occurrences. He urges that they should have been fixed definitely to give him an opportunity to establish an alibi, relying on People v. McCullough, 38 Cal. App.2d 387, 101 P.2d 531. That case, however, is not availing where it is shown, as in the present case, that the occurrences which form the basis of the charges stated in the information were fived with sufficient definiteness. The prosecution was relying on but two of the ten or eleven acts mentioned by the prosecutrix, the one occurring about four days before the Fourth of July and the other the Friday before the opening of school on September 9th. The defendant had an opportunity to refute them by testimony that he was elsewhere at the times in question; but he failed to account for the manner in which he spent his time on either of those occasions. It has been held that confusion or discrepancies as to dates is not alone sufficient to support a characterization of the prosecutrix' testimony as incredible as a matter of law. People v. Christensen, 32 Cal.App.2d 380, 89 P.2d 1095. On the record here presented the question whether the prosecutrix' confusion in the matter of dates affected her credibility was a question for the jury to determine. In this connection the defendant also makes the contention that the trial court erred in giving an instruction to the jury which stated in effect that proof of a charge committed "on or about" a certain date is sufficient if it be shown to have been committed within the three year period of limitations. Standing alone, without proof of any definiteness regarding the time of the occurrences, such an instruction might be serious error. But in this case the two dates were fixed with sufficient definiteness to afford the defendant ample opportunity to refute them by proof of an alibi. Also, the court further instructed the jury that where several acts were relied on, proof of the first two acts must be presumed to be the acts relied on by the prosecution. There was no error in the instruction.

[7] The defendant assigns as prejudicial error the failure of the court to give a cautionary instruction to the jury, that is, an instruction in effect warning the jury of the danger of a conviction on testimony of a prosecutrix not sustained by corroborating circumstances. The defendant did not request such an instruction, but he contends that nevertheless the court should so have instructed the jury on its own motion. He concedes that it is the law of this state that the testimony of the prosecutrix is sufficient to sustain a conviction when such evidence is not inherently improbable or unbelievable. Nevertheless he contends that in every similar case where the conviction has been affirmed there has been some corroborating circumstance or fact to give credence to the testimony of the prosecutrix. He relies on People v. Benson, 6 Cal. 221, 65 Am.Dec. 506, and other cases, wherein it has been indicated that the court will warn the jury of the danger of a conviction on uncorroborated testimony of a prosecutrix. In the Benson case, and similar cases relied on, wherein it was determined that the failure of the court to give a cautionary instruction at the defendant's request constituted prejudicial error, it has been noted that the unsupported testimony of the prosecutrix was so improbable of itself as to warrant the belief that the verdict was more the result of prejudice or popular excitement than the calm and dispassionate conclusion upon the facts.

In the present case, however, the testimony of the prosecutrix was not characterized by such inherent improbability and there was some circumstantial evidence which could be said to corroborate and lend plausibility to her testimony.

The case of People v. Adams, 14 Cal.2d 154, 93 P.2d 146, affords no support to the

defendant's contention. In that case the defendant was charged on two counts of violation of section 288 committed against a female child of five. It was there indicated that in a proper case the trial court's refusal at the defendant's request to give a cautionary instruction would amount to prejudicial error, but that in that case the defendant's rights were fully protected by the fact that substantially the same admonitions were contained in other instructions. The judgment was reversed on other grounds.

The opinion in the case of People v. Lucas, 16 Cal.2d 178, 181, 105 P.2d 102, 103, 130 A.L.R. 1485, was intended to clarify what appeared to be an uncertain state of the law with respect to the giving of cautionary instructions in cases of this character involving offenses against children. We there stated: "We are firmly of the view that in all cases of this character a defendant should be afforded the benefit of a cautionary instruction * * * to the general effect that such a charge is easily made and difficult to disprove for which reason the testimony of the prosecuting witness should be examined with caution." However, for the reason that no prejudice resulted to the defendant in that case by failure to give the instruction, the judgment of conviction was affirmed.

[8] In the present case no prejudice to the defendant's rights appears by reason of the court's failure to give a cautionary instruction on its own motion. There was no evidence of coaching of the prosecutrix. There was every indication that her testimony was the result of actual experience, rather than a fancy or figment of her imagination. There was no showing that there existed any animosity, or malice, or desire for vengeance on the part of either the prosecutrix or her mother toward the defendant or his family. The mother and the defendant had not been acquainted until the time of the arrest. There is nothing in the record to indicate that the jury was moved by prejudice or was inflamed by popular excitement. The trial, which took place in a large room with the use of a microphone by the witnesses, was conducted in an orderly and quiet manner and counsel for both the People and the defendant appeared to be cooperating with the court so to conduct it. In this respect the defendant contends that nevertheless certain remarks of the court at the commencement of the trial constituted prejudicial error. They occurred in the presence of the jury when the court asked counsel concerning exclusion of spectators. Upon receiving a reply in the negative from the defendant's counsel, the court questioned the propriety of conducting the trial in the hearing of "these people who have long ears and who want to hear something smutty". Additional conversation was had outside the hearing of the jury. Thereupon the trial proceeded without the order of exclusion. In view of what has been stated, and considering the entire record, we cannot conclude that any prejudice resulted to the defendant by reason of the remarks of the court. The court's designation of the case as "smutty", while perhaps unbecoming to judicial decorum, was merely descriptive of an element in the case of which it may be said the jury was already aware. The record in this case does not show that the remarks of the court caused the jury to prejudge the defendant or that they influenced its verdict in any way.

[9] It is also claimed that the acquittal of the defendant on the charges of violation of section 288 of the Penal Code amounted to an acquittal on the charges of rape, because, so it is asserted, both charges depended on the same act committed by the defendant. The defendant argues that having been found guilty of rape he must necessarily have been found guilty of the charges under section 288, therefore, having been acquitted of the latter charges, he should also be deemed to have been acquitted of the former. The only acts proved were the acts of rape. It is conceivable that in some cases circumstances may be presented to support convictions on both charges relating to the same event. People v. O'Donnell, 11 Cal. 2d 666, 81 P.2d 939; People v. Hickman, 31 Cal.App.2d 4, 87 P.2d 80. But it does not follow that where the act of rape only is involved the defendant must be found guilty of both charges or neither.

The defendant furnishes one answer. He quotes the following from People v. Day, 199 Cal. 78, 248 P. 250, 252: "It may be conceded that, if the two counts stated precisely the same offense, an acquittal upon one count would operate as an acquittal upon the other count." This test is not available to him, because the two counts involved stated separate offenses, the one, statutory rape, § 261, Pen.Code, and the other, lewd and lascivious conduct

committed against children. § 288. The fact that section 288 as it now reads also includes "any of the acts constituting other crimes provided for in part one of this code", which includes section 261, does not militate against this conclusion, for, under that provision, the defendant may be found guilty under either section.

Another answer is furnished by section 954 of the Penal Code. That section permits charges of two or more different offenses connected together in their commission, or different statements of the same offense, in one indictment, information or complaint, and provides that a verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.

[10] The provisions of section 954 of the Penal Code do not lend support to the defendant's contention. That section provides that an act which is made punishable in different ways by different provisions of the code, may be punished under either of such provisions, and in no case under more than one; also that an acquittal or conviction and sentence under one bars a prosecution for the same act under any other. The defendant has been convicted under the one, and in accordance with those provisions he was therefore acquitted under the other.

[11, 12] The defendant asserts that the verdict was a compromise. It has been held that a verdict of guilty on some counts and not guilty on others in a similar case does not necessarily give rise to the suspicion that the action of the jury was a compromise. People v. Christensen, supra. Such a suspicion is unfounded in the present case where it may be said that the jury was justified in concluding that the only acts proved were those based on the charge of statutory rape. The fact that the jury had a choice of finding the defendant guilty under one or the other section does not of itself indicate a compromise. There can be no suspicion of a compromise where the record shows that the evidence sustains the verdict of the jury.

We find in the record no error which would justify a reversal.

The judgment and the order are affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, JJ., and PULLEN, J. pro tem., concurred.

18 Cal.2d 645

FOX v. FOX.

L. A. 16628.

Supreme Court of California.

Sept. 30, 1941.

1. Divorce ⇐249(3)

Court's power to assign property upon dissolution of marriage is limited to community property and homestead, and it is not authorized to assign separate property of one of spouses to other, nor to require one to pay to other any amount in lieu of an assignment or division of it.

2. Divorce ⇐249(3)

Where there was no community property, an order in an interlocutory decree of divorce granted by reason of wife's fault that husband pay $840 to wife in settlement of property rights, and which made such payment a lien on husband's separate estate, was unauthorized, since court's power to assign property upon dissolution of marriage was limited to community property and homestead.

In Bank.

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Suit for divorce by Albert J. Fox against Marguerite Fox. Defendant filed a cross-complaint. An interlocutory decree of divorce ordering plaintiff to pay defendant $840 was awarded. From the portion of the decree as to payment of money, plaintiff appeals.

Decree modified and affirmed.

Carl W. Faucett, of Los Angeles, for appellant.

Samuel Marks, of Los Angeles, for respondent.

EDMONDS, Justice.

Although the plaintiff was awarded an interlocutory decree of divorce upon a complaint charging his wife with extreme cruelty, the court ordered him to pay her $840. His appeal, which is upon the judgment roll alone, concerns only this portion of the decree.

In the cross-complaint the wife alleged that her husband had committed acts constituting cruelty. By other allegations, she asserted that they have acquired, as their community property, a lot, an automobile and some household furniture valued at

$2,000, $150, and $20, respectively. Upon trial, the court found that all of the plaintiff's charges concerning his wife are true and that the community property consists of the furniture, which is of no value. The lot was found to be the separate property of the husband, but the court ordered that the wife recover from him the sum of $840, "in full satisfaction and settlement of all property rights between the parties", and declared that the payment of this amount "is to be a lien upon the real property of the plaintiff".

The only point raised by the appellant is that the law does not authorize a court to require the husband to pay, from his separate property, any amount for the support of the wife when the divorce is granted by reason of her fault. However, it may be noted, the amount awarded to the wife was stated to be in satisfaction of her property rights and not for her support. Respondent has filed no brief in reply.

[1, 2] In an action for divorce, only the community property and the homestead may be awarded; the court is not authorized to assign the separate property of one of the spouses to the other, nor to require one to pay to the other any amount in lieu of an assignment or division of it. Conard v. Conard, 5 Cal.App.2d 91, 41 P. 2d 968. The decree in the present case violates this rule and must be modified by striking therefrom the provisions relating to the payment of $840.

As so modified, the judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, TRAYNOR, JJ., and PULLEN, J., pro tem., concurred.



18 Cal.2d 685

HENNESSY v. STATE BAR OF CALIFORNIA.

S. F. 16593.

Supreme Court of California.

Oct. 2, 1941.

As Modified on Denial of Rehearing Oct. 30, 1941.

1. Attorney and client ⇐53(1)

In disciplinary proceeding against an attorney, both local administrative committee and board of governors of the state bar can properly take into consideration past record and conduct of accused attorney.

2. Attorney and client ⇐53(1)

In disciplinary proceeding against an attorney, the local administrative committee and the board of governors of the state bar may consider any past conduct of accused attorney, including any facts disclosed on prior investigation by the state bar on complaints filed and regularly brought before it, for whatever bearing such facts may have on question of attorney's integrity or measure of discipline which is to be recommended under the particular circumstances.

3. Attorney and client ⇐53(2)

Evidence regarding attorney's misconduct in regard to retaining and converting to his own use moneys of his client deposited with him for disbursement justified disbarment from practice of law. St.1939, p. 357, § 6106.

In Bank.

Proceeding by Harold C. Hennessy against the State Bar of California to review a recommendation of the Board of Governors of the State Bar that petitioner be disbarred from the practice of law.

Petitioner disbarred from the practice of law.

Franklyn M. O'Brien, of San Francisco, for petitioner.

W. Eugene Craven, of Merced (Dolger Trowbridge, of San Francisco, of counsel), for respondent.

PER CURIAM.

In October, 1940, the petitioner, an attorney at law admitted to practice in this state, was charged with misconduct involving moral turpitude and dishonesty, § 6106, Art. 6, State Bar Act, St.1939, p. 357, in that he retained and converted to his own use moneys of his client deposited with him for disbursement.

The petitioner was born in San Francisco in April, 1894. He became an electrician by trade and was a chief electrician in the Navy in the first world war. While still following that trade he studied law and was admitted to practice in January, 1926. Prior to 1940 he was practicing law in the Mission district in San Francisco.

The facts giving rise to the charges against the petitioner are admitted. In December, 1939, he was retained by one, Frank

Desmond, to represent him in an action for divorce commenced by his wife. The agreed fee was $50 and $15 court costs, which amounts were paid to the petitioner. In the same month the court awarded to Mrs. Desmond $40 a month as temporary alimony and $65 as counsel fees. Prior to May, 1940, Desmond paid to the petitioner an aggregate of $275 to be transmitted to his wife or her attorney on account of alimony payments and counsel fees. The petitioner transmitted $130 of that sum, but at the time of the filing of the complaint against him herein he had not accounted for the sum of $145. By the time of the hearing he had reduced that sum to $70, with a promise to discharge the balance by payments of $20 per week, and it is now represented that the balance due from the petitioner has been fully paid.

In 1940 and prior to the time of the complaint made against him, the petitioner voluntarily gave up the practice of the law temporarily and returned to his trade, and he is now employed as an electrician. He testified that his gross earnings from the practice of the law in 1939 were about $700, and in 1940, until his temporary abandonment of law practice, about $300. He stated before the committee that he used the moneys deposited with him because he was hard pressed for funds to support himself. The record shows that on January 6, 1939, the petitioner was suspended from the practice of the law for a period of thirty days on proof of a similar charge. There are records of two other similar complaints made against him by other clients, the first one in 1934, but those matters had not resulted in the institution of formal proceedings.

The local administrative committee No. 4 for the city and county of San Francisco recommended disbarment. The board of governors adopted the findings and recommendation of the local administrative committee.

[1, 2] Both the committee and the board of governors properly took into consideration the past record and conduct of the petitioner. Kennedy v. State Bar, 13 Cal.2d 236, 88 P.2d 920; Petersen v. State Bar, 16 Cal.2d 57, 104 P.2d 769. The petitioner asserts that the local administrative committee and the board of governors erroneously considered the past record of complaints filed against him which did not result in the institution of formal disciplinary proceedings. The committee and the board may consider any past conduct of the accused attorney, which may include any facts disclosed on prior investigation by the State Bar on complaints filed, and regularly brought before it in the proceeding under review, for whatever bearing such facts may have on the question of his integrity or the measure of discipline which is to be recommended under the particular circumstances. No abuse of the discretion of the committee or the board in this regard has been disclosed.

The petitioner does not contend that he is not subject to discipline for his admitted misconduct. He contends that disbarment is too severe a discipline under the circumstances.

[3] The petitioner, however, has not met the burden of showing that the conclusion and recommendation of the board of governors is erroneous or unlawful.

It is ordered that the petitioner be disbarred and that his name be stricken from the roll of attorneys of this state.



18 Cal.2d 667

BRUNS v. STATE BAR OF CALIFORNIA.

L. A. 17850.

Supreme Court of California.

Oct. 1, 1941.

Rehearing Denied Oct. 30, 1941.

1. Attorney and client ⇐54

The Board of Governors of the State Bar of California had jurisdiction to recommend that an attorney be disbarred, without first hearing the cause de novo or taking additional evidence notwithstanding the adoption of findings of the local committee which recommended a three-month period of suspension, even though attorney failed to appear before the Board at the appointed time.

2. Attorney and client ⇐46

That an attorney was under a physical and mental strain at time involved and that

he had attempted to make restitution could not excuse either the failure to take any action after most of agreed fees had been collected or misrepresentation to client that an action had been filed.

3. Attorney and client ⇐58

An attorney's acceptance of a fee from a client upon false assurances that a suit would be filed and misrepresentation that suit had been filed although no legal services of value had been performed would warrant the imposition of a longer period of suspension than the three months recommended by local committee and when considered with attorney's record of other misconduct afforded strong support for order of disbarment recommended by Board of Governors of the State Bar.

4. Attorney and client ⇐53(2)

Finding of local committee that an attorney had misused funds belonging to client and had refused to account therefor was supported by evidence in disbarment proceeding.

5. Attorney and client ⇐117
Trusts ⇐182

A trustee or attorney handling funds of a client cannot escape responsibility for trust fund by failing to keep any record or data from which an accounting might be made.

6. Attorney and client ⇐38

Repeated acts of negligence and omission may involve "moral turpitude" and prove as great a lack of fitness to practice law as affirmative violations of duty.

See Words and Phrases, Permanent Edition, for all other definitions of "Moral Turpitude".

7. Attorney and client ⇐53(2)

In disbarment proceeding, evidence disclosed a complete disregard for the fiduciary relation of an attorney to his clients and an absence of fair dealing in handling the affairs of ignorant, credulous or impecunious clients.

8. Attorney and client ⇐53(2)

In disbarment proceeding, proof that attorney had accepted a fee from a client upon false assurances that a suit would be filed and had misrepresented to client that suit had been filed although no legal services of value had been performed and misuse of funds and refusal to account to other clients therefor, when taken into consideration with attorney's past record which included a three-month suspension for deliberately misleading the court by a false averment as to custody of a minor in a petition for adoption, required that attorney be disbarred.

CARTER and HOUSER, JJ., dissenting.

In Bank.

Petition by Paul H. Bruns to review the action of the State Bar of California in recommending petitioner's disbarment.

Ordered that petitioner be disbarred.

Rehearing denied; CARTER, J., dissenting.

L. J. Styskal, M. E. Barth, and Paul H. Bruns, in pro. per., all of Los Angeles, for petitioner.

W. Eugene Craven, of Merced (Joe Crider, Jr., of Los Angeles, of counsel), for respondent.

PER CURIAM.

In two separate proceedings instituted before a local administrative committee of the State Bar of California, petitioner was charged with (1) acceptance of a fee from a client upon false assurances that a suit would be filed, misrepresenting to the client that suit had been filed although no legal services of value were performed, and (2) misuse of funds, failure to defend legal actions, refusal to account for funds received, and other professional misconduct in connection with petitioner's employment as an attorney by members of a milk producers' association.

In the first proceeding the local committee recommended that petitioner be suspended from the practice of law for a period of three months. In the second proceeding the committee recommended, on the basis of the facts found together with petitioner's past record, a three-year period of suspension. The causes were consolidated for presentation to the Board of Governors. When petitioner failed to appear before the Board at the appointed time, after a postponement of the hearing had been granted at his request, the matter was taken under submission upon the record made before the local committee together with petitioner's past record. The past record included a public reproval administered by the Board on September 21, 1929, in disciplinary proceedings L.A. No. 284 and 285, and a three months' suspension ordered by this court on July 17, 1931. Bruns v. State Bar, 213 Cal. 151, 1 P.2d 989. Upon reviewing these records the Board adopted the findings of the local

committee, but recommended that petitioner be disbarred.

[1] Petitioner contends that after adopting the findings of the local committee, the Board of Governors had no jurisdiction to order a discipline more severe than that recommended, without first hearing the cause de novo or taking additional evidence. A complete answer to this contention is found in Trusty v. State Bar, 16 Cal.2d 550, 107 P.2d 10, and cases there cited. See, also, Maggart v. State Bar, 7 Cal.2d 495, 61 P.2d 451. Petitioner argues that if he had known that his punishment might be increased he would have appeared before the Board. His absence was of his own volition, however, after full opportunity to testify had been accorded him, and affords no basis for compelling the Board to accept the committee's recommendations or to limit its jurisdiction.

The findings of the local committee correctly represent the facts shown by the record in each proceeding.

First proceeding, L. A. No. 1023 (3774):

In 1939 one C. H. Englesby, who had first met petitioner a few weeks previously, consulted him as an attorney, presenting to him the case of his sister-in-law, Eliza Jane Fear, a destitute blind woman, over 80 years of age, who many years before had loaned her brother, James, various sums of money totaling, with interest, about $10,500, which he had failed to repay. The brother signed a note which was subsequently lost. A substantial portion of the amount borrowed was used to educate his two daughters. Mr. Englesby asked petitioner whether the money could be collected from the daughters, and petitioner advised that in his opinion not only did a good cause of action exist against them, but they could be compelled to contribute to their aunt's support. He agreed to handle the case for a fee of $100 and an additional $27.50 for costs. These sums, he was told, would be saved by the aunt from her monthly pension check.

On August 5, 1939, Mr. Englesby paid petitioner $80 on the fee, and thereafter $12 toward costs, and petitioner promised to file suit. On November 5, 1939, he told Mr. Englesby that an action had been filed. This statement was untrue. At the hearing before the local committee petitioner claimed that under his fee arrangement he was not obligated to file suit until the full amount of the fee was paid. He advanced the necessity for research as another excuse for his failure to act. Very little research would have revealed that no cause of action existed in favor of the aunt against her nieces either for support or for the money loaned their father. The local committee gave petitioner every opportunity to make restitution before taking action on the charge against him. On May 29, 1940, he stated that he believed he could restore the money to his client within fifteen or twenty days. On August 21st, three months later, he had only repaid $65, and claimed that it had been impossible for him to raise the rest of the money.

[2, 3] Petitioner now argues that the evidence does not justify an order of suspension or disbarment. He states that the giving of erroneous advice through ignorance is not punishable, and that he honestly believed that a cause of action existed when he so informed Mr. Englesby. In pleading for leniency he asserts that he was under a physical and mental strain at the time in question, and that he has attempted to make restitution. These factors, however, cannot excuse either the failure to take any action after most of the agreed fees have been collected, or the misrepresentation to the client that an action was filed. The evidence on this matter would warrant the imposition of a longer period of suspension than the three months recommended by the local committee, and considered in conjunction with petitioner's record of other misconduct, it affords strong support for the order of disbarment recommended by the Board of Governors.

Second proceeding, L. A. No. 1005 (3711):

In February, 1938, certain milk producers, assisted by petitioner and one Gray, organized the Producers' Cooperative Creamery Company, a copartnership, for the purpose of processing and selling their milk at better prices than those previously received from dairies. The producers, of Holland Dutch descent, had difficulty in speaking or understanding the English language, and relied upon petitioner to advise them. They were unsuccessful in their business and in July, 1938, they decided to leave the plant they had leased and to abandon operations. During the period from February to July, 1938, petitioner acted as attorney for Mr. Gray and for the producers, but he had nothing to do with

the management of the business or the funds. Mr. Gray, however, was also interested in a selling organization called the Dairy Guild. He and petitioner succeeded in obtaining the permission of the producers to sell their milk, after it was processed at Guernsey Gold Seal Farms. In August, 1938, this arrangement was put into operation. The producers delivered milk to the Guernsey Gold Seal Farms for processing. It was then sold by Mr. Gray, doing business as the Dairy Guild. Petitioner participated actively in the enterprise and opened a "trustee" account with the bank. All funds collected by Mr. Gray from milk sales, less certain expenses and salaries, were delivered to him, and he had complete control of this money. In the beginning from $30 to $35 was turned over to him daily, but the receipts dwindled to nothing in a period of approximately sixty days because the producers were dissatisfied and supplied less and less milk. Petitioners drew checks on the "trustee" account in favor of the producers and others. Some of these checks were returned for insufficient funds. After the institution of criminal proceedings part were paid; others still remain unpaid. Demands were made upon petitioner for an accounting and on numerous occasions he promised to furnish it, but failed to do so. It was not until July 25, 1940, at the last hearing before the local committee in the present proceeding, that he explained for the first time that he was unable to make an accounting because his records had been destroyed in a flood at Tujunga. The record substantiates the committee's finding that this was improbable.

Between August and December, 1938, petitioner undertook to represent the producers in litigation arising out of their abandonment of the plant leased by them and the unsuccessful operation of their business from February to September, 1938. Three suits were brought against the producers. In Kurtz v. Wassenaar et al., L. A. Municipal Court No. 484614, an action for rent, there was no defense, and a default judgment was entered against the producers in May, 1939.

In Guernsey Gold Seal v. Wassenaar, L. A. Municipal Court No. 497197, petitioner served and filed an answer and cross-complaint on behalf of the producers. The plaintiff, however, without the knowledge of petitioners, secured from each of the defendant producers an affidavit denying petitioner's authority to represent them. Upon the basis of these affidavits a motion to strike the answers and cross-complaints was granted, and a default judgment was entered. Apparently the producers did not fully understand the meaning or possible effect of their affidavits, but, so far as the evidence shows, petitioner was entitled to and did rely upon them. He therefore advised the counsel for the plaintiff in the third action (Keeley v. Wassenaar et al., Los Angeles Superior Court No. 433791), in which he had been securing oral and written extensions of the time for appearance, that his authority to represent the defendant producers had been repudiated.

The evidence regarding petitioner's failure to defend the legal actions properly and regarding other phases of the matters charged was inconclusive and the local committee concluded that petitioner did not violate his duties as an attorney in any of the respects charged except in his refusal and failure to account for funds handled from August to October, 1938. Petitioner offered no credible explanation for his failure to keep a record of the funds received by him in trust for the producers and disbursed by him on their behalf. The lack of any financial statement or report made it impossible to determine whether petitioner had actually misappropriated any of the funds entrusted to him and his excuses for this negligent handling of his clients' affairs only beclouded the question.

[4, 5] The findings and conclusions of the committee are amply supported by direct evidence of petitioner's failure to account and other acts of negligence and omission. Petitioner contends, however, that even if the committee's conclusions are correct, his violations of duty involved no moral turpitude and were not of sufficient consequence to serve as the basis of either a prolonged suspension or disbarment. He argues that as he was neither the collector of sales receipts nor the bookkeeper for the business, he was under no obligation to produce a record of the funds of his clients which were delivered to him in trust and disbursed by him under his complete control. This argument demonstrates a lack of understanding of the duties and obligations arising out of a fiduciary relationship. It would be a distortion of justice to permit a trustee, or attorney handling funds of a client, to escape re-

sponsibility by the simple act of not keeping any record or data from which an accounting might be made.

[6] Repeated acts of negligence and omission may involve moral turpitude and prove as great a lack of fitness to practice law as affirmative violations of duty. Marsh v. State Bar, 210 Cal. 303, 291 P. 583; Marsh v. State Bar, 2 Cal.2d 75, 39 P.2d 403; Waterman v. State Bar, 8 Cal. 2d 17, 63 P.2d 1133; Trusty v. State Bar, supra. The evidence here discloses a complete disregard for the fiduciary relation of an attorney to his clients and an absence of fair dealing in handling the affairs of ignorant, credulous, or impecunious clients. See Stanford v. State Bar, 15 Cal.2d 721, 104 P.2d 635; Id., 16 Cal.2d 252, 105 P.2d 984.

[7, 8] The consolidated record of the present proceedings, considered in conjunction with petitioner's past record (Bruns v. State Bar, supra), attests the correctness of the conclusion that the public interest will be best served and protected by petitioner's removal from practice. Marsh v. State Bar, 2 Cal.2d 75, 39 P.2d 403; Kennedy v. State Bar, 13 Cal.2d 236, 88 P.2d 920. Although ten years have elapsed since the previous disciplinary proceedings against petitioner, in which he was suspended for a period of three months for deliberately misleading the court by a false averment as to custody of a minor in a petition for adoption, it is apparent that the discipline then administered did not succeed in imparting to him an understanding of the duties of an attorney to his clients and to the public.

It is ordered that petitioner be disbarred from the practice of law in the courts of this state, effective thirty days after the filing of this decision.

CARTER, Justice (dissenting).

I dissent.

While the facts found by the local administrative committee with reference to the misrepresentation made by petitioner that he had filed an action on behalf of his client when he had not done so, and his failure to render an accounting of money received by him in trust are sufficient to justify disciplinary action against him, I cannot agree with the holding in the majority opinion that a member of the Bar can be subjected to a disciplinary proceeding for mere negligent conduct.

I still hold to the views expressed by me in my dissenting opinions in the cases of Trusty v. State Bar of California, 16 Cal. 2d 550, 554, 107 P.2d 10, and In re McKenna, 16 Cal.2d 610, 612, 107 P.2d 258, and I disagree with everything said in the majority opinion in the instant case contrary to the views expressed by me in said dissenting opinions.

HOUSER, J., concurred.



18 Cal.2d 674

HAIGLER et al. v. DONNELLY et al.

L. A. 17916.

Supreme Court of California.

Oct. 1, 1941.

Rehearing Denied Oct. 30, 1941.

1. Trial ⇐397(1)

There is no error in trial court's failure to make an express finding upon an issue, if such finding is implicit in the findings made, and there is no necessity expressly to negate contradictory allegations.

2. Brokers ⇐71

If a broker's contract for the sale or lease of property fixes a net amount to be paid the owner, the broker's compensation is limited to the excess of the payment by the purchaser or lessee over the net amount specified, and, if he fails to sell or lease for more than the amount named, the broker is entitled to no compensation.

3. Brokers ⇐86(8)

In owners' action to recover portion of sale price of furniture retained by broker, although furniture was sold with owners' consent for less than amount stipulated in original contract of listing, which provided for broker's commission in amount for which furniture could be sold in excess of stipulated amount, evidence sustained implied finding that sale was negotiated under original net listing contract so that broker was not entitled to any commission.

4. Brokers ⇐71

A provision in a contract signed by owners and buyer of furniture that so much of down payment or other moneys collected by the broker as necessary to pay the seller's commission shall be retained by the broker

was not an agreement to pay a commission but simply an authorization to retain commissions that may be due.

5. Brokers ⇐71

Owners' consent to sale of apartment house furniture under terms different from those set forth in contract of listing, which provided for broker's commission in amount for which furniture could be sold in excess of stipulated amount, did not extinguish such listing contract nor make owners liable under an implied contract to pay the reasonable value of services rendered by broker in finding a buyer.

6. Brokers ⇐71

Where broker undertakes to sell property under an agreement, whereby he is to receive as commission a certain percentage of the sale price obtained, seller cannot defeat broker's right to a commission by consummating a sale at a smaller price than that originally proposed, but broker is not entitled to any compensation in case of sale at less than stipulated price if right to commission is conditional upon a sale at the price stipulated in the authorization.

7. Brokers ⇐71

Where contract of listing stipulates net amount to be received by owner for sale or lease of property, broker is entitled to no compensation unless he negotiates a sale or lease of property for more than such net amount.

8. Damages ⇐89(2)

Under statute providing for recovery of exemplary damages, such damages may not be recovered in an action based upon a contractual obligation, even though the breach of contract is wilful or malicious, but, if action is one for tort, exemplary damages may be recovered upon a proper showing of malice, fraud, or oppression, even though the tort incidentally involves a breach of contract. Civ.Code, § 3294.

9. Damages ⇐89(2)

An action for money had and received is "ex contractu" in nature as respects recovery therein of exemplary damages, since such action is founded upon a promise implied in law. Civ.Code, § 3294.

See Words and Phrases, Permanent Edition, for all other definitions of "Ex Contractu".

10. Damages ⇐89(2)

There is a question whether exemplary damages can be recovered in an action for money had and received, since such action is ex contractu in nature. Civ.Code, § 3294.

11. Damages ⇐89(1)

Any action for conversion is "ex delicto" in nature, as respects right to recover exemplary damages therein. Civ.Code, § 3294.

See Words and Phrases, Permanent Edition, for all other definitions of "Ex Delicto".

12. Damages ⇐89(1)

Exemplary damages are properly awardable in an action for conversion, given the required showing of malice, fraud, or oppression. Civ.Code, § 3294.

13. Trover and conversion ⇐32(4)

A complaint charging defendant with exercising dominion over property inconsistent with plaintiff's ownership thereof sets forth a good cause of action for conversion, where no special demurrer for uncertainty is interposed.

14. Brokers ⇐35
Principal and agent ⇐72

A broker or agent is ordinarily liable for converting the funds of his principal when he refuses to account for such funds upon proper demand.

15. Principal and agent ⇐72

While money cannot be the subject of an action for conversion, unless a specific sum capable of identification is involved, in order to hold agent liable for conversion, it is necessary only to show the receipt by agent upon principal's account of a definite sum, which agent refuses to turn over to principal upon proper demand.

16. Brokers ⇐38(4)

In action to recover from real estate broker a portion of sale price of property, evidence was sufficient to show a conversion and to justify the conclusion that broker's refusal to account for the sum was not made in good faith but was the result of a fraudulent scheme to secure plaintiff's money by means of trickery and deliberate falsehood, constituting "oppression, fraud, or malice" within statute authorizing imposition of exemplary damages. Civ.Code, § 3294.

See Words and Phrases, Permanent Edition, for all other definitions of "Oppression, Fraud, or Malice".

17. Appeal and error ⇐1073(6)

Any supposed error in judgment awarding plaintiffs full amount prayed for in an action to recover money retained by broker,

a part of the sum sought having been paid to plaintiffs before trial, was not prejudicial to broker, where the possibility that broker would be subjected to double payment was precluded by an acknowledgment upon the margin of the judgment of a partial satisfaction thereof in the amount so paid.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by C. F. Haigler and others against Dottie Delphy Donnelly and others for money received by the named defendant, a real estate broker, for the use and benefit of plaintiffs. From a judgment for plaintiffs, defendants appeal.

Judgment affirmed.

For prior opinion, see 110 P.2d 130.

Henry S. Cohen and Bernard B. Cohen, both of Los Angeles, for appellants.

W. W. Comstock and H. A. Finkenstein, both of Los Angeles, for respondents.

TRAYNOR, Justice.

Plaintiffs owned a furnished apartment house in Los Angeles. In March, 1939, they listed the house and furniture with defendant, a licensed real estate broker, the house to be leased at $250 per month, the furniture to be sold for $3,000 cash, such amounts to be *net* to plaintiffs. A listing card setting forth these terms was signed by plaintiffs and left in the possession of defendant. In April, 1939, plaintiff gave to defendant another listing which authorized the sale of the apartment house and furniture for the lump sum of $27,000 with a five per cent commission to defendant. Thereafter, through defendant's offices, Anna M. Silva agreed to lease the apartment house for a term of ten years at $250 per month and to buy the furniture for $2,500. Defendant communicated the terms to plaintiffs who accepted them and executed a written contract with Mrs. Silva on May 11, 1939. Mrs. Silva paid $3,500 to defendant, $2,500 representing the price of the furniture and $1,000 representing payment on account of the lease. From the total sum defendant retained $1,150, which she claimed as commission, and tendered to plaintiffs a check for $2,258.35, the balance of the amount paid less prorated rents in the sum of $91.65. Plaintiffs demanded the full amount of $3,408.35 and on being refused undertook the present action. Prior to the filing of the complaint, plaintiffs accepted the check for $2,258.35 under a stipulation that it could be cashed without prejudice to the rights of either party.

The complaint sets forth two causes of action. The first is for money had and received. The second, after incorporating the allegation of a demand contained in the first cause of action, alleges that defendant, as agent for plaintiffs, maliciously and fraudulently refused to account to plaintiffs for money belonging to plaintiffs which defendant had collected on their account. Then follows a prayer for actual damages in the sum of $3,408.35 and for exemplary damages in the sum of $3,000. The trial court found that defendant was not entitled to retain as commission the sum withheld by her and gave judgment for $3,408.35, plus $500 as exemplary damages to plaintiffs. From this judgment, defendant has appealed.

Plaintiffs contend that under the original net listing defendant was entitled to receive for her services only such amounts as she secured in excess of the net prices specified. Defendant contends that the original net listing was cancelled and the listing card destroyed by her at the instance of plaintiffs at the time of the second listing. Since the lease and sale to Mrs. Silva were not within the terms of the second listing, which contemplated a lump sum sale of both building and furniture, defendant bases her alleged right to a commission upon the theory of an implied contract to pay the reasonable value of her services. She also claims a commission on the basis of an oral contract assertedly entered into between her and plaintiffs shortly before the deal with Mrs. Silva was closed.

[1] Defendant challenges the sufficiency of the findings, citing in particular the failure of the trial court to find whether or not she was entitled to the reasonable value of her services. Following the language of the pleadings, the trial court found that defendant, while acting as agent for plaintiffs, received the sum of $3,408.35 belonging to them, for which she did not account. This finding of ultimate fact includes by necessary implication a finding that the transaction was consummated under the original net listing and that defendant therefore was not entitled to the reasonable value of her services. There is no error in the failure of the trial court

to make an express finding upon an issue if it is implicit in the findings made, and there is no necessity expressly to negate contradictory allegations. See cases cited in 24 Cal.Jur. 974, 976.

[2] If a broker's contract for the sale or lease of property fixes a net amount to be paid the owner, the broker's compensation is limited to the excess of the payment by the purchaser over the net amount specified. If he fails to sell or lease for more than the amount named, the broker is entitled to no compensation. Ford v. Brown, 120 Cal. 551, 52 P. 817; Sill v. Ceschi, 167 Cal. 698, 140 P. 949; Church v. Dunham, 14 Idaho 776, 96 P. 203; Burnett v. Potts, 236 Ill. 499, 86 N.E. 258; Culbertson v. Sheridan, 93 Kan. 268, 144 P. 268; Futrell v. Reeves, 165 Ky. 282, 176 S.W. 1151; Gilmore v. Bolio, 165 Mich. 633, 131 N.W. 105, 34 L.R.A.,N.S., 1050; Beatty v. Russell, 41 Neb. 321, 59 N.W. 919; Wolverton v. Tuttle, 51 Or. 501, 94 P. 961; 9 C.J. 581, 582; 12 C.J.S., Brokers, §§ 78, 79. Therefore, if there is substantial evidence to support the implied finding of the trial court that the sale and lease to Mrs. Silva were negotiated under the original net listing, defendant is not entitled to a commission.

[3] An examination of the record reveals ample evidence to support the finding. At the trial, plaintiff Haigler testified that during the negotiations with Mrs. Silva nothing was said concerning a commission and that it was his understanding with defendant that the lease and sale would be governed by the original net listing. He denied authorizing the cancellation of the original agreement and the destruction of the card or making an oral contract to pay defendant a commission. He testified that Mrs. Brown, a saleswoman in the employ of defendant, produced the listing card when the deal was closed but that defendant refused to show it to him. This testimony was corroborated by Mrs. Silva and her husband, who were present at the time. Mrs. Brown also testified that the listing card was present at the time of the closing of the deal with Mrs. Silva and had in fact been used by defendant in negotiating the transaction.

In support of her claim, defendant introduced in evidence a typewritten receipt admittedly signed by Mr. Haigler which read: "Received from Donnelly & Company the sum of Twenty-five hundred Dollars, above mentioned, Less 10% commission earned." Both Mr. and Mrs. Haigler testified that the words "Less 10% commission earned" were not on the receipt at the time Mr. Haigler signed the writing. Mr. Sellers, a handwriting expert, testified that in his opinion these words were typed at a different time and under different conditions from the typewriting preceding them. Mr. and Mrs. Silva testified that defendant had said to them at different times that "she could do anything with them [plaintiffs] because they were dumb," and several witnesses testified that the reputation of defendant for truth and honesty was bad.

[4] In further support of an alleged agreement to pay her a commission, defendant refers to a provision in the contract signed by plaintiffs with Mrs. Silva which reads: "It is hereby agreed that so much of said down payment, or any other money collected by Donnelly & Co., as is necessary shall be retained by Donnelly & Co., to pay the seller's commission and the balance if any, after said payment, shall be paid by said Donnelly & Co., to said party of the first part or held by agent subject to first parties order." This provision is not an agreement to pay a commission but simply an authorization to retain commissions that may be due.

[5-7] Defendant finally urges that plaintiffs, in consenting to a lease and sale under terms different from those set forth in the net listing, waived the conditions therein for the payment of the commission and thereby became liable under an implied contract to pay the reasonable value of the services rendered by defendant in finding a purchaser. This contention is unsound. The parties were not prevented by the terms of the agreement from negotiating a sale at a reduced net price. Plaintiff's consent to a $500 reduction of the price of the furniture did not extinguish the agreement. Defendant has erroneously sought to invoke a rule applicable to a broker who undertakes to sell property under an agreement whereby he is to receive as commission a certain percentage of the sale price obtained. In such a case a seller cannot defeat the right of a broker to his commission by consummating a sale with the purchaser at a smaller price than that originally proposed. Boland v. Ashurst Oil, etc., Co., 145 Cal. 405, 78 P. 871; Wetzell v. Wagoner, 41 Mo.App. 509; cases cited in 9 C.J. 600, 601; 12 C.J.S., Brokers, § 86.

These cases also recognize, however, that the broker is not entitled to any recovery if his right to a commission is conditional on a sale at the price mentioned in his authorization (see cases cited in 9 C.J. 602; 12 C.J.S.Brokers, § 86). A broker under a net contract is entitled to no compensation unless he successfully negotiates a sale for more than the net amount. It would be absurd to hold that defendant may recover a commission on concluding a sale for $2,500 when none would be due her had she found a purchaser for $3,000.

[8] The question remains whether the award of exemplary damages is proper. The right to recover punitive or exemplary damages is created by section 3294 of the Civil Code, which provides that "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." See Fitzpatrick v. Clark, 26 Cal.App.2d 710, 80 P.2d 183. Under this section exemplary damages may not be recovered in an action based upon a contractual obligation even though the breach of contract is wilful or malicious. Berning v. Colodny & Colodny, 103 Cal.App. 188, 284 P. 496; Baumgarten v. Alliance Assurance Co., C.C., 159 F. 275; see 8 Cal.Jur. 872. If on the other hand the action is one in tort, exemplary damages may be recovered upon a proper showing of malice, fraud or oppression even though the tort incidentally involves a breach of contract. Gorman v. Southern Pac. Co., 97 Cal. 1, 31 P. 1112, 33 Am.St. Rep. 157; Lyles v. Perrin, 119 Cal. 264, 51 P. 332; Jones v. Kelly, 208 Cal. 251, 280 P. 942; Berning v. Colodny & Colodny, supra.

[9, 10] The first cause of action set forth by plaintiff is one for money had and received. Since it is established in California that an action for money had and received is ex contractu in nature, being founded upon a promise implied in law (Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990; McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019; Los Angeles Drug Co. v. Superior Court, 8 Cal.2d 71, 63 P.2d 1124; see Fordson Coal Co. v. Kentucky River Corporation, 6 Cir., 69 F.2d 131), there is a question whether exemplary damages can be recovered in such an action.

[11-13] The second cause of action set forth by plaintiffs, however, contains the essential elements of an action for conversion and is therefore ex delicto in nature. Exemplary damages are properly awardable in an action for conversion, given the required showing of malice, fraud or oppression. Arzaga v. Villalba, 85 Cal. 191, 24 P. 656; Gilbert v. Peck, 162 Cal. 54, 121 P. 315, Ann.Cas.1913C, 1349. This count in brief alleges that defendant, while acting as agent for plaintiffs, received a stipulated sum of money belonging to plaintiffs and refused to account for it after a proper demand. Defendant contends that a conversion of the money is not sufficiently alleged. The more recent cases, however, indicate that a complaint charging defendant with exercising dominion over property inconsistent with the ownership of plaintiff sets forth a good cause of action for conversion where no special demurrer for uncertainty is interposed. Faulkner v. First National Bank, 130 Cal. 258, 62 P. 463; Dieterle v. Bekin, 143 Cal. 683, 77 P. 664; Gustafson v. Byers, 105 Cal.App. 584, 288 P. 111; First National Bank of Long Beach v. Crown T. & S. Co., 89 Cal.App. 243, 264 P. 534.

[14, 15] A broker or agent is ordinarily liable for converting the funds of his principal when he refuses to account for them upon proper demand. Wood v. Blaney, 107 Cal. 291, 40 P. 428; Bellus v. Peters, 165 Cal. 112, 130 P. 1186; Stacy v. Browne, 99 Okl. 104, 219 P. 336; Jones v. Smith, 65 Misc. 528, 120 N.Y.S. 865; see 3 C.J.S. Agency, § 143, p. 19. While it is true that money cannot be the subject of an action for conversion unless a specific sum capable of identification is involved (Baxter v. King, 81 Cal.App. 192, 253 P. 172), it is not necessary that each coin or bill be earmarked. When an agent is required to turn over to his principal a definite sum received by him on his principal's account, the remedy of conversion is proper. Salem Light & Traction Co. v. Anson, 41 Or. 562, 67 P. 1015, 69 P. 675.

[16] The trial court found in accordance with the allegations set forth in the second cause of action. The evidence is sufficient to show a conversion and to justify the court in concluding that defendant's refusal to account for the sum withheld by her was not made in good faith under an honest belief that she was entitled thereto, but was the result of a fraudulent scheme to secure plaintiffs' money by

means of trickery and deliberate falsehood. Such action constitutes "oppression, fraud, or malice" within the meaning of section 3294 of the Civil Code.

[17] Defendant complains that the judgment is erroneous in awarding plaintiffs the full amount of $3,408.35, whereas in fact $2,258.35 of such sum was paid to plaintiffs before the trial. Any supposed error in the judgment in this respect is in no way prejudicial to defendant. She makes no contention that she will be subjected to double payment, and such a possibility is precluded by the recital on the margin of the judgment acknowledging a partial satisfaction of the judgment in the sum of $2,258.35.

The judgment is affirmed.

GIBSON, C. J., CURTIS, EDMONDS, and CARTER, JJ., and PULLEN, Justice pro tem., concurred.



18 Cal.2d 636

CHILDRESS et al. v. PETERSON et al.

L. A. 17921.

Supreme Court of California.

Sept. 30, 1941.

1. Municipal corporations ⇐218(8)

The executive officers of a city acting under enabling legislation have plenary power to exercise full administrative judgment and control over city employees and to promote a program of economy in good faith, but they are required in the enforcement of their judgment to act in conformity with charter provisions and procedural requirements.

2. Municipal corporations ⇐185(6)

Where positions of policewomen of city of San Diego were not vacated and there was no termination of policewomen's employment by virtue of absence of sufficient funds for payment of their salaries, notices of dismissal which were sent before appropriation for police salaries had been made giving false reasons of lack of provision in the budget were insufficient. St.1931, pp. 2860, 2886, 2888, 2906, 2912, §§ 28, 69, 71, 115 et seq., 130.

3. Evidence ⇐387(6)

The official record of the action of the city council could not be altered by oral statements of individual councilmen.

4. Municipal corporations ⇐180(3)

A mere intent by city council to reduce the force of policewomen, unaccompanied by proper official action of record, was not sufficient to accomplish their purpose.

5. Mandamus ⇐168(3)

Where city council of city of San Diego did not take proper steps to effect proposed economies and was forced to justify dismissal of policewomen by attempting to prove either the absence of a sufficient appropriation or an actual shortage of funds, in mandamus proceeding by policewomen for reinstatement and for payment of salaries, evidence showing that there was no shortage of funds and that there was a sufficient appropriation to pay policewomen's salaries was properly admitted. St.1931, pp. 2860, 2886, 2888, 2906, 2912, §§ 28, 69, 71, 115 et seq., 130.

6. Municipal corporations ⇐180(3), 185(5)

The charter provisions of the city of San Diego creating police department and authorizing chief of police to appoint employees subject to civil service requirements and establishing a procedure under protective regulations of civil service commission for suspension or dismissal of employees by the appointing power for cause after notice did not impliedly give chief of police power to discharge policewomen but placed the control of positions and offices and the power to create or abolish them in the city council. St.1931, pp. 2877, 2911, §§ 57, 129.

7. Municipal corporations ⇐177

Under city charter of city of San Diego, the appointing officer is not required to fill all offices which are created, but, once he has filled a position, he has no implied power to discharge the employee at will or to suspend with a view to later appointing another whom he may deem to be better qualified to fill the vacancy, but can only remove or suspend employees or reduce the personnel in any branch of the department by taking action in conformity with the restrictions and procedural requirements of the civil service regulations. St.1931, pp. 2877, 2911, §§ 57, 129.

8. Municipal corporations ⇐180(3), 185(3, 6, 7)

The civil service rules established by charter of city of San Diego providing that,

whenever necessary to reduce the number of employees, certain steps shall be taken, authorize reduction of force made necessary by economy, or lack of funds, work, or to promote efficiency and do not contemplate that entire appropriation must be used as preliminary to proving good faith in making the reduction, the essential elements being substantial compliance with procedural requirements outlined in the regulations, a true statement of reasons underlying reduction and due notice to end that priority and seniority may be determined and govern the discharges. St.1931, pp. 2877, 2911, §§ 57, 129.

In Bank.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Proceeding in mandamus by Mrs. Beula F. Childress and others, against John T. Peterson, etc., and others, for the reinstatement of plaintiffs in the positions of policewomen of the City of San Diego and the payment of their salaries from the date of commencement of the action. From a judgment for plaintiffs, the defendants appeal.

Judgment affirmed.

For prior opinion, see 109 P.2d 983.

Dayton L. Ault, City Atty., and Morey S. Levenson and J. H. McKinney, Deputy City Attys., all of San Diego, for appellants.

Thomas Whelan, Vincent Whelan, and Whelan & Whelan, all of San Diego, for respondents.

PULLEN, Justice pro tem.

In this proceeding in mandamus the trial court entered a judgment which reinstates plaintiffs in the positions of policewomen of the city of San Diego, and directs payment of their salaries at the rate of $157 per month from date of commencement of the action. Defendants, the city, its officers and agents, have appealed.

Prior to 1939, plaintiffs reached the status of classified employees of the city under its civil service rules and regulations. Charter of San Diego, Art. VIII, Stats. 1931, p. 2906. On June 22, 1939, the acting chief of police addressed a letter to each of them reading: "This is to inform you that the 1939-1940 budget only makes provision for two policewomen in this department and due to the fact that others hold seniority over you in service it becomes my duty to terminate your services as of July 15. Your services have been satisfactory and you may apply to the Civil Service Commission for reinstatement to the eligible list in case provisions are made later for additional policewomen."

The question is whether the above notice operated to effect plaintiffs' discharge. Appellants contend that when the civic welfare will be promoted by a reduction of personnel, the city officials are empowered in the exercise of their administrative discretion to eliminate positions and dispense with the services of any number of employees of a given class. In 1939 they were endeavoring to lower the tax rate by enforcing a program of economy in the expenditure of city funds. They had scaled budget estimates with a view to accomplishing this end and planned, among other restrictions, to limit the force of policewomen. On July 5, 1939, they passed an annual appropriation ordinance (No. 1617 N.S.), which provided a reduced appropriation for the salary account of the police department. They claim that by virtue of this reduction, their program of economy, their intention to dispense with the services of some of the policewomen, and the giving of the above notice, plaintiffs' dismissal from the service was validly accomplished.

Plaintiffs assert that the notice was ineffective because it failed to set forth the true motive underlying the attempted dismissal, which was not that of economy; that the positions were never in fact eliminated; that sufficient money was appropriated and was available at all times for payment of salaries; and that the prescribed procedure for effecting the lay-off or discharge of civil service employees was not observed. These contentions were upheld by the trial court. The evidence establishes the correctness of its findings and conclusions.

[1] While the executive officers of a city, acting under enabling legislation, have plenary power to exercise full administrative judgment and control over city employees and to promote a program of economy in good faith, they are required in the enforcement of their judgment to act in conformity with charter provisions and procedural requirements. Lotts v. Board of Park Com'rs, 13 Cal.App.2d 625, 57 P.2d 215; O'Neill v. Williams, 53 Cal. App. 1, 199 P. 870; Jenkins v. Board of

Civil Service Com'rs, 137 Cal.App. 410, 30 P.2d 606; note 111 A.L.R. 432, 438. In the present case this was not done.

The positions held by plaintiffs were not abolished by the city council, although this would have been one means of reducing the force of policewomen. The fiscal year of the city of San Diego runs from July 1st to June 30th of the succeeding year. In May or June the city council passes a classification ordinance creating and establishing positions in the city service and repealing the ordinance enacted the previous year. The classification ordinance passed in 1939 (Ord. 1611 N. S., enacted June 13, 1939), repeated the provision made by several prior classification ordinances (Ord. 1160 N. S., passed May 25, 1937; Ord. 1387 N. S., passed May 24, 1938), for the creation and establishment of positions for eight policewomen. This ordinance, like the ones preceding it, created many positions which were never filled, the excess being designed to safeguard against emergencies which might arise during the fiscal year requiring additional help in different departments. In the police department no more than six policewomen were ever employed, and just prior to June 1, 1939, there were only five in the service. Thus at all times a sufficient number of positions to cover plaintiffs' employment were established by ordinance and remained unabolished.

[2] The positions held by plaintiffs were not vacated nor was plaintiffs' employment terminated by virtue of the absence of sufficient funds for payment of their salaries. Conceding that the council could have brought about a dismissal by either general or special appropriation eliminations, coupled with an intent on the part of a majority of the councilmen to dispense with plaintiffs' services, the evidence shows that such purpose was not accomplished because the appropriation for police salaries had not been made at the time the notices of dismissal were sent, and as later made it was not inadequate. Neither was it exhausted at the time of trial of this cause.

Under the procedure set up by charter provisions it is the duty of the city manager to keep the council advised of the city's financial needs and, on or before the first meeting of the council in May, to prepare and submit to it a report of all departments and an annual budget estimate for the succeeding fiscal year. Stats.1931, pp. 2860, 2886, secs. 28, 69. The council then prepares an annual appropriation ordinance, using the estimate as a basis, and while it may reduce or eliminate any item, it cannot increase any amount or add any new item. Stats.1931, p. 2888, sec. 71. It is required to establish by ordinance a schedule of uniform compensation for officers and employees in the classified service. Stats. 1931, p. 2912, sec. 130.

The evidence here shows that a budget estimate was duly filed by the city manager on May 2, 1939. There had, however, just been a city election which resulted in a change of administration, so that early in May several new councilmen, and on June 1st a new city manager, took office. The councilmen instructed the new manager to prepare a budget estimate which would reduce the city expenditures by approximately half a million dollars. The new manager thereupon prepared a revised or new estimate (Document 314,188, Budget Estimates for 1939-1940, dated June 15, 1939), and transmitted it to the council with a letter stating: "Budget figures for departments not under the manager's control are submitted exactly as requested by those departments. The budget is the basis of the Appropriation Ordinance * * *." This estimate, like the earlier one, contained a recommendation of the manager for an appropriation to cover the salaries of five policewomen, in the amount of $10,056. The full appropriation recommended was $352,088.50, which with anticipated revenue of $165,000 from other sources, and anticipated deductions of $3,500, would make available for salaries and wages in the police department, a total sum of $520,588.50.

After hearing and consideration of the estimates, and on July 5, 1939, the council passed the annual appropriation ordinance (Ord. No. 1617, N. S.). This ordinance appropriated $345,560.50 for police salaries and wages (a reduction of $6,528 from the estimated figure of $352,088.50), in addition to the $165,000 anticipated revenue to be used for the same purpose, making a total fund of $510,560.50 available for the payment of salaries and wages to officers and employees of the police department. The items comprising the salary and wage account were not listed separately in the ordinance as they had been in the budget estimate. Only the lump sum in a reduced amount as finally appropriated was given. So far as shown by the ordinance, there-

fore, the reduction was general and applied proportionately to all police salaries and wages and not solely to the item for policewomen.

Appellants offered testimony by the acting chief of police to prove that he knew when he addressed the notice of dismissal to plaintiffs on June 22 that the amount which would be appropriated, and was later actually appropriated by the ordinance of July 5, would be insufficient to pay all salaries for the coming year. Appellants also offered testimony of a councilman to explain and reconcile the reductions made in the salary and wage and other budget items pertaining to the police department, in order to prove an intent on the part of the councilmen to effect a program of economy and among other things to dispense with the services of the policewomen by failing to appropriate money for their salaries. The trial court excluded this line of testimony on the ground that oral statements regarding official action were inadmissible to vary the written records and explain that an appropriation reduction shown on the ordinance as general was in fact intended to be special and to cover only one item of the account, thereby effecting the discharge of a certain group of employees.

[3, 4] The exclusion of this testimony was proper. The official record of the action of the council could not be altered by oral statements of individual councilmen. Under the procedure provided by the charter for the creation and abolishment of positions, the preparation and submission of budget estimates, and the preparation and passage of the annual appropriation ordinance, that ordinance and the other official documents constituted the record of official action. See Stats.1931, p. 2855, Sec. 13. While the evidence as a whole indicated that it was probably the intent of a majority of the councilmen to put into operation a uniform program of reduced expenditures, and that one of the savings contemplated was the reduction of the force of policewomen and the performance of their work by other employees of the department, and there is no intimation that the officials did not act in good faith or that they were controlled by other than what they thought would best advance the public welfare, nevertheless their official intent to reduce the force of policewomen, unaccompanied by proper official action of record, was not sufficient to accomplish their purpose.

So far as lack of funds is concerned, the evidence shows that the reduced appropriation, coupled with other sums which could lawfully be used for the same purpose, was in fact adequate to permit the payment of plaintiffs' salaries. The deputy city auditor, testifying at the trial on February 8, 1940, stated that between July 1, 1939, and January 31, 1940, both inclusive, only $292,-285.86 had been expended for police salaries and wages, leaving a balance in the fund of $218,274.64. Therefore, if the monthly expenditures for salaries during the last five months of the fiscal year remained at the same average level as during the first seven months, as they probably would if no additional appointments were made, the end of the fiscal year would find an unexpended balance in the salary and wage fund of over $9,000. The auditor also testified that on January 31, 1940, there remained an unappropriated balance of $25,932.89 in the general fund of the city. This statement apparently referred to the balance of a $150,000 appropriation, designated in the ordinance as "unappropriated balance," and authorized by the charter, Stats.1931, p. 2887, Sec. 69(h), to provide a fund "available for appropriation later in the fiscal year to meet contingencies which might arise"; for example, a shortage in another fund, such as the police salary fund. It is therefore apparent that there was never at any time during the fiscal year, up to the date of trial of this cause, any actual or threatened shortage in the funds appropriated and available to pay plaintiffs' salaries.

[5] Appellants objected to admission of the auditor's testimony on the ground that it was not necessary for the council to wait for an entire appropriation to be exhausted before effecting economies, and therefore the condition of the fund at time of trial was immaterial. But this argument is answered by the fact that the council did not take proper steps to effect the economies it contemplated and was therefore forced to justify plaintiffs' dismissal by attempting to prove either the absence of a sufficient appropriation or an actual shortage of funds. Neither factor was established.

Lastly it is contended that even if the action of the council was ineffectual, the plaintiffs were validly discharged by their appointing officer, the chief of police. The

pertinent charter provision is section 57, Stats.1931, p. 2877, which states: "The Police Department shall consist of a Chief of Police and such other officers, members and employees as the Council may from time to time by ordinance prescribe. * * * The Chief of Police may appoint, subject to the approval of the Manager, [an] Assistant Chief of Police, a Chief of Detectives, and all members, officers and employees of the Police Department, subject to the Civil Service requirements of this Charter." The charter also provides a procedure, under the protective regulations of the civil service commission, for the suspension or dismissal of employees by the appointing power for cause after notice. Sec. 57, supra; also Stats.1931, p. 2911, art VIII, Sec. 129. Appellants argue that the power of appointment conferred upon the chief of police by the charter provision to fill offices created by ordinance, implies a corresponding power in him to vacate such offices by discharge of the appointees where such action is taken in good faith in order to effect economies or otherwise promote the welfare of the department.

[6, 7] The provisions, as we read them, confer no such implied power. Their purport is to place the control of positions and offices, and the power to create or abolish them, in the council. While the appointing officer is not required to fill all offices which are created, once he has filled a position, he has no implied power to discharge the employee at will or to suspend with a view to later appointing another whom he may deem to be better qualified, to fill the vacancy. He may only remove or suspend employees or reduce the personnel in any branch of the department by taking action in conformity with the restrictions and procedural requirements of the civil service regulations. In this connection section 5 of article XII of the civil service rules prescribes the procedure for a reduction of personnel by the appointing officer in the exercise of his discretion in a proper case. It provides: "Whenever it becomes necessary to reduce the number of employees in a given class, the appointing authority shall, prior to such impending reduction, notify the Personnel Director of the number of positions in the class to be vacated, indicating the reasons therefor. The Personnel Director shall thereupon furnish the appointing authority the names of the employees in the order such lay off shall be effective." The order of lay off is prescribed by section 6.

[8] The opening phrase of section 5, "whenever it becomes necessary to reduce the number of employees", is sufficiently broad to authorize a reduction of the force made necessary by the stress of economy, or for lack of funds, or lack of work, or any other factor embraced in an effort in good faith to promote the efficiency and proper functioning of the department. Moreover it does not contemplate that in order to institute a program of economy an appointing officer necessarily has to use up his entire appropriation as a preliminary to proving good faith in making the reduction. The essential elements are substantial compliance with the procedural requirements outlined in the regulations, a true statement of the reasons underlying the reduction, and due notice to the end that priority and seniority may be determined and govern the discharges.

In the present case the acting chief of police testified that he sent the notices of dismissal to plaintiffs on the order of the city manager, one purpose being to promote economy. The notices themselves set forth a different reason, that is, no provision in the budget, whereas the budget did make provision. Furthermore the appointing officer, having submitted a budget estimate allowing for plaintiffs' salaries, could not have anticipated that the council would reduce the recommended amount in enacting the appropriation ordinance. Yet the notices of discharge preceded the enactment of the ordinance. It was also shown by evidence bearing on the issue of good faith that there was a controversy over the desirability of taking plaintiffs off the detail of supervision of the dine and dance establishments of the city, and therefore the cause of dismissal set forth in the notices may have been a mere subterfuge, cloaking an attempt to remove plaintiffs for entirely different reasons. At any rate the notices were clearly defective and could not serve as a basis for proceedings leading to plaintiffs' suspension or discharge.

The judgment is affirmed.

GIBSON, C. J., and CURTIS, CARTER, and TRAYNOR, JJ., concurred.

18 Cal.2d 682

PEARLIN v. STATE BAR OF CALIFORNIA.

L. A. 17914.

Supreme Court of California.

Oct. 1, 1941.

1. Attorney and client ⇐46

An attorney who made restitution of moneys wrongfully retained from client only as a matter of expediency and under pressure was not entitled to any indulgence in disbarment proceedings by reason of such restitution.

2. Attorney and client ⇐44(2)

Where attorney had been privately reproved for commingling the funds of another client with his own and for which he subsequently issued a check without sufficient funds to cover it, attorney should be disbarred from practice for subsequent commingling of a client's funds with his own and deliberately spending it at night clubs and bars. St.1939, p. 357, §§ 6103, 6106.

CARTER, J., dissenting.

In Bank.

Petition by Paul Pearlin to review the action of the State Bar of California in recommending that petitioner be disbarred from the practice of law.

Ordered that petitioner be disbarred.

Paul Pearlin, of Los Angeles, in pro. per., for petitioner.

W. Eugene Craven, of Merced, for respondent.

PER CURIAM.

Petitioner was cited to appear before a local administrative committee of the State Bar and to show cause why he should not be disciplined for professional misconduct growing out of the alleged violation of his oath and duties as an attorney and the commission of acts involving moral turpitude within the meaning of sections 6103 and 6106 of the State Bar Act, St.1939, p. 357. At the conclusion of its hearing, the local committee made findings of fact and recommended disbarment. The board of governors adopted the findings and has recommended to this court that petitioner be disbarred from the practice of the law. Petitioner does not challenge the findings or the sufficiency of the evidence to support them. In his petition he states that this court "in fair justice to the state and the complainant could not overlook the gravity of the offense of the petitioner" but he urges that disbarment is "harsh and oppressive" and that "a period of suspension would be sufficient".

At the hearing before the committee petitioner frankly admitted that he had deliberately commingled the funds of a client with those of his own, and had deliberately, and not inadvertently, expended the same at night clubs and bars in an effort, he states, to impress a third person whom he then regarded as a prospective client. The funds so improperly commingled and expended represented the proceeds of a draft in the amount of $130 payable to the client for damages to her automobile and by her endorsed in blank to petitioner to be used by him for the express purpose of purchasing a new automobile for said client. The money was repaid by petitioner only after the client had reported his action to the State Bar.

In addition to confessing freely his misconduct, petitioner also admitted his familiarity at the time with the rules of professional ethics which prohibit the commingling and misuse of a client's funds. He stated to the committee that "I don't feel, truthfully speaking, that I'm entitled to a lot of consideration".

The record further discloses that previously petitioner had been privately reproved for commingling the funds of another client delivered to him to defray the costs of certain litigation and for which he subsequently issued a check to the county clerk when there were insufficient funds to cover the same.

[1, 2] In the light of petitioner's admissions, covering his present and past misconduct, we are satisfied with the findings and recommendation of the local committee and the board of governors. While petitioner is a comparatively young man who had been practicing only approximately five years, his misconduct by his own statement was not the result of inexperience or inadvertence but was the deliberate act of one fully cognizant of its impropriety. His testimony merely serves to explain where and why he expended his client's money. It offers nothing by way of justification or mitigation. Petitioner is not entitled to any indulgence by reason of restitution of moneys wrongfully retained, especially where such restitution is made merely as

a matter of expediency and under pressure. Maggart v. State Bar, 7 Cal.2d 495, 502, 61 P.2d 451.

In our opinion disbarment is warranted under the facts and circumstances disclosed by the record.

It is therefore ordered that petitioner, Paul Pearlin, be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys, effective thirty days after the filing hereof.

CARTER, Justice (dissenting).

I dissent. While great weight should be given to the recommendation of the board of governors of the State Bar as to the discipline to be administered to the members of the Bar who are found guilty of unprofessional conduct, it is obvious that the members of this court in reviewing a disciplinary proceeding are in substantially the same position as the board of governors with respect to the extent of the discipline to be administered, and in my opinion, the members of this court should exercise their independent judgment as to whether or not the discipline recommended by the board of governors is commensurate with the nature of the dereliction of the member of the Bar in each case. At least, this has been the policy of this court in the past in cases of this character.

In the instant case, I am of the opinion that in view of the age and inexperience of petitioner, the smallness of the amount involved, the repayment of the money misappropriated by him, and the frank and open disclosure by him of his misconduct, the ends to be served by disciplinary measures would be served by suspension of petitioner's right to practice law for a definite period rather than permanent disbarment.

While it may be impossible to arrive at a very high degree of uniformity in administering discipline in cases of this character, I believe that an attempt should be made to do so. A review of similar cases decided by this court where discipline has been administered convinces me that disbarment of this petitioner is clearly out of line with the discipline administered in such cases, and I am of the opinion that the suspension of petitioner from the practice of law for the period of two years is adequate punishment to be inflicted upon him for the misconduct committed by him which is the subject of this proceeding.

18 Cal.2d 697

ALLEN et al. v. McKINLEY et al.

S. F. 16579.

Supreme Court of California.

Oct. 3, 1941.

1. Municipal corporations ⇐217(5)

The provision of present charter of San Francisco that when civil service commission deems it practicable it shall provide for promotional examinations, and provision of former charter that "wherever practicable" such examinations must be given, mean substantially the same thing, and under both provisions the question of whether a promotional examination is practicable is confined to the limited jurisdiction of the commission.

2. Municipal corporations ⇐217(5)

It is only when it appears that the limited discretion of the civil service commission of San Francisco in determining whether a promotional examination is practicable has been abused that courts are warranted in interfering.

3. Municipal corporations ⇐978(1)

Under charter of San Francisco requiring civil service commission to hold promotional examinations "when practicable", where there were at least 18 persons ready and willing to take a promotional examination for the position of adjuster in the office of tax collector, to which they were eligible under the qualifications prescribed by commission, commission's action in ordering an open examination instead of a promotional examination, on theory that promotional examination was not "practicable", constituted an abuse of discretion.

See Words and Phrases, Permanent Edition, for all other definitions of "Practicable".

4. Municipal corporations ⇐217(5)
Officers ⇐11

Under San Francisco charter provision requiring civil service commission, whenever it deems practicable, to provide for promotion on basis of such examinations and tests as commission may deem appropriate and to give consideration to ascertained merit and record of city and county service applicants, the commission has wide discretion in determining what groups shall be included within the class permitted to take a promotional examination and the qualifications of those desiring to take it.

5. Mandamus ⇐168(2)

Where petitioners in mandamus proceeding against city civil service commission established a prima facie case of abuse of discretion by commission in giving notice of an open examination to establish an eligible list for a certain position in classified service instead of holding a promotional examination, burden was on commission of bringing forth any explanation it might have by way of defense.

6. Municipal corporations ⇐216(1)

A city civil service commission has wide discretionary powers in many of its fields of operation, but such commissions have only such powers as are conferred on them, and when they exceed or abuse their powers it is not only within the power, but it is the duty, of the judicial branch of government to prevent such excess or abuse on petition of those adversely affected.

7. Officers ⇐69

The purpose of civil service is to abolish the so-called spoils system, and to increase the efficiency of the service by assuring employees of continuance in office regardless of what party may be in power.

8. Municipal corporations ⇐217(5)

City charter provisions requiring promotional examinations to be held by civil service commission when practicable are intended to promote efficiency among public employees.

9. Municipal corporations ⇐217(5)

San Francisco charter provisions requiring civil service commission, whenever it deems it to be "practicable", to provide for promotion in service on basis of such examinations and tests as commission may deem appropriate, are mandatory.

10. Municipal corporations ⇐217(5)

The provision of the San Francisco charter requiring civil service commission, whenever it deems it to be practicable, to provide for promotion in civil service on the basis of such examinations and tests as commission may deem appropriate, constitutes a limitation on commission's discretion, and where it is practicable to hold a promotional examination such examination must be given.

11. Municipal corporations ⇐217(5)

Under San Francisco charter provision requiring civil service commission to give a promotional examination where it deems practicable, commission in determining whether it is "practicable" to give such examination has not an uncontrolled discretion, but if such an examination is not to be given a valid reason for not doing so must exist.

12. Mandamus ⇐75

Under city charter provision requiring civil service commission where practicable to provide for promotion on basis of examinations and tests, mandamus lies to compel commissioners to hold a promotional instead of an open examination where the decision of commissioners to hold an open examination is shown to constitute an abuse of discretion.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Mandamus proceeding by P. G. Allen and others against Howard M. McKinley and others, as the Civil Service Commission of the City of San Francisco, its secretary and personnel director, to require respondents to hold a promotional examination instead of an open one, for purpose of creating an eligible list for positions in the civil service of San Francisco in the tax collector's office, designated as Adjuster, Class G153. From a judgment directing the issuance of a writ of mandamus commanding respondents to hold a promotional examination, the respondents appeal.

Affirmed.

For prior opinion, see 109 P.2d 429.

John J. O'Toole, City Atty., and Thomas P. Slevin and Norman Sanford Wolff, Deputy City Attys., all of San Francisco (L. R. Bunney, of San Francisco, of counsel), for appellants.

Grover O'Connor, of San Francisco, for respondents.

Loren A. Butts, of Los Angeles, for City Employees Ass'n of City of Los Angeles, amicus curiae for respondents.

PER CURIAM.

The appeal in this case was originally heard by the First District Court of Appeal, Division One. Following a decision by that court, a petition for hearing by this court was granted. Consideration of the cause leads us to the conclusion that the appeal was correctly decided by the District Court of Appeal. Its opinion rendered therein, which was prepared by Mr. Presiding Justice Peters, is therefore adopted as

the opinion of this court herein. It is as follows:

"This is an appeal by the Civil Service Commission of San Francisco, its secretary, and its personnel director, from a judgment directing the issuance of a writ of mandamus commanding the appellants to hold a promotional examination, instead of an open one, for the purpose of creating an eligible list for positions in the civil service of San Francisco in the Tax Collector's office designated as 'Adjuster, Class G153. The proceeding was instituted in the trial court by respondents, who are eighteen employees in the office of the Tax Collector in San Francisco, after the Civil Service Commission had given notice of an open and original examination to establish an eligible list for the positions in question. It is the theory of these respondents, upheld by the trial court, that, under the appropriate charter provisions they, as employees lower in rank to that of Adjuster, G153, as well as others in the civil service, are legally entitled to take a promotional examination to fill that position, and that the action of the Commission in ordering an open examination, under the circumstances here involved, constituted an abuse of discretion.

"The case was decided upon the petition of respondents and the answer and certain amendments to the answer. Based upon these pleadings, the trial court granted the motion of petitioners for judgment on the pleadings.

"In support of the judgment the respondents first urge that the record shows that many of them entered the employ of the City and County of San Francisco under civil service prior to January 8, 1932, the effective date of the present charter, and that, under the old charter, the right to a promotional examination was secured to them by section 8, article XIII, of that charter, and that section 142 of the new charter preserves this right. Section 142 of the new charter provides, in part, that: 'The civil service rights, acquired by persons under the provisions of the charter superseded by this charter, shall continue under this charter.'

"The old charter (sec. 8, art. XIII) in reference to promotions provided: 'The Commissioners shall provide for promotion in the classified service on the basis of ascertained merit and standing upon examination; and shall provide, wherever practicable, that vacancies shall be filled by promotion. All examinations for promotions shall be competitive among such members of the next lower rank, as established by the Commissioners, as desire to submit themselves to such examinations.'

"The comparable provision of the new charter is section 146, which provides as follows: 'Whenever it deems it to be practicable, the Commission shall provide for promotion in the service on the basis of such examinations and tests as the Commission may deem appropriate, and shall, in addition, give consideration to ascertained merit and records of city and county service of applicants. The Commission shall announce in the examination scope circular the next lower rank or ranks from which the promotion may be made. All promotions in the police and fire departments, respectively, shall be made from the next lower rank on the basis of examinations and tests, seniority of service and meritorious public service being considered.'

[1, 2] "Appellants urge that, if the old charter conferred greater rights than the new, section 142 of the new charter, supra, does not operate to preserve such an inchoate right as the right to a promotional examination, but only preserves vested or already acquired rights. We do not find it necessary to pass upon this point for the reason that we are of the opinion that, whether the old or new charter measures the rights of respondents, under both provisions it is the duty of the Commission to hold promotional examinations when 'practicable'. While the language employed in the two sections is not identical, and, while the new charter expressly provides that, when the *Commission* deems it practicable it shall provide for promotional examinations, whereas the old charter provided that 'wherever practicable' such examination must be given, it seems quite clear that the two sections should be construed to mean substantially the same thing—that is, that under the old section, as under the new, the question as to whether a promotional examination is practicable, is confined to the limited discretion of the Commission. Sound principles of administrative law, as well as the provisions of the statute, compel the conclusion that it is only when it appears that such limited discretion has been abused that the courts are warranted in interfering.

[3] "There can be but little doubt that, under the facts alleged in the petition and admitted by appellants, an abuse of discretion appears.

"In 1932 the Commission established, in the Tax Collector's office, a class of employment designated as License Adjuster Class G152. On March 23, 1932, the Commission, pursuant to an examination theretofore held, created an eligible list for that position. The names of seven of the eighteen respondents were on that list. On April 8, 1932, M. J. Lawley (who was first on that list with a grade of 100 per cent) and I. A. Richardson (who was second on that list with a grade of 98 per cent) were appointed from that list as License Adjusters. On October 3, 1934, two other appointments were made from the eligible list to that position—Charles A. Burgess and Eugene Sheehy—who had grades of 87½ per cent. These last two men were ranked as numbers 10 and 10½ on the eligible list, ranking below five of the petitioners on the eligible list. Why the appointments were made of people so low on the eligible list does not appear. At that time, Sheehy, as well as several of the respondents, were employed in the Tax Collector's office as General Clerk, Class B222.

"On March 23, 1936, the eligible list for License Adjuster, Class G152, expired automatically. At that time all but five of the respondents were General Clerks, Class B222, in the Tax Collector's office. Many of them had been so employed for many years. Of the five who were not so employed on that date, one of them, P. G. Allen, first entered the employ of the city for the Tax Collector's office in 1915 as Deputy Tax Collector. Subsequently, his position was classified as that of General Clerk, while still later he was appointed as Teller. The four other respondents were appointed General Clerks, B222, subsequent to March 23, 1936. Several of the respondents, from time to time, had been assigned to the bureaus in the Tax Collector's office known as the Bureau of Delinquent Revenue and the Bureau of Licenses.

"After the expiration of the eligible list for License Adjuster, G152, in March of 1936, nothing was done to create a new eligible list for that position. Prior to June 1, 1938, there existed a vacancy in the Tax Collector's office in the classified position of General Clerk, Class B222. This general clerkship carried a monthly salary of $200. Other general clerkships in the same class carried lower salaries, and many of these lower salaried clerkships were held by the respondents. Instead of transferring one of the petitioners who was already in Class B222 to the vacant higher paid clerkship of the same class, the Commission proceeded in a different manner. By resolution of June 1, 1938, it abolished the class of License Adjuster, G152, and created a new class—Adjuster, G153. It further provided that persons theretofore holding the positions in Class G152 should be entitled, without examination, to hold positions in the new class, G153. The only persons thus entitled to be appointed to the new class of Adjuster, G153, were Lawley, Burgess and Sheehy, heretofore mentioned. What had happened to Richardson who had been appointed with Lawley in 1932 to the position of License Adjuster, G152, does not appear. Apparently, he was no longer employed in that position. Accordingly, Lawley, Burgess and Sheehy were automatically given positions in the new class, G153.

"By the same resolution of June 1, 1938, the Commission created a new class—Senior Inspector of Licenses, Class G154, with the further provision that this class should be deemed promotional from the newly created class, G153. The resolution also provided that the vacant position of General Clerk, B222, should be allocated to the newly created class of Adjuster, G153. Thereafter, Lawley was given an emergency appointment to the newly created position of Senior Inspector of Licenses, and one Connolly was given an emergency appointment to the newly created position of Adjuster, G153 (which had formerly been classified as General Clerk, B222). Respondents allege on information and belief that Connolly had not theretofore taken any examination for any position falling within the classified service. This allegation is admitted in the answer.

"On July 27, 1938, the Commission gave notice of an examination for the position of Senior Inspector of Licenses, Class G154, restricting the examination to the persons who had theretofore been appointed to the abolished position of License Adjuster, G152. By this limitation, the Commission restricted the field of those eligible to take that promotional examination to Lawley, Burgess and Sheehy. Stated another way, the Commission provided for a promotional examination to fill the position in Class G154, restricting the field of those eligible to take the promotional examination to three men.

"Thereafter, on August 3, 1938, the Commission gave notice of an *open, nonpromotional examination* to create an eligible list

for the other new class, Adjuster, G153. It was further provided that the examination might be taken by persons possessing either of the following qualifications:

"1. One year of first-class experience, within the past eight years, in the investigation and adjustment of accounts and the investigation of claims, assets and attachable property in connection with such accounts, or in general office procedure; or

"2. Permanent employees of the Tax Collector's office falling within classes of General Clerk, General Clerk-Stenographer, or in the old class of Deputy.

"The notice for this examination also provided that those falling within Class 2, supra, might receive a rating of not to exceed one hundred out of a total of one thousand points for ascertained merit in City and County service.

"It was the action of the Commission in thus providing for an open nonpromotional examination for License Adjuster, G153, that led respondents to file an application for writ of mandate to compel the Commission to make the examination promotional in character. It should be noted that respondents do not seek to invalidate the action of the Commission in declaring the examination for Class G154 promotional, nor its action in reclassifying the various positions. They do not charge that the Commission was without right to appoint Burgess and Sheehy to positions in Class G152 in 1934, although five of the respondents were higher on the eligible list than were the two men appointed. Their attack is upon the action of the Commission in making the examination for the new class, G153, open rather than promotional. The other matters enumerated above are set forth for whatever bearing they may have on the question as to whether the Commission abused its discretion in noticing an open examination for Class G153.

"There seems to be no escape from the conclusion that the facts alleged in the petition and admitted in the answer demonstrate that the Commission abused the discretion conferred upon it by section 146 of the charter, supra, in noticing an open examination for the position in question. Although the Commission provided in the notice for the examination that persons who have had one year of first-class experience in general office procedure are qualified to take the examination, the Commission likewise determined that it was impracticable to provide a promotional examination when there are eighteen employees of the Tax Collector's office who have had experience in office work in that office for from 'several years' to over twenty-three years. Several of these employees have had several years' experience in the Bureau of Delinquent Revenue and the Bureau of Licenses. Furthermore, seven of the eighteen were on the eligible list for the old position of G152, five of them with ratings higher than Burgess and Sheehy who have been appointed to G153. That the duties of Class G153, here involved, are generally similar to that of old Class G152 is indicated by the fact that, in abolishing Class G152, the Commission provided that the three persons then occupying positions in Class G152 should automatically, without examination, hold positions in Class G153.

[4] "The respondents also point out that the judgment here appealed from does not determine that the promotional examination must be limited to the eighteen General Clerks in the Tax Collector's office. The Commission, under the charter provision here involved, has wide discretionary powers in determining what groups shall be included within the class permitted to take a promotional examination, and what the qualifications of those desiring to take the examination shall be. If one year of first-class experience in general office procedure is a qualification for eligibility to the position of Adjuster, G153, there is a large number of persons in the civil service outside the Tax Collector's office earning less than the salary provided for Class G153 who are eligible for this examination. Even if it were impracticable to hold a promotional examination limited to the eighteen qualified employees of the Tax Collector's office, it is obviously not impracticable to hold such an examination among the large group of civil service employees with the requisite qualifications.

"Another factor which tends to show an abuse of discretion is that the Commission has provided a promotional examination for Class G153 to Class G154, although, as described by the Commission, the distinction between the duties of those two classes is greater than between old Class G152 and new Class G153, and, although there are but three persons eligible to take the promotional examination for Class G154.

[5-9] "Upon the showing made by respondents in their petition, and the admissions made by appellants in their answer and amended answer, the trial court cor-

rectly held that respondents established a prima facie case of abuse of discretion. This placed on the Commission the burden and duty of bringing forth any explanation it might have by way of defense. The Commission has offered no reasonable explanation or justification for its actions in either its pleadings in the trial court or in its briefs filed in this court. It takes refuge in the proposition that local administrative boards should be permitted to operate with as little interference as possible from the judicial branch of the government. They cite cases for the rule that administrative action of local boards is beyond judicial control unless abuse of discretion is clearly shown. (Maxwell v. Civil Service Commission, 169 Cal. 336, 146 P. 869; Pratt v. Rosenthal, 181 Cal. 158, 183 P. 542; Mann v. Tracy, 185 Cal. 272, 196 P. 484; Mitchell v. McKevitt, 128 Cal.App. 458, 17 P.2d 789.) We may agree with these principles but still come to the conclusion that the Commission has abused its discretion in the instant case. The Commission has wide discretionary powers in many of its fields of operation. However, such commissions have only such powers as are conferred upon them. When they exceed or abuse their powers it is not only within the power, but it is the duty of the judicial branch of the government to prevent such excess or abuse upon the petition of those adversely affected. Here the people of the City and County of San Francisco have seen fit to insert in section 146 of the charter, supra, a provision requiring the Commission 'Whenever it deems it to be practicable', to give promotional and not open examinations. This provision embodies one of the fundamental concepts of a sound civil service system. All authorities agree that promotions are an essential of a sound civil service system. The purpose of civil service is twofold—to abolish the so-called spoils system, and to increase the efficiency of the service by assuring the employees of continuance in office regardless of what party may then be in power. Efficiency is secured by the knowledge on the part of the employee that promotion to higher positions when vacancies occur will be the reward of faithful and honest service. Provisions such as section 146 of the charter, that promotional examinations shall be held when practicable, are intended to promote efficiency among public employees. (People v. Errant, 229 Ill. 56, 82 N.E. 271; Ptacek v. People, 194 Ill. 125, 62 N.E. 530.)

[10, 11] "Section 146 of the charter, supra, constitutes a limitation on the discretion of the Commission. Where it is practicable to hold a promotional examination, such examination must be given. In determining whether it is practicable to give such an examination the Commission has not an uncontrolled discretion. If such an examination is not to be given, a valid reason why not, must exist. When the Commission's action is challenged, and the petitioner produces a prima facie case that a promotional examination is practicable, the burden is on the Commission to justify its action.

"There appears to be but little case law on the exact problem here presented. The diligence of counsel, and independent research by this court, have unearthed but two cases where the problem has been passed upon directly by the appellate courts in this country. Both of these cases are in accord with the views herein expressed—in fact, in some respects, they go beyond the holding in this opinion.

"In People v. Errant, supra, the Supreme Court of Illinois was presented with the following facts: The Chicago Civil Service Commission proposed to hold an open competitive examination instead of a promotional one for the position of Assistant Superintendent of Streets. Those next lower in rank contended that, under the civil service act and rules adopted pursuant thereto, a promotional examination should be given. The civil service act there involved provided that the Commission 'shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion'. This is substantially the same language used in the old charter of San Francisco (sec. 8 of art. XIII, supra), and in section 146, supra, of the present charter. In interpreting the Illinois section the court stated (page 274 of 82 N.E.): 'The phrase in section 9 above quoted, "in all cases where it is practicable," adds but little to the meaning of the section, and takes little or nothing from it. If this phrase was eliminated entirely from the statute, it would mean substantially the same as it does with it in. The meaning in both cases is that the vacancies are to be filled by promotion. If this is not possible, the office is not to remain vacant and the wheels of government stop; but the place is to be filled in another way and the functions of the government go on. In the case before us the determination

of appellees that it was not practicable to fill the place by promotion should not precede, but come after, a promotional examination, where it is their duty to hold such examination. There are, it is admitted, at least 15 ward superintendents who are ready and willing to take the promotional examination for the position to be filled. If the examination is held, and two or more ward superintendents qualify, then it will be practicable to appoint the one making the highest grade. Until such examination is held, and these persons given a chance to pass, the appellees cannot know whether it is practicable to fill the place from the ward superintendents. The only prayer of the petition is that appellees be required to hold such promotional examination. This, we think, it is their clear legal duty to do.'

"A similar conclusion was reached by the same court in Ptacek v. People, supra. That was a proceeding in quo warranto brought to test the legal right of Ptacek to hold the position of Assistant Superintendent of Police, an office to which he had been appointed after having participated in an open examination held by the Commission. It was contended that the examination had been improperly and unlawfully held in that it should have been a promotional and not an open examination. The civil service act in question contained the same clause as is quoted in the Errant case, supra. The court held that a promotional examination was required, although there were but five men eligible to take a promotional examination. In so holding the court stated (page 132 of 194 Ill., page 533 of 62 N.E.): 'We do not understand how the civil service commission could, under its rules, hold an original examination for the position of assistant superintendent of police unless it is shown in some way that the vacancy in that office could not be filled by promotion, and this, we think, the pleas wholly failed to do.'

"In the briefs of the parties to this appeal a decision of Honorable Emmet H. Wilson, Judge of the Superior Court of Los Angeles County, in the case of Crowe v. Board of Civil Service Commissioners, L. A. No. 427,601, is quoted in full. That case involved the question as to whether an examination for City Treasurer should be open or promotional, under charter provisions similar to those involved in the two Illinois cases, supra. The Commission pleaded that it had conducted an investigation as to the qualifications of all the employees of the City Treasurer's office, and all other classifications in the civil service, and after such investigation had found that it was not practicable to fill the office by promotion. Nevertheless, the court granted the petitioners a judgment on the pleadings. It held that the provisions of the charter in reference to promotional examinations were mandatory, and that, if there were qualified persons in the service eligible to take the examination, the Commission could only ascertain that it was impracticable to give a promotional examination after those eligible had been given such an examination.

[12] "The reasoning of these three cases is conclusive here. Under the provisions of section 146 of the charter, supra, promotional examinations, except for those in the lowest ranks, are required to be held unless they are not 'practicable'. In determining that fact the Commission does not possess unlimited discretion. There are doubtless many situations where it would be impracticable to give a promotional examination, and where the Commission could determine that an open examination was proper. But the facts of the instant case demonstrate that this case does not fall within that category. Here the Commission has determined, by fixing the qualifications as a condition precedent for the taking of the examination, that the eighteen petitioners, as well as many others, are fully qualified to take the examination, and, if they pass, fully qualified to fill the position. If there are large numbers of persons in the service fully qualified to take the examination for the eligible list for the position in question, how can the Commission determine before it gives a promotional examination to those persons, that it is not 'practicable' to give such an examination? Obviously, under such circumstances, to so determine is an abuse of the discretion vested in the Commission."

The judgment is affirmed.

18 Cal.2d 709

RHODEHAMEL v. CIVIL SERVICE BOARD OF CITY OF OAKLAND et al.

S. F. 16580.

Supreme Court of California.
Oct. 3, 1941.

1. Municipal corporations ⇐217(5)

A city charter provision requiring civil service board to provide for promotion in the classified service on basis of ascertained merit, seniority in service, and standing on competitive examination, and where practicable, that vacancies shall be filled by promotion from among such members of the next lower rank established by the board as submit themselves for promotional examinations is mandatory.

2. Municipal corporations ⇐217(5)

Under city charter provision requiring civil service board to provide in all cases where "practicable" that vacancy shall be filled by promotion from among such members of next lower rank established by board as submit themselves for examination, board in passing on question whether a promotional or an open examination shall be given does not possess an uncontrolled discretion, but, if it is "practicable" to give a promotional examination, board must give such examination regardless of its opinion as to relative merits of the two types of examinations.

See Words and Phrases, Permanent Edition, for all other definitions of "Practicable".

3. Municipal corporations ⇐217(5)

If there are persons in the classified service who by reason of their position in the service possess the qualifications fixed by city civil service board as a prerequisite to take examination, board may properly ascertain that it is "impracticable" to give a promotional examination only after the persons eligible have been given a promotional examination.

See Words and Phrases, Permanent Edition, for all other definitions of "Impracticable".

4. Municipal corporations ⇐216(1)

Local boards, such as city civil service boards have only such powers as the people see fit to confer on them, and, if such a board exceeds or abuses its powers, the courts are empowered to prevent such excess or abuse on petition of one adversely affected.

5. Mandamus ⇐168(4)

In mandamus proceeding to compel civil service board to hold a promotional examination to obtain an eligible list for position of senior account clerk and to terminate proceedings for an open examination, evidence of existence of classified positions known as "intermediate account clerk" and "senior account clerk," and as to respective duties of the positions, established a prima facie case that board abused its discretion in determining that a promotional examination was not practicable under city charter provision requiring such examinations to fill vacancies where practicable.

6. Municipal corporations ⇐217(5)

The question whether better employees will be secured by an open or a promotional examination is one of "legislative policy" and not of "administrative" or "judicial" policy, which was settled by city charter provision requiring civil service board to provide in all cases, where practicable, that vacancies be filled by promotion from among such members of next lower rank established by board as submit themselves for promotional examination, and neither the board nor District Court of Appeal, whatever its opinion as to merits of that policy, can substitute its opinion for that of the people as set forth in the charter.

See Words and Phrases, Permanent Edition, for all other definitions of "Administrative Policy", "Judicial Policy", and "Legislative Policy".

7. Municipal corporations ⇐217(5)

Under city charter provision requiring civil service board to provide, where practicable, that vacancies should be filled by promotional examinations from next lower rank established by board, it was no proper ground for holding an open instead of a promotional examination for position of senior account clerk on theory that the intermediate account clerks, who would be eligible to take such examination, would not be eligible to fill positions above that of senior account clerk.

8. Municipal corporations ⇐217(5)

A civil service board may not deny an employee the right to advance one rank by means of a promotional examination because he will not be able to be promoted to a still higher rank.

9. Mandamus ⇐168(4)

Evidence *held* to establish that duties of senior account clerk, as related to the lower

position of intermediate account clerk, were such that the superior position was promotional from the inferior one under city charter provision requiring civil service board to provide, where practicable, that vacancy shall be filled by promotional examination from members of next lower rank established by board.

10. Municipal corporations ⇐217(5)

City civil service board cannot substitute its present opinion on issue whether one position is promotional from another position in the classified service in place of the board's prior official description of the duties of the two positions, without any prior action changing the description of those duties, under city charter provision requiring board, where practicable, to fill all vacancies by promotional examinations.

11. Municipal corporations ⇐217(5)

In order that one position should be "promotional" from another within city charter provision requiring that, where practicable, vacancy shall be filled by a promotional examination, it is not required that the duties of the two positions be identical, but real question is whether duties of the inferior position are such that they reasonably prepare employee for the superior position.

See Words and Phrases, Permanent Edition, for all other definitions of "Promotional Position".

12. Municipal corporations ⇐217(5)

The fact that there were only eight intermediate account clerks and eight senior account clerks in classified service furnished no ground for holding an open examination to obtain an eligible list for position of senior account clerk instead of holding a promotional examination, which would have been limited to the intermediate account clerks under charter provision requiring civil service board to provide in all cases where practicable for filling of vacancies by promotional examinations from next lower rank established by the board, where, when board determined to give open examination, there was but one vacancy in the position of senior account clerk.

13. Municipal corporations ⇐217(5)

The fact that, when a promotional examination is held, none of those in the immediate rank below taking the examination will pass it, conclusively demonstrates that a promotional examination is not "practicable" within city charter provision requiring civil service board to provide, in all cases where practicable, that vacancy shall be filled by a promotional examination from among members of next lower rank.

In Bank.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Mandamus proceeding by Harry Rhodehamel against the Civil Service Board of the City of Oakland and others, to compel the Board to hold a promotional examination to obtain an eligible list for the position of senior account clerk and to terminate the proceedings for an open examination. From a judgment denying his application for a writ of mandate, the petitioner appeals.

Reversed.

For prior opinion, see 109 P.2d 436.

J. Paul St. Sure and Edward H. Moore, both of Oakland, for appellant.

F. B. Fernhoff, City Atty., and John W. Collier, Asst. City Atty., both of Oakland, for respondents.

PER CURIAM.

The appeal in this case was originally heard by the First District Court of Appeal, Division One. Following a decision by that court, a petition for hearing by this court was granted. Consideration of the cause leads us to the conclusion that the appeal was correctly decided by the District Court of Appeal. Its opinion rendered therein, which was prepared by Mr. Presiding Justice Peters, is therefore adopted as the opinion of this court herein. It is as follows:

"Petitioner appeals from a judgment denying his application for a writ of mandate to compel the Civil Service Board of the City of Oakland to hold a promotional examination to obtain an eligible list for the position of Senior Account Clerk, and to terminate proceedings for an open examination, as announced by the Board. Petitioner is an employee in the classified civil service of the city, holding the position of Intermediate Account Clerk. He filed the petition as such employee, and as a resident, taxpayer, and elector of the city, and also as a member and on behalf of all members of the Oakland Municipal Civil Service Association.

"The Oakland Charter, § 77, provides as follows: 'The Board shall provide for promotion in the classified service on the basis of ascertained merit, seniority in service,

and standing upon competitive examination, *and shall provide, in all cases where practicable, that vacancies shall be filled by promotion from among such members of the next lower rank established by the Board* as submit themselves for such examination for promotion. The Board shall certify to the appointing power the names of not more than three applicants having the highest rating for each promotion.' (Italics ours.)

"It is urged by appellant that, under this charter provision, if it is practicable to give a promotional examination the Board has no discretion, but must give such promotional examination; that under the facts of this case it amounted to an abuse of whatever discretion is vested in the Board to order an open examination.

[1-3] "The problem involved in this case is similar to that presented in Allen v. McKinley, Cal.Sup., 117 P.2d 342, this day decided. The charter provisions involved in the two cases are substantially similar. What was said in that case concerning the proper interpretation of such a charter provision need not be repeated in this opinion. Upon the authority of, and for the reasons stated in, Allen v. McKinley, supra, we hold:

"1. That such charter provisions are mandatory.

"2. That in passing on the question as to whether a promotional or an open examination shall be given the Board does not possess an uncontrolled discretion—that if it is practicable to give a promotional examination the Board must give such examination regardless of what its opinion may be as to the relative merits of an open or promotional examination.

"3. That if there are persons in the service who, by reason of their position in the service, possess the qualifications fixed by the Board as a prerequisite to take the examination, the Board may properly ascertain that it is impracticable to give a promotional examination only after those eligible have been given a promotional examination.

[4] "As in Allen v. McKinley, supra, the Board argues that whether it is 'practicable' to fill a vacancy by promotion is confided to the discretion of the Board, and that such discretion is not subject to judicial control. They cite the same cases that were cited by the San Francisco Civil Service Commission in Allen v. McKinley, supra, to the effect that local administrative boards should be permitted to operate with as little interference as possible from the judicial branch of the government. However, as was pointed out in the Allen v. McKinley opinion, supra, local boards such as the one here involved have only such powers as the people see fit to confer upon them. If such local boards exceed or abuse their powers the courts are empowered to prevent such excess or abuse upon the petition of one adversely affected.

"Applying these principles to the facts here involved, and keeping in mind the fact that the trial court in the instant case has decided all controverted questions of fact in favor of the Board, we have no hesitancy in stating that the record herein demonstrates, as a matter of law, that the Board, in a legal sense, abused the limited discretion confided to it by § 77 of the Oakland Charter, supra.

[5] "The evidence shows that pursuant to the powers conferred upon the Board it has classified all positions subject to civil service. Among the classified positions is one known as Intermediate Account Clerk, and another as Senior Account Clerk. On June 2, 1938, one vacancy occurred in the position of Senior Account Clerk. There was no existing eligible list from which that position could be filled. The Board, after several meetings, at which the question as to whether the examination should be open or promotional was discussed, decided to hold an open examination, on the theory that there was no rank, for promotional purposes, next lower to the position of Senior Account Clerk. Admittedly, all those holding the position of Intermediate Account Clerk, as well as many others in the Civil Service, would be eligible to take the examination for Senior Account Clerk.

"There are various factors which demonstrate that the Board abused the limited discretion vested in it. In the first place, the title 'Intermediate Account Clerk' tends to indicate that such position is of the same type, but lower in rank, to that of 'Senior Account Clerk'. In the second place, evidence shows that each position has three salaries attached to it. For the position of Intermediate Account Clerk these salaries are $140, $150, and $160 a month, depending upon merit and length of service. For the position of Senior Account Clerk the three salaries are $160, $170, and $185 per month. This again tends to show that one position is the next advanced position from the other.

"In the third place, the evidence shows that, in addition to classifying the positions, the Board has officially described the two positions. Thus, the two positions have been described officially by the Board as follows:

"'Intermediate Account Clerk:

"'Under direction, to do clerical work of average difficulty involved in the keeping and certifying of financial and other office records, and the handling of office routine; to interview callers; and to do other work as required.

"'Senior Account Clerk:

"'Under direction, to do difficult clerical work involved in auditing, keeping, and certifying financial records; and to do other work as required.'

"The 'typical duties' officially described by the Board are quite lengthy, and no useful purpose would be served by setting them forth in this opinion. Suffice it to say that an examination of such duties shows that they are quite similar, the differences being such as would be anticipated by reason of the higher salary of the superior position. This same conclusion follows from a consideration of the minimum qualifications officially fixed by the Board for each position. They are as follows:

"'Intermediate Account Clerk:

"'Either (1) education equivalent to that represented by completion of the twelfth grade, and two years of clerical or other office experience, or (2) some other combination of education and clerical experience of equal or greater value; good knowledge of modern office methods and ability to operate modern office appliances; ability to understand and carry out oral and written directions; arithmetical aptitude; accuracy in computing and posting figures; resourcefulness; accuracy; good penmanship; orderliness; integrity; good address; and good judgment.

"'Senior Account Clerk:

"'Either (1) education equivalent to that represented by completion of the twelfth grade, including a standard course in bookkeeping and three years experience as a bookkeeper, or (2) some other combination of education and experience of equal or greater value; knowledge of double and single entry bookkeeping and the keeping of financial accounts and records; intimate knowledge of accepted accounting principles and methods; skill in the operation of computing machines and other office appliances; accuracy in computing and posting figures; good penmanship; integrity; orderliness; and good business judgment.'

"In the fourth place, the evidence shows that previously the Board had given a promotional examination for the position of Assistant Supervising Officer, a position more advanced and carrying a higher salary than Senior Account Clerk, and that Intermediate Account Clerks were permitted to take that promotional examination.

"From this evidence there can be no doubt that appellant presented to the trial court a prima facie case of abuse of discretion. From this evidence but one conclusion can be reached, namely, that the positions of Intermediate Account Clerk and Senior Account Clerk present a plain instance of positions in a regular line of promotional progression, and that before an open examination may be given to create an eligible list for the superior position, under § 77 of the charter, supra, those in the next lower rank are first entitled to take a promotional examination.

[6] "In support of its determination that a promotional examination was not 'practicable', and in an attempt to meet the prima facie case of appellant, the Board offered the testimony of T. G. Stahlberg, secretary and chief examiner of the Board, and of Harold C. Holmes, Jr., president of the Board. They both frankly admitted that two of the factors that motivated the Board in its determination were that, in the opinion of the Board, a better man would be secured by an open examination than would be secured by a promotional examination because a larger group would take the examination; and that, if the position of Intermediate Account Clerk were established as the position next lower in rank to that of Senior Account Clerk, there were still higher positions above Senior Account Clerk for which such intermediate clerks would not be eligible. In the opinion of the Board, therefore, Intermediate Account Clerks should not be permitted to take a promotional examination for Senior Account Clerk because that would be as high as they could go. This second factor was frequently referred to by both witnesses and obviously was one of the major factors that led the Board to determine to give an open examination. At the time of the oral argument counsel for respondents conceded that neither, or both, of these factors 'standing alone' constitute a lawful justification for the action of the Board.

"This concession is in accordance with the law. The question as to whether better employees will be secured by open or promotional examinations is one of policy. The people of the city of Oakland have settled that question of policy and have taken its determination from the Board by § 77 of the charter, supra. They have determined, as a matter of policy, that, in the long run, better employees will be secured, and higher efficiency promoted, by a system of promotional examinations. That is a question of legislative and not administrative or judicial policy. Neither the Board nor this court, whatever its opinion as to the merits of that policy may be, is empowered to substitute its opinion for that of the people as set forth in the charter.

[7, 8] "The second reason—that Intermediate Account Clerks could not take promotional examinations for positions higher than that of Senior Account Clerk—obviously should not have been considered by the Board. If a civil service board may deny an employee the right to advance one rank by means of a promotional examination because he will not be able to be promoted to a still higher rank, it can deny the right to all promotional examinations. Obviously, only a very few are qualified for the highest positions, but that is no reason for denying the employee the opportunity to rise as far as his ability and training will permit him. It is obvious that these two factors, therefore, cannot be relied upon as a lawful justification for the action of the Board.

[9-11] "Stahlberg and Holmes also testified that in their opinion the duties of the two positions were such that one was not promotional from the other. In fact, in their answer in the trial court the respondents pleaded that there is no position in the classified service which affords sufficient training to make the position of Senior Account Clerk promotional from a lower rank. This contention, if sustained, would mean that the names given to the positions of Intermediate and Senior Account Clerks were misnomers. It would also mean that the Board would be justified in substituting its present opinion in place of the description of the duties of the two positions as officially set forth by the Board itself without any action by the Board in changing the description of those duties. We think the evidence demonstrates that the duties are such that the superior position is promotional from the inferior one, and that the 'opinion' of the secretary and president finds no support in the record. It must be remembered that for one position to be promotional from the other it is not required that the duties of the two be identical. The real question is whether the duties of the inferior position are such that they reasonably prepare the employee for the superior position. On that question the evidence is clear and uncontradicted. The duties of Intermediate Account Clerk are so related to those of Senior Account Clerk, as those duties are officially described by the Board, that the former is clearly preparatory for the latter.

[12, 13] "The only other reason given by respondents to support the judgment, is that the Board considered the fact that, if the examination were limited to Intermediate Account Clerks, there was a possibility of not obtaining an eligible list large enough to fill all possible vacancies which might occur in the position of Senior Account Clerk during the two years that such eligible list would remain in effect. There were eight Intermediate Account Clerks, and eight Senior Account Clerks in the service during the times here involved. At the time the Board determined to give an open examination there was one vacancy in the position of Senior Account Clerk. The exact number of vacancies that would occur could not be fixed by the witnesses, but one of them stated that perhaps there would be three or four during the two-year period. It is conceivable, of course, that, if all eight Intermediate Account Clerks took a promotional examination, all eight would pass. If so, for all practicable purposes, the number on the list would be far in excess of the anticipated number of vacancies. It may be that if a promotional examination is held, none of the Intermediate Account Clerks will pass it. If so, that would conclusively demonstrate that a promotional examination is not 'practicable', and that an open one is required. But, until the promotional examination is given, it rests in mere guess or conjecture as to the number that will pass it.

"The appellant having presented a prima facie case that a promotional examination is practicable, and the Board having failed to offer a lawful reason why such an examination should not be held, it must be held that, as a matter of law, an abuse of discretion has been shown."

The judgment is reversed.

18 Cal.2d 647

SAN BERNARDINO COUNTY v. WAY, County Surveyor.

L. A. 17869.

Supreme Court of California.

Sept. 30, 1941.

1. Municipal corporations ⇐871

In determining whether an appropriation of public funds is a "gift" within constitutional provision denying legislature power to authorize any political corporation to make a gift of public money or thing of value, the primary and fundamental subject of inquiry is as to whether the money is to be used for a public or private purpose, and if it is for a public purpose, it is not, generally speaking, a gift. Const. art. 4, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

2. Counties ⇐57
Municipal corporations ⇐103
Schools and school districts ⇐60

The findings by legislative bodies of the county, city and school districts in which land involved lay that cancellation of delinquent general taxes as part of refunding plan of road improvement district was required by the public interest were not conclusive but were entitled to considerable weight. St.1935, p. 2023, as amended.

3. Counties ⇐153½
Municipal corporations ⇐871
Schools and school districts ⇐90

The mere fact that property owners and bondholders incidentally benefit from a refunding plan of road improvement district involving the cancellation of delinquent general taxes does not render the cancellation invalid as a "gift" of public money or thing of value. St.1935, p. 2023, as amended; Const. art. 4, § 31.

4. Municipal corporations ⇐871

So far as constitutional prohibition against empowering political corporations to make a gift of public money or thing of value is concerned, no effective distinction can be made between the contribution of tax moneys after collection and the contribution of the taxes themselves. Const. art. 4, § 31.

5. Counties ⇐153½
Municipal corporations ⇐871
Schools and school districts ⇐90

The section of Refunding Assessment Bond Act authorizing cancellation of delinquent taxes in connection with refunding plan of road improvement district was for a "public purpose" and is not unconstitutional as authorizing a "gift" of public money or thing of value for a private purpose. St. 1935, p. 2023, as amended; Const. art. 4, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Purpose".

6. Taxation ⇐40(12)

A remission of taxes is invalid under the constitutional provision that all property shall be taxed in proportion to its value. Const. art. 13, § 1.

7. Taxation ⇐40(12)

Where plan for refunding indebtedness of road improvement district provided for surrender of outstanding bonds and coupons at 33⅓ cents on the dollar and the cancellation of all assessments levied for payment of such bonds, the cancellation of delinquent general taxes on lands in the district as authorized by statute is not unconstitutional as a "remission" of taxes which implies forgiveness or a voluntary relinquishment of a claim or part thereof, without any consideration therefor. St.1935, p. 2023, as amended; Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Remission".

8. Taxation ⇐40(8, 12)

The word "taxation" as used in the constitution embraces both assessment and collection, and both the levy of taxes and the collection thereof must be uniform and equal. Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Taxation".

9. Taxation ⇐40(1)

It is the purpose of uniformity of taxation that all property in the state carry its fair burden and contribute its just amount in taxation to the support of the various public bodies which levy taxes. Const. art. 13, § 1.

10. Constitutional law ⇐229(3)
Taxation ⇐37

The section of statute authorizing the cancellation of delinquent general taxes in connection with plan to refund indebtedness of special assessment districts is not unconstitutional as contrary to the "equal protection of the law" clauses of state or federal

Constitution. St.1935, p. 2023, as amended; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

11. Constitutional law ⇐209

The "equality" guaranteed by the state and federal Constitutions is equality under the same conditions and among persons similarly situated. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Equality".

12. Constitutional law ⇐211

The general rule that classification must not be arbitrary, but must be based upon some difference in the classes having a substantial relation to the purpose for which the legislation is designed rests upon the constitutional interpretation that the equality guaranteed is equality under the same conditions and among persons similarly situated. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

13. Constitutional law ⇐229(3)
Taxation ⇐37

The peculiar financial exigencies of ad valorem tax and assessment districts furnished a reasonable basis for the legislature's selection of such districts as the subjects of remedial legislation exemplified by the Refunding Assessment Bond Act. St.1935, p. 2023, as amended; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

14. Constitutional law ⇐211

A discrimination is not "arbitrary" where founded on sound reasons of public policy. Const.Cal. art. 1, § 13; U.S.C.A. Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Arbitrary".

15. Constitutional law ⇐229(3)
Taxation ⇐37

The provision of the Refunding Assessment Bond Act authorizing cancellation of delinquent general taxes as part of plan to refund indebtedness of ad valorem tax and assessment districts does not discriminate against nondelinquent taxpayers who are to receive credits for ad valorem special assessments paid by them and with others will be relieved of danger from pyramiding assessment levies. St.1937, p. 1679, § 7; Const. Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

16. Statutes ⇐95(3)

The provision of the Refunding Assessment Bond Act is not unconstitutional as "special or local legislation" because it is limited in application to cancellation of taxes in ad valorem assessment and taxing districts only. St.1935, p. 2023, as amended; Const. art. 4, § 25.

See Words and Phrases, Permanent Edition, for all other definitions of "Special or Local Legislation".

17. Statutes ⇐67

The requirement of "general laws" and the prohibition of "special laws" do not prevent reasonable classification. Const. art. 4, § 25.

See Words and Phrases, Permanent Edition, for all other definitions of "General Law" and "Special Law".

18. Statutes ⇐66

Classification must not be made arbitrarily for the mere purpose of classification, but must be based upon some distinction, natural, intrinsic or constitutional which suggests a reason for and justifies classification. Const. art. 4, § 25.

19. Statutes ⇐68

If the class itself is germane to the purpose of the law, and the individual components of the class are characterized by substantial qualities or attributes which suggest the need for and propriety of the legislation, a law is "general" despite the fact that it operates only upon a class of individuals or things if it applies equally to all persons or things within the class to which it is addressed. Const. art. 4, § 25.

20. Constitutional law ⇐45
Statutes ⇐66

The legislature has a broad discretion in the exercise of its power to classify, and the legislative classification will not be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason. Const. art. 4, § 25.

21. Evidence ⇐25

The conditions existing in ad valorem assessment and taxing districts that resulted in the passage of the Refunding Assessment Bond Act are matters of common knowledge, to be judicially noticed. St.1935, p. 2023, as amended.

22. Evidence ⇐5(2), 23(1)

In determining the need and propriety of classificatory legislation, where the need does not appear on the face of the enactment, the court may judicially notice contemporaneous conditions, the situation of the people, the existing economic, sociological and

civil policy of the state and all other matters of common knowledge.

23. Statutes ⇐95(4)

The provision of the Refunding Assessment Bond Act is not unconstitutional as a "special law" because reclamation districts, irrigation districts and districts under the Improvement Bond Act of 1915 are not included within its scope. St.1915, p. 1441; St.1935, p. 2023 as amended; Const. art. 4, § 25.

24. Constitutional law ⇐70(3)

The policy of legislation and the wisdom of legislature in determining the scope thereof are not the concern of the courts.

25. Statutes ⇐68

If good ground for the classification exists, such classification is not void because it does not embrace within it every other class which might be included. Const. art. 4, § 25.

26. Statutes ⇐95(4)

The provision of the Refunding Assessment Bond Act properly made applicable to ad valorem assessment and taxing districts only, applies equally and uniformly to all persons and things falling within the designated class and is not unconstitutional as "special legislation". St.1935, p. 2023, as amended; Const. art. 4, § 25.

27. Constitutional law ⇐143

Laws in existence at time of issuance of municipal bonds, under the authority of which such bonds are issued, enter into and become a part of the contract to such an extent that the obligation of the contract cannot thereafter be impaired or fulfillment of the bond obligation hampered or obstructed by a change in such laws. Const.Cal. art. 1, § 16; U.S.C.A.Const. art. 1, § 10.

28. Constitutional law ⇐168

Nothing is more material to the obligation of a contract than the means of enforcement, and the ideas of validity and remedy are therefore inseparable and both are parts of the obligation which is guaranteed by the Constitution against impairment. Const.Cal. art. 1, § 16; U.S.C.A.Const. art. 1, § 10.

29. Constitutional law ⇐168

A contract obligation is not "impaired" by a change of law unless such alteration deprives a party of a substantial right or remedy. Const.Cal. art. 1, § 16; U.S.C.A. Const. art. 1, § 10.

See Words and Phrases, Permanent Edition, for all other definitions of "Impair".

30. Constitutional law ⇐154(1)

If, notwithstanding the modification of a law, the party can enforce his rights with substantially the same degree of effectiveness as before, his contract rights have not been violated. Const.Cal. art. 1, § 16; U.S. C.A.Const. art. 1, § 10.

31. Courts ⇐107

Expressions in opinion of the court must be read with the context and in view of the issue presented.

32. Constitutional law ⇐143
Taxation ⇐37

Where no bond issues of the county, city or school districts were in default, and each of such taxing units had a continuing power to levy taxes upon all property within its boundaries for payment of its bonds, the provisions of the Refunding Assessment Bond Act authorizing the cancellation of delinquent taxes levied upon land within a road improvement district the indebtedness of which is to be refunded and the cancellation pursuant thereto of all taxes for the fiscal years prior to 1939–1940 do not invade the substantial rights of the general obligation bondholders' contract. St.1935, p. 2023, as amended; Const.Cal. art. 1, § 16; U.S.C. A.Const. art. 1, § 10.

33. Constitutional law ⇐143
Municipal corporations ⇐907

Where bondholders' right to security of delinquent taxes is without value, its elimination as a feature of consideration in a settlement plan authorized by subsequent legislation to relieve pressing financial conditions existing in certain districts does not constitute an "impairment" of the bondholders' contract so as to defeat such legislation. St.1935, p. 2023, as amended; Const.Cal. art. 1, § 16; U.S.C.A.Const. art. 1, § 10.

See Words and Phrases, Permanent Edition, for all other definitions of "Impairment".

34. Constitutional law ⇐137

Upon the vesting of bonds in connection with assessment proceedings there arises between the state or its agency and the taxpayers certain contractual obligations which must be respected by any subsequent legisla-

tion or by any action by public officials. Const.Cal. art. 1, § 16; U.S.C.A.Const. art. 1, § 10.

35. Constitutional law ⇐137

A subsequent statute that operates in any way to the prejudice of taxpayers' contract arising from voting of bonds in connection with assessment proceedings cannot stand. Const.Cal. art. 1, § 16; U.S.C.A. Const. art. 1, § 10.

36. Constitutional law ⇐137
Taxation ⇐37

The cancellation of general taxes on lands within road improvement district pursuant to Refunding Assessment Bond Act as a part of plan to refund the indebtedness of road district whose indebtedness was so great that only 12 of 182 parcels of land were current in tax payments and five-sixths of remainder had been forfeited to the state without redemption or sales to third persons would be for benefit of taxpayers by reduction of the district's indebtedness and restoration of lands to tax rolls, so that the act and the plan do not impair the obligation of taxpayers' contract. St.1935, p. 2023 as amended; Const.Cal. art. 1, § 16; U.S.C.A. Const. art. 1, § 10.

37. Constitutional law ⇐137

Where the change made in existing law by legislation redounds to the material advantage of the taxpayers, there is no "impairment" of the taxpayers' contract rights. Const.Cal. art. 1, § 16; U.S.C.A.Const. art. 1, § 10.

38. Mandamus ⇐117

Where county surveyor wrongfully refused to make and prepare a diagram of the property within a road improvement district and a reassessment for purpose of refunding the outstanding indebtedness of the district as ordered by the board of supervisors, mandamus would issue to compel compliance with such order. St.1935, p. 2023, as amended.

HOUSER, J., dissenting.

In Bank.

Original proceedings in mandamus by County of San Bernardino to compel Howard L. Way, County Surveyor, to prepare a diagram of the property within a road improvement district and a reassessment for purpose of refunding the outstanding indebtedness of the district as ordered by the board of supervisors.

Peremptory writ directed to issue.

Jerome B. Kavanaugh, Dist. Atty., and Albert E. Weller, Chief Deputy Dist. Atty., both of San Bernardino, and O'Melveny & Myers, James L. Beebe, and Ray H. Lindman, all of Los Angeles, for petitioner.

Clyde C. Woodworth, of South Gate, for respondent.

CURTIS, Justice.

The petitioner, the County of San Bernardino, filed in this court its petition for a writ of mandamus to compel the respondent county surveyor to prepare a diagram of the property included within Road Improvement District No. 38 of the County of San Bernardino, and to make an assessment, both as provided by the Refunding Assessment Bond Act of 1935. Stats.1935, p. 2023, as amended Stats.1937, p. 1675; Stats.1938, Ex.Sess., p. 73; Stats.1939, p. 1637.

Road Improvement District No. 38 was organized in 1927 under the provisions of the Road Improvement District Act of 1907, Stats.1907, p. 806, as revised Stats.1921, p. 312, amended Stats.1925, p. 327. The district lies entirely within unincorporated territory of the County of San Bernardino except for a shoestring strip of City of San Bernardino territory running through the district and connecting the city proper with a portion of the city water system. Bonds of the district were issued in the principal sum of $81,400, bearing interest at the rate of 6 per cent per annum. They were issued to mature $4,070 annually in the years 1928 to 1947, inclusive. The outstanding bonded indebtedness of the district as of June 10, 1940, was $88,753.04, of which amount $65,120 was principal and $23,633.04 was interest. The outstanding bonds are payable from special assessments levied annually in accordance with the assessed value of the land; and the amount of unpaid assessments heretofore levied to pay the principal and interest of these bonds is in excess of $50,000. The assessed valuation of taxable land in the district for the fiscal year 1940-1941 was $36,950. Of the 182 parcels of land in the district, only 12 were current in the payment of general taxes and special assessments in 1940-1941. Property once delinquent has remained so in every subsequent year, with the result that the percent-

age of tax delinquencies has increased annually to reach the present figure of ninety-three per cent.

The instant refunding proceeding was commenced by the adoption by the board of supervisors of the County of San Bernardino on the 10th day of June, 1940, of a resolution declaring its intention to refund the outstanding indebtedness of Road Improvement District No. 38, pursuant to the provisions of the Refunding Assessment Bond Act of 1935, as amended. The resolution set forth that the consent of the council of the City of San Bernardino had been obtained, in compliance with the statutory requirements governing a district embracing both incorporated and unincorporated territory. The plan proposed by said resolution provided for the settlement of the obligations of the road improvement district in the following manner: (1) all unpaid ad valorem assessments levied for payment of bonds of the district would be cancelled; (2) the outstanding bonds and interest coupons of the district would be surrendered and cancelled; (3) all delinquent general taxes upon land in the district for the fiscal years prior to 1939-1940, amounting to $10,678.77, would be contributed to assist in the refunding of the indebtedness of the district and cancelled, pursuant to section 1.1 of the Refunding Assessment Bond Act of 1935, as amended, Stats.1939, p. 1637; and (4) a refunding assessment in the amount of $30,000 would be levied and refunding bonds maturing over a period of ten years would be issued in settlement of the unpaid outstanding bonds of the district. It is further recited in said resolution that the legislative bodies of the County of San Bernardino, the City of San Bernardino, City of San Bernardino Elementary School District and High School District, and the San Bernardino Valley Union Junior College District have agreed to the cancellation of the delinquent general taxes aforementioned and have by resolution determined that the public interest and necessity require the contribution and appropriation of such delinquent taxes. The resolution of intention fixed a time and place when and where any objections against the proposed refunding plan might be made by any person interested or by any owner of property within said district. At the time fixed for the hearing of said matter, no protest or objection having been made to the proposed refunding plan and the written consent of the owners of more than fifty per cent of the land in the district having been filed, it was ordered by the board of supervisors of said county that the refunding of the outstanding indebtedness of said district be made in accordance with said resolution of intention. It was further ordered at said hearing that the county surveyor of said county make a diagram of the property upon which a reassessment was to be levied and prepare a reassessment for the purpose of refunding the outstanding indebtedness of said district in accordance with said proposed refunding plan and in pursuance of the provisions of the Refunding Assessment Bond Act of 1935, as amended. The state controller of the state of California gave his written consent to the appropriations and contributions of the delinquent general taxes made by the respective legislative bodies above mentioned, upon condition that the statutory authority governing this particular procedure be adjudicated valid and constitutional before cancellation of these taxes is made. The county surveyor refused to comply with the aforementioned order of the board of supervisors, and this proceeding was instituted for the purpose of compelling compliance on the part of the county surveyor with said order.

Respondent concedes that the reassessment proceedings were in conformity with the requirements of the Refunding Assessment Bond Act of 1935, as amended. The several grounds assigned by respondent for his refusal to perform the duties imposed upon him by the statute are concerned entirely with the constitutionality of section 1.1 of the act, added in 1939. Stats.1939, p. 1637. In determining the validity of this section, which provides for the cancellation of delinquent taxes as a contribution to aid in the refunding of the indebtedness of a special assessment district, we shall consider the various legal questions raised in the application for this writ and the respondent's demurrer thereto in the order of their presentation.

[1] The first point urged by respondent is that section 1.1 violates article IV, section 31, of the Constitution of this state, which denies to the legislature the power to authorize any county, city or other political corporation to make a gift or donation of "public money or thing of value" to any person or individual. Respondent contends that the general taxes which are proposed to be cancelled in this refunding

proceeding are things of value within the meaning of this constitutional provision, and that the cancellation constitutes a gift to the private owners of the property or the holders of bonds of this Road Improvement District No. 38, or both. In support of his argument that legislation authorizing the cancellation of a tax which has become due and payable, is invalid, respondent cites Estate of Stanford, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L.R.A. 788, and like inheritance tax cases, wherein it was held that the right to such tax vests in the state at the date of the taxable transfer, and that the legislature cannot by subsequent acts reduce the rate of taxation thereon, for the reason that to do so would in effect be a gift of the property of the state to the extent of the reduction, in violation of the inhibition of the Constitution. Such cases, being concerned simply with an attempted remission of taxes to private parties, have no application to this proceeding, wherein petitioner relies upon the public purpose of the instant reassessment plan to overcome the constitutional objection advanced here by respondent. Pertinent to this phase of our discussion is the following language from County of San Diego v. Hammond, 6 Cal.2d 709, 721, 59 P.2d 478, 484, 105 A.L.R. 1155, wherein this same provision of the state Constitution was unsuccessfully urged in opposition to the proposed use of county funds in special assessment district refunding: "It is well settled that in determining whether any appropriation of public funds is to be deemed a gift, 'The primary and fundamental subject of inquiry is as to whether the money is to be used for a public or a private purpose. If it is for a public purpose * * * it is not, generally speaking, to be regarded as a gift.' City of Oakland v. Garrison, 194 Cal. 298, 302, 228 P. 433, 434."

[2-5] From the foregoing statement of facts in this case, it appears that the bonded indebtedness of the road improvement district alone was as of June 10, 1940, almost two and one-half times the assessed valuation of the land in the district. Delinquent general taxes and special assessments were approximately one and two-thirds times the amount of the assessed valuation of the property. This condition of affairs, supporting petitioner's assertion that the land in this district is unable to carry such burden of taxes and assessments, undoubtedly prompted the county board of supervisors to initiate proceedings under the Refunding Assessment Bond Act of 1935, as amended, to refund said bonded indebtedness and to restore the delinquent tax property to the tax roll. Accordingly, the legislative bodies of the county, the city and the school districts in which the land lies, found by appropriate resolution, pursuant to the provisions of section 1.1 governing the circumstances under which the cancellation of delinquent general taxes may be made to assist a particular refunding plan, that the public interest and necessity require the contribution of such delinquent taxes, that the general interest of the respective public corporations will be served and promoted by the contribution, and that the refunding of the indebtedness of the road improvement district will tend to restore property in this road improvement district to the tax roll or keep it upon the tax roll, and will tend to promote the improvement and development of property in such road improvement district. The combined declarations of these legislative bodies, while perhaps not conclusive, are entitled to considerable weight in substantiating the public purpose of these taxing units' cancellation of all unpaid general taxes for fiscal years prior to 1939-1940, amounting to $10,678.77, in aid of the settlement plan proposed. The mere fact that the property owners and bondholders incidentally benefit from the scheme does not, under the cases of County of Los Angeles v. Jones, 6 Cal.2d 695, 706, 59 P.2d 489, and County of San Diego v. Hammond, supra, 6 Cal.2d at page 726, 59 P.2d 478, 105 A.L.R. 1155, render the contribution invalid. In these last-named cases, wherein the conditions in ad valorem special assessment districts sufficient to justify the appropriation of public funds in refunding proceedings were reviewed, it was held that a public purpose is served by the restoration of delinquent property to the tax roll, and the same point raised here by respondent under a similar factual situation involving like legal principles is controlled by these decisions. So far as the gift clause is concerned, there can be no effective distinction between the contribution of the tax moneys after collection and the contribution of the taxes themselves. Since under the circumstances shown to exist here, the aforesaid public bodies could have made a cash contribution

in furtherance of the refunding proceeding under the law as established in the Jones and Hammond cases, supra, without violating section 31 of article IV of the Constitution of this state, it necessarily follows that their contribution by cancellation of the delinquent general taxes aforementioned must likewise be deemed for a public purpose, and the contention of respondent that section 1.1 is unconstitutional in that it authorizes or permits the appropriation of public funds for a private purpose cannot be sustained.

Respondent next invokes section 1 of article XIII of the Constitution of this state, commanding that "all property in the State * * * shall be taxed in proportion to its value". It is respondent's position that the cancellation of taxes authorized by section 1.1 operates as a remission, which is not permitted under uniformity of taxation, as article XIII, section 1, of the state Constitution has been construed to require. Wilson v. Supervisors of Sutter County, 47 Cal. 91.

[6, 7] That a remission of taxes is invalid under the Constitution of this state is not debatable. To permit such procedure would tend to promote tax delinquency and would result in great uncertainty in the collection of public revenues. However, in the present case the contribution of taxes by way of cancellation does not constitute a remission, which term implies forgiveness or voluntary relinquishment of a claim, or part thereof, without any consideration therefor. See 54 C.J. 106; Kilgore Lumber Co. v. Thomas, 95 Ark. 43, 48, 128 S.W. 62, 64; Gambell v. Irvine, Mo.App.1937, 102 S.W.2d 784, 790. In the instant proceeding the bondholders of the road improvement district have, in effect, agreed with the various legislative bodies of the county, city and school districts entitled to the general taxes in question that, in consideration of the proposed cancellation, the said bondholders will surrender their bonds and interest coupons at something less than 33⅓ cents on the dollar and that all of the assessments levied for the payment of their bonds may be cancelled. Thus, the reduction of the indebtedness of the district furnishes the consideration for the cancellation. This distinct factual situation nullifies the force of respondent's argument based on cases from other jurisdictions wherein, under constitutional provisions similar to ours, legislative enactments relating to the remission of taxes upon tax delinquent property were held to run counter to the rule of uniformity. State ex rel. Richards v. Armstrong, 17 Utah 166, 53 P. 981, 41 L.R.A. 407; State of Minnesota ex rel. Matteson v. Luecke, 194 Minn. 246, 260 N.W. 206, 99 A.L.R. 1053; State v. O'Quinn, 114 Fla. 222, 154 So. 166; Richey v. Wells, 123 Fla. 284, 166 So. 817. [Parenthetically it might be said here that the Refunding Assessment Bond Act of 1935, as amended, leaves it entirely optional with each bondholder of the road improvement district whether he will retain his old bonds or whether he will avail himself of the rights accorded to him under said refunding proceeding. County of San Diego v. Hammond, supra, 6 Cal.2d at page 719, 59 P.2d 478, 105 A.L.R. 1155].

Neither petitioner nor respondent has referred us to any case wherein was involved the question of cancellation of taxes in connection with a statute providing for a settlement of a bonded indebtedness or tax or assessment obligation of a special district, and apparently there is but little judicial authority on the precise type of legislation here under consideration. However, petitioner does call to our attention several recent decisions wherein the courts of these last-mentioned jurisdictions cited by respondent, as well as those elsewhere, have held that the constitutional requirements that the legislature should provide for a uniform and equal rate of ad valorem taxation upon just valuations of all taxable property, and that all property should be taxed according to these principles, do not forbid the enactment of statutes designed to aid delinquent taxpayers, through sale proceedings and compromise settlements, to retain their land for less than the amount of the original assessments against their property. Logan City v. Allen, 86 Utah 375, 44 P.2d 1085; State ex rel. Equity Farms, Inc., v. Hubbard, 203 Minn. 111, 280 N.W. 9; Messer v. Lang, 129 Fla. 546, 176 So. 548, 113 A.L.R. 1073; Blackford v. Judith Basin County, 109 Mont. 578, 98 P.2d 872, 126 A.L.R. 639. The significance of these cases, arising out of a variety of circumstances dependent upon prevailing local conditions, but concerned primarily with questions of appropriate relief to be afforded former owners of land forfeited to the state for nonpayment of taxes, lies in their common recognition of the necessity for some remedial legislation calculated to

bring about an orderly restoration of forfeited property to the tax rolls as revenue producing assets. Analogous in principle is the present situation, where the increasing delinquencies—of the 182 parcels of land in the district, only 12 are current in tax payments and 170 are delinquent, 157 of the latter number, or over five-sixths of the entire area, having already been forfeited to the state—furnish potent evidence of the overburdened condition of this road improvement district and of the critical need for some readjustment.

[8, 9] It cannot be denied that the word "taxation" as used in the Constitution embraces both assessment and collection, and it would simply flout the rule of uniformity to say that the levy shall be uniform and equal, but the collection may be variable and unequal. But the proposed settlement plan, involving the cancellation of taxes as above outlined, would not operate in a manner inconsistent with the constitutional provision in question. It appears that the taxes in this district have been properly levied, that the taxing authorities have exhausted every means available to collect the full amounts, and that the required pyramiding of taxes and assessments, which scheme necessitates that the levies be made by the district not only for principal and interest due in the current year, but also for past due principal and interest, will result in the property becoming more and more delinquent. Section 1.1 outlines a method of relief for such an aggravated condition and to prevent abuse, this section authorizes cancellation of taxes only after the legislative bodies of the taxing entities concerned have made findings that the public interest and necessity require the contribution, and that the refunding plan will tend to restore property in the assessment district to the tax roll or keep it upon the tax roll. It is the purpose of uniformity of taxation that all property in the state carry its fair burden and contribute its just amount in taxation to the support of the various public bodies which levy taxes. The statute under discussion promotes this policy by providing a means for the restoration of delinquent property to an active taxpaying basis, producing a substantial benefit not only to the former owner, who again enters the ranks of a taxpayer, but also helping to a pro rata extent every other taxpayer because of his re-entry in that role. Under the settlement plan proposed in the instant proceeding the general taxes for 1939-1940 and subsequent fiscal years are expected to be paid, and it is the opinion of the various aforementioned legislative bodies, the bondholders and the property owners interested that if the refunding is accomplished, the refunding assessments and the general taxes thereafter will be paid. From these considerations it is manifest that section 1.1 of the Refunding Assessment Bond Act of 1935, as a settlement section, whose purpose is to furnish an effective means whereby delinquent property might be returned to the tax roll and bear its proper share of the tax burden, is in nowise repugnant to the provisions of article XIII, section 1, of the state Constitution.

[10-15] Likewise without merit is respondent's contention that section 1.1 contravenes the requirement of equal protection of the laws embodied in both the state and federal Constitutions. Const.Cal. art. 1 § 13; U.S.C.A.Const. Amend. 14. The equality guaranteed is equality under the same conditions, and among persons similarly situated. Upon this well-settled interpretation is predicated the general rule that the classification must not be arbitrary, but must be based upon some difference in the classes having a substantial relation to the purpose for which the legislation is designed. An examination of the instant factual situation convinces us that the peculiar financial exigencies of these ad valorem tax and assessment districts furnished a reasonable basis for the legislature's selection of this single class of property as the subject of the particular remedial legislation under consideration. A discrimination is not arbitrary, of course, where founded on sound reasons of public policy; so that our determination earlier in this opinion, under authority of County of Los Angeles v. Jones, supra, 6 Cal.2d at pages 704-707, 59 P.2d 489, and County of San Diego v. Hammond, supra, 6 Cal.2d at pages 720-727, 59 P.2d 478, 105 A.L.R. 1155, that the refunding plan here contemplated is for a public purpose assumes additional importance at this point of our discussion. This identical question was treated in State ex rel. Equity Farms, Inc., v. Hubbard, supra, wherein the Supreme Court of Minnesota, in sustaining the validity of a statute relating to the repurchase of land after forfeiture to the state for nonpayment of taxes, said at page 118, 203

Minn., at page 11 of 280 N.W.: "Any classification is permissible which has a reasonable relation to some permitted end of governmental action." Furthermore, the provision for cancellation of the general taxes aforementioned as a contribution in the refunding proceeding does not discriminate against the nondelinquent taxpayers, for they, too, derive substantial benefit from the settlement plan in that they will receive credit for the ad valorem special assessments which they have paid (Refunding Assessment Bond Act of 1935, sec. 7, as amended Stats. 1937, ch. 603, pp. 1675, 1679, 1680), and they, like other property owners in the district, will be relieved of any danger from pyramiding assessment levies to pay principal and interest of the road improvement district bonds. These features of section 1.1 render untenable respondent's claim that this legislation is obnoxious to the constitutional requirement of equal protection of the laws.

[16-20] Closely allied to the last-mentioned objection advanced by respondent, but separately discussed by him, is his contention that because section 1.1 is limited in application to the cancellation of taxes in ad valorem assessment and taxing districts only, it conflicts with the provisions of article IV, section 25, of the Constitution of this state, forbidding special or local legislation. It is our opinion that this point is not well taken. The authorities are legion to the effect that the requirement of "general laws" and the prohibition of "special laws" do not prevent reasonable classification. Expressive of this well-established legal principle is the following language from Martin v. Superior Court, 194 Cal. 93, 100, 101, 227 P. 762, 765: "The classification, however, must not be arbitrarily made for the mere purpose of classification, but must be based upon some distinction, natural, intrinsic, or constitutional, which suggests a reason for and justifies the particular legislation. That is to say, not only must the class itself be germane to the purpose of the law, but the individual components of the class must be characterized by some substantial qualities or attributes which suggest the need for and the propriety of the legislation. Subject to these limitations a law is general despite the fact that it operates only upon a class of individuals or things, if it applies equally to all persons or things within the class to which it is addressed. [Citing cases.]" The legislature has a broad discretion in the exercise of its power to classify, and "the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason". Martin v. Superior Court, supra, 194 Cal. at page 101, 227 P. at page 765.

[21, 22] That good and sufficient reason existed for the enactment of section 1.1 is forcefully demonstrated by the peculiar financial straits in which these special assessment and taxing districts were enmeshed because of the pyramiding of the ad valorem special assessments and taxes, and the resulting problems of tax delinquency existent therein have been the subject of recent discussion by this court in County of Los Angeles v. Jones, supra, 6 Cal.2d, at pages 705, 706, 59 P.2d 489, and County of San Diego v. Hammond, supra, 6 Cal.2d at pages 716, 724–726, 59 P.2d 478, 105 A.L.R. 1155. Furthermore, the conditions rampant in these districts and provocative of this legislation are matters of common knowledge, to be noticed judicially. As was stated in Martin v. Superior Court, supra, 194 Cal. at page 102, 227 P. at page 766: "In determining the need and propriety of classified legislation, where the same does not appear upon the face of the legislative enactment, the court may resort to its judicial knowledge of the contemporaneous conditions and situation of the people, the existing economic, sociologic and civic policy of the state, and all other matters of common knowledge."

[23-25] Nor is there any merit to respondent's argument that section 1.1 of the Refunding Assessment Bond Act of 1935 is a special and not a general law because reclamation districts, irrigation districts and districts under the Improvement Bond Act of 1915, Stats.1915, p. 1441, Deering's Gen. Laws, 1915, Act 3932a, are not included within its scope. This criticism goes only to the policy of the legislation in question and the wisdom of the legislature in determining to exclude the aforementioned districts from the benefits of the tax cancellation provision, which considerations are not the concern of the courts. Illustrative of the limited extent of our inquiry in such circumstances is the following observation made

in Heron v. Riley, 209 Cal. 507, 518, 289 P. 160, 165: "If good ground for the classification exists, such classification is not void because it does not embrace within it every other class which might be included."

[26] The classification being permissible, it cannot be denied that section 1.1 purports to, and undoubtedly does, in its operation and effect, apply equally and uniformly to all persons and things falling within the designated class, and such section is therefore not vulnerable to attack as special legislation in violation of the terms of article IV, section 25, of the state Constitution.

Respondent finally urges that section 1.1 contravenes article I, section 10, of the United States Constitution, and article I, section 16, of the California Constitution, in that the cancellation of the delinquent taxes levied for payment of general obligation bonds of the county, city and school districts above named not only impairs the bondholders' contract in respect to their security, but also violates the taxpayers' contractual rights created by the issuance of said bonds. In considering first the rights of the general obligation bondholders as affected by the terms of the assailed legislative enactment, a brief resumé of the pertinent legal principles of constitutional law and their application will facilitate our determination of the merits of the respondent's objection.

[27-29] Laws in existence at the time of the issuance of municipal bonds, under the authority of which such bonds are issued, enter into and become a part of the contract to such an extent that the obligation of the contract cannot thereafter be impaired or fulfillment of the bond obligation hampered or obstructed by a change in such laws. United States ex rel. Von Hoffman v. City of Quincy, 4 Wall. 535, 550, 71 U.S. 535, 550, 18 L.Ed. 403. Nothing is more material to the obligation of a contract than the means of enforcement. The ideas of validity and remedy are therefore inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment. Walker v. Whitehead, 16 Wall. 314, 83 U.S. 314, 317, 318, 21 L.Ed. 357. But a contract obligation is not impaired by a change of law unless such alteration deprives a party of a substantial right or remedy. Sturges v. Crowninshield, 4 Wheat. 122, 17 U.S. 122, 200, 4 L.Ed. 529. This important limitation, defining the character of the rights deemed to be within the protection of the constitutional inhibition under consideration, was approved in the leading case of United States ex rel. Von Hoffman v. City of Quincy, supra, 4 Wall. at pages 553, 554, 18 L.Ed. 403: "It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances."

[30] Consonant with these basic principles, it is manifest that if, notwithstanding a modification of law, the party can enforce his rights with substantially the same degree of effectiveness as before, his contract rights have not been violated. Of the numerous authorities cited by petitioner as illustrative of the doctrine that subsequent legislation not encroaching upon a valuable contractual right is unimpeachable upon constitutional grounds, the following representative list is sufficient to demonstrate the prevailing uniformity of decision upon this point. Davidson v. Town of Kirkwood, 152 Ga. 357, 110 S. E. 154; Ancient Order of United Workmen v. Paragould Special School District No. 1, 143 Ark. 493, 222 S.W. 368; Sitte v. Paulson, 56 N.D. 146, 216 N.W. 344; Board of Com'rs v. C. Lagarde Co., 167 La. 612, 120 So. 25; Hanson v. Burris, 86 Utah 424, 46 P.2d 400.

[31] Obviously at variance with this settled interpretation of the constitutional prohibition under discussion is respondent's argument that any change of law, no matter how trivial, constitutes an impairment of the contract. Furthermore, an examination of the cases upon which respondent relies to support his contention reveals no ruling therein in conflict with the aforementioned principles. Hendrickson v. Apperson, 245 U.S. 105, 38 S.Ct. 44, 62 L.Ed. 178; Moore v. Otis, 8 Cir., 275 F. 747; Moore v. Gas Securities Co., 8 Cir., 278 F. 111; Rorick v. Board of Commissioners of Everglades Drainage

District, D.C., 57 F.2d 1048; State v. Young, 29 Minn. 474, 9 N.W. 737; Martin v. Saye, 147 S.C. 433, 145 S.E. 186. Even a casual reading of these opinions discloses that in each instance the assailed legislation, enacted subsequently to the issuance of the bonds, did violence to the substantial rights of the bondholders in that it directly diminished the material benefits of the earlier law by reducing or diverting to other purposes the valuable security previously pledged for payment of the bonds, and the later law was therefore properly held void to that extent. Typical of these cases is Martin v. Saye, supra, wherein it was held that purchasers of county bonds, issued under a statute providing for the placing by the county treasurer of specified moneys in a special fund and their application solely to the payment of the principal of the bonds as it became due, were justified in relying upon all the provisions of the statute, including those fixing and pledging the security for payment of the bonds, as being part of the contract of sale, and that a subsequent statute attempting, by diversion of the funds, to divest the bondholders of a vested right accruing under the contract, was invalid because of its impairment of the obligation of the contract. Respondent directs our attention to isolated passages of this opinion wherein the court employed certain general language which, severed from the connection in which it was used, might be construed to mean that the materiality of the change of law affecting existing contract rights is of no significance, and that any alteration, however inconsequential, must be condemned. However, such expressions in the opinion of the court must be read with the context and in view of the issue presented, and when so considered, such language is not susceptible of the broad interpretation respondent seeks to assign to it. In this state the soundness of the distinction based upon consideration of whether the change effected by the later legislation is of such character as to impair contractual obligations was recognized and approved in Metropolitan Water District v. Toll, 1 Cal.2d 421, 35 P.2d 519, wherein a statute providing for a different method for securing funds for the payment of interest but not diminishing the value of the bondholders' investment, was declared not to offend the constitutional principle of inviolability of contracts.

[32, 33] In line with the foregoing considerations it becomes important in the instant case to determine whether the cancellation of the delinquent taxes under authority of section 1.1 adversely affects the general obligation bondholders' rights in a material degree so as to constitute an impairment of their contract.

As previously stated in this opinion, section 1.1 authorizes the contribution of all or any part of the delinquent taxes levied upon land lying within the road improvement district, the indebtedness of which is to be refunded. In the present proceeding the contribution and cancellation is to be of all taxes for the fiscal years prior to 1939-1940, including those levied for the payment of the general obligation bonds issued by the county, city and school districts concerned herein. In support of the validity of the reassessment plan petitioner calls attention to the fact that none of these last-named bond issues is in default as to principal or interest, and that each of the taxing units aforementioned has a continuing power to levy taxes upon all property within its boundaries for the payment of principal and interest hereafter coming due. In these circumstances respondent's argument that this proposed modification as to the security will invade the substantial rights of the general obligation bondholders' contract is without foundation, for it is difficult to perceive how said bondholders will sustain any injury by the cancellation of delinquent taxes which are not collectible and which therefore add nothing to the value of said bondholders' contract. Furthermore, it appears that these bondholders will, in fact, be benefited by the present refunding proceeding, for the settlement of the road improvement district's indebtedness will restore the property to the tax roll so that the taxes for 1939-1940 and subsequent years will be paid. No change in the relative status of the taxing units has been made and their continuing power to tax the property in their respective districts protects the bondholders fully as to their security. Although it is indisputable that the bondholders have a right to these delinquent taxes as part of the originally intended security for their bonds, yet where that portion of the security has no actual value its elimination as a feature of consideration in a settlement plan authorized by subsequent legislation for the purpose

of relieving pressing financial conditions existing in certain districts of the state, does not constitute an "impairment" of the bondholders' contract and will not operate to defeat the later statute enacted for the general public interest. Accordingly, it is our conclusion that section 1.1 does not diminish the value of said bondholders' contractual rights by its authorization of the contribution and cancellation of delinquent taxes in these special assessment districts, and its validity in respect to these bondholders cannot be questioned.

[34, 35] The remaining point to be considered involves the effect of the terms of section 1.1 upon the rights of the general taxpayers of the county, city and school districts herein concerned. It is respondent's argument that these taxpayers have contractual rights in the delinquent taxes levied for payment of the principal and interest of the general obligation bonds, and that the cancellation of these taxes under authority of section 1.1 would constitute an impairment of these rights, which are entitled to protection under the aforementioned contract clauses of the federal and state Constitutions. It is the settled doctrine in California that upon the voting of bonds in connection with these assessment proceedings, there arises between the state or its agency and the taxpayers certain contractual obligations which must be respected by any subsequent legislation or by any action on the part of public officials. Peery v. City of Los Angeles, 187 Cal. 753, 767, 203 P. 992, 19 A.L.R. 1044; O'Farrell v. County of Sonoma, 189 Cal. 343, 348, 208 P. 117; Golden Gate Bridge & Highway District v. Filmer, 217 Cal. 754, 757, 21 P.2d 112, 91 A.L.R. 1; Metropolitan Water District v. Toll, supra, 1 Cal.2d at page 429, 35 P.2d 519. Thus, in determining the issue of alleged impairment of the taxpayers' contract, the character of the change effected by the subsequent legislation is of the same controlling force as in the case of the general obligation bondholders' contract heretofore discussed, for if it appears that section 1.1 would operate in any way to the prejudice of the taxpayers, this statute cannot be upheld.

[36, 37] With respect to the instant proceeding, respondent argues that the proposed cancellation of the delinquent taxes will necessitate an additional levy upon all taxable property in the aforementioned county, city and school districts, so that the liability of the taxpayers is correspondingly increased in violation of their contract. It is true that if there were any likelihood that these delinquent taxes could ever be collected, their cancellation would unquestionably be an impairment of the taxpayers' contractual obligation, and such change in derogation of their rights would be subject to constitutional condemnation. But that is not the situation here where it appears that by the cancellation of uncollectible taxes, an important contributing factor in effectuating the settlement of the special assessment indebtedness of the road improvement district, the burden upon the taxpayers will be lightened rather than increased. An examination of the petition herein reveals that this road improvement district's indebtedness is so great that the taxpayers, aside from the faithful 12, are not paying taxes or assessments, and that in a period of delinquency extending over eleven years, not a single parcel of the property has been redeemed nor has a buyer been found for any part of it at a tax sale. That the land and improvements within this road improvement district will be uniformly benefited by the settlement plan has been expressly found by the legislative bodies of the taxing units concerned, as required by the provisions of section 1.1. The instant refunding proceeding, contemplating the reduction of the assessment indebtedness by approximately two-thirds and the cancellation of the aforementioned delinquent taxes prior to the fiscal year of 1939-1940, will restore the delinquent property to the tax roll so that the current and future taxes will be paid with respect to this latter, as well as other land in the road improvement district, and each parcel, rather than merely twelve, will assume its proper share of the tax burden. It is obvious that the taxpayers cannot be prejudiced by any diminution of their obligations. Where the change made in the existing law by the subsequent legislation redounds to the material advantage of the taxpayers, there is no impairment of the taxpayers' contract rights. Metropolitan Water District v. Toll, supra, 1 Cal.2d at page 429, 35 P.2d 519.

[38] None of the objections advanced by respondent against the legality of this refunding proceeding is, in our opinion, well taken. As section 1.1 of the Refunding Assessment Bond Act of 1935, as amended, impairs neither the rights of

the general obligation bondholders nor those of the taxpayers, and as its provisions do not contravene any constitutional inhibition, it must be sustained as a valid legislative enactment. It therefore follows that it is the duty of the respondent to make and prepare a diagram of the property within Road Improvement District No. 38 of the County of San Bernardino, and also to prepare a reassessment for the purpose of refunding the outstanding indebtedness of this district.

Let the peremptory writ issue as prayed for.

GIBSON, C. J., and EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

HOUSER, J., dissented.



47 Cal.App.2d 143

CALDWELL et al. v. ROSENBERG et al.

Civ. 11661.

District Court of Appeal, First District, Division 2, California.

Oct. 3, 1941.

Hearing Denied Dec. 2, 1941.

1. Remainders ⇐14
Wills ⇐634(9), 740(3)

Where will established trust for benefit of beneficiary during her life, and on her death remainder to beneficiary's children "then living", each of beneficiary's children was given a "future interest" or "contingent remainder" which was a present legal or equitable right in the estate, contingent only on their surviving the life beneficiary, and the interest was subject to transfer or assignment, and either of children could waive his entire interest in remainder for sufficient consideration. Civ.Code, § 699.

See Words and Phrases, Permanent Edition, for all other definitions of "Contingent Remainder" and "Future Interest".

2. Remainders ⇐14
Wills ⇐740(3)

Where will established trust for beneficiary during her life with remainder to beneficiary's children "then living", and life beneficiary's son and daughter, desiring that one-half of trust estate should become property of heirs of the one of them who might be deceased at time of life beneficiary's death, agreed to renounce one-half interest in the estate and to carry out the provisions of the agreement, agreement was a valid release, or assignment of each party, the one to the other, of the future interest to take all the remainder in the event that either one would predecease the life beneficiary. Civ.Code, § 699.

3. Action ⇐6

Where will established trust for benefit of beneficiary for life with remainder to beneficiary's children "then living", and son and daughter, desiring that one-half trust estate should become property of heirs of the one of them who might predeceased life beneficiary, agreed to renounce one-half interest in trust estate, and thereafter daughter denied validity of agreement, "actual controversy" which was a proper case for declaratory relief existed, since contingent remainders of life beneficiary's children constituted a present, legal equitable right which parties had right to protect. Code Civ.Proc. § 1060; Civ.Code, §§ 699, 863.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Controversy".

4. Action ⇐6

Where will provided trust for benefit of beneficiary for life, with remainder to beneficiary's children, then living, and beneficiary's son and daughter, desiring that one-half of trust estate should become property of heirs of one of them who might be deceased at life beneficiary's death, renounced one-half interest in estate, and thereafter daughter renounced agreement, a declaratory judgment decreeing that party surviving life beneficiary should hold one-half of trust property in trust for heirs of predeceased child did not prejudice rights of parties, since, if one of children predeceased beneficiary, on death of life beneficiary, surviving child would hold as a constructive trustee for benefit of heirs of deceased child even in absence of judgment.

5. Specific performance ⇐86

If one of parties to a contract providing for the execution of mutual wills fails to execute a will as agreed, potential beneficiary may claim under the contract and may sue for specific performance, or for a sort of

quasi-specific performance if the contracting parties are deceased, on the theory that the party who receives the estate becomes a constructive trustee for intended beneficiaries, in accordance with terms of the contract.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action for declaratory judgment by Cecil Cooke Caldwell and others against Ouida Caldwell Rosenberg and others. From a judgment for the plaintiffs, named defendant appeals.

Affirmed.

Maurice Rose, of Los Angeles, for appellant.

L. W. Wrixon, of San Francisco (Ridley D. Stone, Jr., of Oakland, of counsel), for respondents.

NOURSE, Presiding Justice.

The plaintiffs sued for declaratory relief and had judgment on the pleadings after an order striking out the answer of the defendant Rosenberg on the ground that it tendered no triable issue of fact. Her appeal from the judgment presents a question of law alone—whether the complaint pleaded a cause of action for declaratory relief.

Plaintiff Cecil Cooke Caldwell and defendant Rosenberg are brother and sister, the two children of Mary S. Caldwell. The latter is a niece of Hannah N. Haviland, deceased. The latter by will devised an estate in trust for the benefit of Mary S. Caldwell during her life, the remainder to "vest in and become the property of the children of said Mary S. Caldwell, then living, share and share alike". The trustee (which is named as a party defendant, but does not appear) took possession of the property following the death of the testator in 1919, and has continued to administer the trust in accordance with the terms of the will. In September, 1925, the brother and sister executed a contract in writing referring to the trust created by the will and reciting:

"We are both married and have children and it is our desire that in case one of us should die before our mother that our family receive our portion of this trust fund rather than that the entire fund go to the one living at the time of our mother's death.

"We therefore enter into this agreement and declare it our wish that one half of the aforementioned estate become the property of the heirs of the one of us who may be deceased at the time of our mother's death.

"We each of us therefore renounce one half interest in this estate and declare and promise to each other that we will carry out the provisions of this agreement."

Within one year preceding the commencement of the action in July, 1940, defendant Rosenberg declared to plaintiff Cecil Caldwell that the said agreement was invalid, that she no longer considered herself obligated by the provisions of the agreement but that she would, in the event that said plaintiff should predecease the life beneficiary, claim the entire estate in her own right free of trust.

The trial court's judgment sustained the validity of the agreement and held each party bound by its terms to hold one-half of the trust property received by him or her upon the death of the life beneficiary for the benefit of the heirs of the other party, in the event that either party should have predeceased the life beneficiary.

The appellant states two grounds in her attack upon the judgment: (1) whether the facts pleaded disclose an actual controversy within the meaning of section 1060 of the Code of Civil Procedure, and (2) whether either party is obligated under the terms of the agreement to hold the property in trust for the heirs of the other.

[1, 2] The first question must be answered in the affirmative. By the terms of the will each party was given a future interest, whether vested or contingent we need not decide, but in any event an interest, or estate, which may pass by "succession, will, and transfer, in the same manner as present interests". Section 699, Civil Code. At the time the agreement was executed each party held a future interest, or a contingent remainder as they term it, which was a present legal or equitable right in the estate, contingent only upon their surviving the life beneficiary. This estate was subject to transfer or assignment and either party might have waived his entire interest in the remainder for a sufficient consideration. Gray v. Union Trust Co., 171 Cal. 637, 642, 154 P. 306; Bridge v. Kedon, 163 Cal. 493, 496, 126 P. 149, 43 L.R.A.,N.S., 404. The agreement must therefore be held a valid release or

assignment of each party, the one to the other, of the future interest to take all the remainder in the event that either one should predecease the life beneficiary.

[3] The question whether an actual controversy exists is a simple one. The parties are so far apart in their interpretation of the contract, and upon the question of its validity, that the controversy runs through all the briefs. But the appellant insists that the controversy is not "actual" within the meaning of the code section, because the "contingency" may never arise. It is true that if the life beneficiary should predecease both of these parties there would be no call for the operation of the agreement. But there can be no denial that these contingent remainders constitute a present legal or equitable right which the parties have the right to protect and preserve under section 863 of the Civil Code. Thus the complaint states a proper case for declaratory relief. Frasch v. London & Lancashire F. Ins. Co., 213 Cal. 219, 225, 2 P.2d 147.

[4, 5] The question of the propriety of that portion of the judgment decreeing that the party surviving the life beneficiary should hold one-half of the trust property in trust for the heirs of the other predeceased party is not a serious one. If the appellant should predecease her brother, and the life beneficiary as well, it would be to the benefit of her heirs that such trust be imposed. In that event she would suffer no prejudice from that portion of the decree and would be in no position to attack it. On the other hand, if the brother should predecease her, and the life beneficiary as well, and all the trust property should be distributed to her for some reason which we cannot foresee, she would hold as a constructive trustee, if the portions of the decree under attack were wholly eliminated. The situation then would be like that arising under a contract providing for the execution of mutual wills. If one of the parties fails to execute a will as agreed the potential beneficiaries may claim under the contract (Estate of Rath, 10 Cal.2d 399, 404, 75 P.2d 509, 115 A.L.R. 836), and may sue for specific performance of the contract, or, as said in Notten v. Mensing, 3 Cal.2d 469, 473, 45 P.2d 198, for a sort of "quasi-specific performance," if the contracting parties are deceased. The theory upon which the cases rest is that the party who receives the estate becomes a constructive trustee for the intended beneficiaries "in accordance with the terms of the contract". These cases are reviewed in Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 113 P.2d 495.

Under these authorities, if we may assume that the entire estate might be distributed to the appellant upon the death of the life beneficiary, she would hold as a constructive trustee for the benefit of the heirs of her brother. She then would be in no better position that she would be, under the same circumstances, because of the provisions of the decree declaring that, in that event, she would hold "as trustee". Hence, it would serve no useful purpose to determine whether the document is a valid declaration of an express trust. Appellant's rights and liabilities would be the same under either theory.

We find no error in the record.

The judgment is affirmed.

SPENCE, J., and DOOLING, Justice pro tem., concurred.



46 Cal.App.2d 854

KIM v. CHINN et al.

Civ. 11930.

District Court of Appeal, First District, Division 1, California.

September 26, 1941.

Hearing Granted Nov. 25, 1941.

1. Appeal and error ⇐478

Where application for writ of supersedeas did not show that appellant's failure to comply with statute as to justification of sureties on appeal was excusable, application was not sufficient to justify issuance of writ. Code Civ.Proc. § 948.

2. Appeal and error ⇐478

Where respondent in response to order made under Code of Civil Procedure prematurely filed demurrer and answer to application for writ of supersedeas, all legal and factual matters set forth therein were disregarded, and demurrer and answer were returned to respondent. Code Civ.Proc. § 1107.

Proceeding between Edwin Kim and O. S. Chinn and another. On application for writ of supersedeas.

Application denied.

A. B. Bianchi, of San Francisco, for appellants and defendants.

Manwell & Manwell, of Marysville, and John L. McCarthy, of Watsonville, for respondent and plaintiff.

PER CURIAM.

[1] The matters set forth in the application for the writ of supersedeas are legally insufficient to justify the issuance of the writ, especially in that they do not show that appellant's failure to comply with section 948 of the Code of Civil Procedure is excusable. Willis v. Paul, 116 Cal.App. 733, 3 P.2d 339; Williams v. Borgwardt, 115 Cal. 617, 47 P. 594; Nonpareil Mfg. Co. v. McCartney, 143 Cal. 1, 76 P. 653; Reliance Acceptance Corp. v. Lundblade, 96 Cal.App. 371, 274 P. 360. It is ordered, therefore, that the application be and the same is hereby denied.

[2] In response to the order heretofore made under the provisions of section 1107 of the Code of Civil Procedure (as added in 1941), respondent herein, besides submitting points and authorities in opposition to the issuance of the writ, prematurely filed therewith a demurrer and an answer to the application; consequently all legal and factual matters set forth in said demurrer and answer have been disregarded, and the clerk of the court is directed to withdraw the same from the files and return them to respondent.



47 Cal.App.2d 112

CLEMENTINE et al. v. BOARD OF CIVIL SERVICE COM'RS et al.

Civ. 12930, 13012.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1941.

Hearing Denied Nov. 27, 1941.

1. Mandamus ⇐16(1)

Where registers of eligibles for promotion in police department under civil service had expired by lapse of time limit, writ of mandamus ordering certification of petitioners as eligibles was refused as involving a "moot question". St.1925, p. 1064, § 107, as amended by St.1935, p. 2341.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

2. Mandamus ⇐16(1)

A writ of mandate will not issue to enforce an abstract right which by reason of occurrence of event subsequent to commencement of proceeding makes issuance of writ of no practical benefit to petitioner.

3. Municipal corporations ⇐217(5)

Pendency on appeal of a proceeding in mandamus to compel certification of petitioners' names as eligible for promotion under civil service does not extend the time limit of the statute providing that names of candidates on the register of eligibles for promotion shall be stricken therefrom after they shall have remained thereon two years without re-examination. St.1925, p. 1064, § 107, as amended by St.1935, p. 2341.

4. Evidence ⇐42

It is common knowledge that appellate courts have, on proper application and adequate showing, advanced for hearing and immediately determined any case where such disposition was necessary in order to preserve the rights of parties litigant.

5. Municipal corporations ⇐217(5)

Pendency on appeal of a proceeding in mandamus to compel certification of petitioners' names as eligible for promotion under civil service did not justify the suspension of operation of statutory time limit for register of eligibles on ground that as practical matter an eligible list would expire under the statutory time limit before determination of dispute on appeal, since for many years the District Court of Appeal had been in position to dispose promptly of any case where exigencies of situation required immediate decision. St.1925, p. 1064, § 107, as amended by St.1935, p. 2341.

6. Municipal corporations ⇐184(5)

Where more than two years had elapsed since approval of registers of eligibles for promotion of police officers under civil service, in absence of showing that parties whose names appeared thereon had been reexamined, their names were required by statute to be stricken from such registers.

St.1925, p. 1064, § 107, as amended by St.1935, p. 2341.

7. Mandamus ⇐16(1)

Where registers of eligibles for promotion in police department under civil service had expired by lapse of statutory time limit, petitioners were not entitled to writ of mandamus requiring that their names be certified for promotion since they would no longer be eligible for positions. St.1925, p. 1064, § 107, as amended by St.1935, p. 2341.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; John Beardsley and Emmet H. Wilson, Judges.

Proceeding in mandamus by James E. Clementine and others against the Board of Civil Service Commissioners and others to compel certification of names of petitioners as eligible to fill positions of captain, lieutenant and sergeant of police. From a judgment denying writ of mandamus and an order refusing to restrain the certifying of any names to fill such positions pending appeal, the petitioners appeal.

Dismissed.

Louis Lombardi and Robert W. Kenny, both of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Hugh MacDonald and Bourke Jones, Deputies City Atty., all of Los Angeles, for respondents.

McCOMB, Justice.

Petitioners appeal from:

1) An order of the trial court denying their application for a writ of mandate to compel respondent board of civil service commissioners to certify the names of petitioners as eligible from existing registers of the civil service commission to fill the positions of captain, lieutenant, and sergeant of police respectively in the police department of the city of Los Angeles;

2) An order of the trial court denying the application of petitioners for an order restraining respondent board of civil service commissioners from certifying any names to the appointing power of the city of Los Angeles as persons eligible to fill the positions above mentioned pending the determination of the appeal from the order denying petitioners' application for a writ of mandate.

The essential facts are:

September 21, 1937, respondent board of civil service commissioners approved a register of eligibles for the position of captain in the police department of the city of Los Angeles upon which appeared the name of respondent James E. Clementine. June 22, 1938, said respondent approved registers of eligibles for lieutenant and sergeant of police in the police department of said city, upon which appeared the names of petitioners Cantin and Shultz respectively.

Subsequently there were vacancies in the police department of the city of Los Angeles in the ranks of captain, lieutenant, and sergeant, and respondent commission refused to certify to the board of police commissioners of the city of Los Angeles any names for the purpose of filling said vacancies from the registers of eligibles of said commission. The present proceedings were instituted to compel respondent board of civil service commissioners to certify to the police commission the names of petitioners as eligible to fill the vacancies in the respective positions of captain, lieutenant, and sergeant of police.

1)

Respondents first confront us with the proposition that the questions presented to this court are now moot, for the reason that the registers of eligibles herein involved have expired by lapse of the time limit prescribed in the charter of the city of Los Angeles.

[1, 2] This proposition is tenable and is governed by these rules:

1) A writ of mandate will not issue to enforce an abstract right, when the occurrence of an event subsequent to the commencement of the proceeding makes the issuance of the writ of no practical benefit to the petitioner (Board of Education v. Common Council, 1 Cal.App. 311, 312, 82 P. 89; Green v. Jordan, 216 Cal. 318, 319, 14 P.2d 297; Jones v. Clark, 355 Ill. 527, 189 N.E. 870, 872; State ex rel. Shelton v. Edwards, 109 Conn. 249, 146 A. 382, 384; State ex rel. Apple v. Pence, 137 Ohio St. 569, 31 N.E.2d 841, 844.)

[3] 2) Pendency on appeal of a proceeding does not extend the time limit pre-

scribed in section 107 of the charter of the city of Los Angeles (see cases cited supra).

Cook v. Civil Service Commission, 160 Cal. 598, 117 P. 662, is not contrary to the second rule, for in that case the Supreme Court held that the question involved on appeal was not moot, because the act of the civil service commission of the city and county of San Francisco in striking names from an eligible list was void as being predicated upon an order of the Superior Court, which was a nullity.

[4, 5] Petitioners' contention that as a practical matter an eligible list will expire before a final determination of a dispute upon appeal, and, therefore, pending an appeal it should be held that the limits prescribed in section 107 of the charter of the city of Los Angeles be suspended, is without merit, for the reason that it is a matter of common knowledge that the appellate courts of this state have, on proper application and adequate showing, advanced for hearing and immediately determined any case where such disposition was necessary in order to preserve the rights of parties litigant. For many years this court has been in a position to dispose promptly of any case where the exigencies of the situation required immediate decision. Even though we assume that People ex rel. Finnegan v. McBride, 226 N.Y. 252, 123 N.E. 374, establishes a rule contrary to the rule above announced, such case is unavailable to petitioners, in view of the holdings of the Supreme and Appellate Courts of California.

Section 107 of the charter of the city of Los Angeles (Stats.1925, p. 1024, as amended by Stats.1935, p. 2341) reads in part thus: "* * * Names of candidates on the register of eligibles for promotion shall be stricken therefrom after they shall have remained thereon two years without re-examination."

[6] Respondent board of civil service commissioners approved a register of eligibles for captain of police of the city of Los Angeles on September 21, 1937, and registers of eligibles for lieutenant and sergeant of police for the same city on June 22, 1938. It thus appears that more than two years have elapsed since the approval of the registers of eligibles and that, under the provisions of the charter of the city of Los Angeles above quoted, in the absence of a showing, as in the instant case, that the parties whose names appeared thereon have been re-examined, their names should be stricken from such eligible registers.

[7] Since, under the rule of law above stated, the pendency of this appeal did not suspend the running of the time limit prescribed in section 107 of the city charter, the issuance of the writs which petitioners seek in the instant case would be of no value to them, because they would not be eligible for the positions which they now seek.

2)

In view of the conclusions which we have reached upon petitioners' main contention, their second appeal is likewise moot.

For the foregoing reasons the above entitled appeals are dismissed and the judgment and order are and each is affirmed.

MOORE, P. J., concurred.

WOOD, J., dissents.



47 Cal.App.2d 28

LANGDON v. LANGDON.

Civ. 13031.

District Court of Appeal, Second District, Division 2, California.

Sept. 29, 1941.

Hearing Denied Nov. 27, 1941.

1. Master and servant ⇐80(10)

In suit to recover bonus for painting houses for defendant, evidence relating to defendant's statement that he would give plaintiff $100 "on every house besides the painting" sustained finding that a valid oral agreement to pay bonus existed.

2. Limitation of actions ⇐66(15)

Where oral agreement to pay plaintiff a bonus for painting houses was made in March, 1937, without fixing time for payment, and thereafter plaintiff, because of defendant's request that he delay collection of bonus until defendant became established

in the building business, delayed demanding that bonus be paid until July, 1939, action commenced February 26, 1940, for recovery of bonus was not barred by limitations.

3. Estoppel ⇐56

Where one person's act or promise causes another in reliance thereon to forbear from doing a thing to his detriment, promisor is "estopped" from taking advantage of the forbearance.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

4. Action ⇐63

Where delay in commencing action is induced by conduct of offending party, it cannot be availed of by him as a defense.

5. Limitation of actions ⇐13

Promisor need not sign written agreement to waive limitation to bar him from subsequently repudiating his agreement, but promisor's conduct, or even his silence, may result in equitable estoppel.

6. Appeal and error ⇐1041(1)

Where plaintiff sought recovery upon an express oral agreement and upon an account stated, but judgment was apparently based upon the oral agreement, defendant was not prejudiced by court's action in permitting amendment of bill of particulars relating only to cause of action based upon the account stated. Code Civ.Proc. § 454.

7. Appeal and error ⇐931(7)

Where plaintiff sought recovery both upon an express oral agreement and upon an account stated, but findings of fact were silent regarding account stated, although finding existence of the oral agreement, it would be assumed on appeal that judgment was based upon the oral agreement and not upon the account stated. Code Civ.Proc. § 454.

8. New trial ⇐102(3)

In suit to recover alleged bonuses owing to plaintiff, defendant was not entitled to new trial on ground of newly discovered evidence consisting of checks payable to plaintiff and marked "paid in full" which defendant claimed he had been unable to find because they had been placed in an out-of-way place in his garage by moving men, where no effort had been made to introduce secondary evidence of contents of checks, of which defendant must have known because they were made by him. Code Civ.Proc. § 657, subd. 4.

9. New trial ⇐99

New trials on ground of newly discovered evidence are not favored, and, although showing is apparently a strong one, much depends upon the sound discretion of trial judge. Code Civ.Proc. § 657, subd. 4.

10. New trial ⇐101, 102(1)

A party cannot obtain a new trial for purpose of introducing evidence known to him and obtainable at time of trial, or which would have been known to him if he had exercised reasonable effort to discover and present it. Code Civ.Proc. § 657, subd. 4.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by Thomas Langdon against J. G. Langdon to recover on an oral contract for the payment of a bonus in addition to hourly wages for each house painted by the plaintiff for the defendant. Judgment for the plaintiff, and the defendant appeals.

Judgment affirmed.

Morgan & Davidson, of Alhambra, for appellant.

Ticknor & Maxwell, Roland Maxwell, and Walter R. Farrell, all of Pasadena, for respondent.

WOOD, Justice.

This action was commenced on February 26, 1940, for the recovery of a sum alleged to be due plaintiff under the terms of an oral contract by which defendant agreed to pay plaintiff the sum of $100 in addition to hourly wages for each house painted by plaintiff. Defendant has appealed from a judgment in plaintiff's favor in the sum of $4,200.

Plaintiff is the father of defendant. In December, 1936, defendant entered the business of buying vacant lots and building houses on them for sale. Plaintiff and defendant had worked together as house painters. In March, 1937, plaintiff entered into an oral agreement with defendant under the terms of which plaintiff was to paint all houses then under construction or thereafter to be constructed by defendant and defendant was to pay plaintiff an hourly wage for his work and in addition a bonus of $100 for each house painted. Within a year after the agreement was made plaintiff demanded

the $100 bonus for each house which he had painted but was informed that defendant could not pay the bonus at that time. At defendant's request plaintiff agreed to wait for his bonus until after defendant had made a good start in the building business. At that time and on several occasions thereafter defendant stated that it would require about three years to get a good start in the building business. Plaintiff continued to work for defendant for approximately two and one-half years until he was discharged in July, 1939, following his demand and defendant's refusal to pay the bonus. Prior to his discharge plaintiff painted a total of 50 houses, upon 42 of which the bonus of $100 per house was proved to be due and unpaid at the time of trial.

[1] It is contended by defendant that the trial court's finding that there was a binding oral agreement between the parties to pay plaintiff a bonus of $100 for painting each house is not supported by the evidence. Plaintiff testified that in March, 1937, after they had finished constructing a house, he told defendant that he was through, that he did not intend to continue working for daily wages but was going to get his own painting contracts. Defendant then requested plaintiff not to leave him and stated: "I will give you $100.00 on every house besides the painting, and if I do well and can give you more, I will." Plaintiff replied: "O. K., son; if that is satisfactory with you, it is all right with me; but I am not working by the day after putting all these years in working up to this together and you get everything and I get nothing, because I am getting too old to go out and get business." Subsequently, in February of 1938, plaintiff demanded that the $100 bonus for each house painted be paid to him and defendant replied: "Gee, Dad! It takes about three years to get started. I told you that before. It takes about three years to get started in the building business. I can't do anything for you now. Be patient and you will get your money." Plaintiff then agreed to be patient provided he got his money. On several other occasions defendant requested plaintiff to delay the collection of the bonus due him until after defendant had made a good start in the building business, which defendant estimated would require about three years. Viewed in the light favorable to plaintiff, the evidence supports the finding of the trial court as to the existence of a valid oral agreement.

[2–5] It is contended that the action is barred by the statute of limitations. The trial court found upon substantial evidence that when the oral agreement was made in March, 1937, no time for the payment of the bonus was fixed; that after entering into the agreement defendant repeatedly requested plaintiff to delay the collection of the bonus until defendant would be well started in the building business, which defendant estimated would require three years' time; and that plaintiff solely because of such requests delayed the collection of the bonus until July, 1939, at which time he demanded that the bonus be paid. The rule applicable is set forth in Calistoga Nat. Bank v. Calistoga V. Co., 7 Cal.App.2d 65, 72, 46 P.2d 246, 249: "It is a well-established rule of law that when the act or promise of one person causes another in reliance thereon to do or forbear from doing a thing to his detriment, which he would have otherwise performed, the promisor is estopped from taking advantage of the act or omission of the promisee. The violation of such a promise amounts to fraud and estops the promisor from repudiating the agreement on the doctrine of equitable estoppel." In Miles v. Bank of America, etc., Ass'n, 17 Cal.App.2d 389, 62 P.2d 177, 182, the plaintiff "was repeatedly assured that, if he would be patient and wait, the bank would carry out its agreement". In holding that the defendant was estopped from setting up the bar of the statute the reviewing court stated: "Where the delay in commencing action is induced by the conduct of the offending party, it cannot be availed of by him as a defense. Mitchell v. J. H. Roth & Co., 124 Cal.App. 96, 99, 12 P.2d 91. Nor is it necessary that the promisor shall sign a written agreement to waive the statute of limitations to bar him from subsequently repudiating his agreement. Calistoga Nat. Bank v. Calistoga Vineyard, supra. The authorities are uniform to the effect that the conduct of a promisor, or even his silence under certain circumstances, may result in an equitable estoppel." The trial court was justified in holding that the action was not barred.

[6, 7] In his complaint plaintiff set forth three causes of action. In one count he sought to recover the reasonable value

of work and labor performed at defendant's request; the second count was based upon an express oral agreement and the third count upon an account stated. Prior to filing his answer defendant demanded a bill of particulars which plaintiff accordingly furnished. The bill of particulars specified that "each item of $100 became due and payable at the date of completion of construction of each and every house". At the conclusion of the trial plaintiff moved the court to amend his pleading to conform to the proof and to strike from his bill of particulars the portion above quoted regarding the due date of each $100 item. The motion was granted and defendant now contends that the court abused its discretion in permitting plaintiff to amend his bill of particulars. Since the bill of particulars was furnished in connection with the cause of action which was based upon an account stated (Code Civ.Proc., sec. 454) it is obvious that defendant could only be prejudiced by the ruling in question in the event that the judgment should be based upon the third cause of action. The findings of fact upon which the judgment is based are entirely silent as to any matters concerning an account stated, but the existence of the oral agreement is expressly found. It must be assumed therefore that the judgment was based upon the oral agreement and not upon an account stated. The court's action in permitting the amendment of the bill of particulars could not have been prejudicial to defendant since the bill of particulars was furnished in connection with the cause of action upon which the judgment was not based.

[8] It is also contended that the court erred in denying defendant's motion for a new trial. In support of his motion for a new trial on the ground of newly discovered evidence defendant set forth in his affidavit that after the conclusion of the trial he had discovered some cancelled checks made by defendant which were payable to plaintiff; that the checks were marked "paid in full" and represented an accord and satisfaction as to a portion of the money which plaintiff claimed to be due him. In an effort to show diligence defendant alleged that prior to the commencement of the action he had moved all of his cancelled checks and business records from Alhambra to West Los Angeles where they were stored in boxes in the garage of his new residence; that although he searched through the stored records prior to trial he failed to discover the checks in question; that his failure to discover the checks until after the trial was due to the fact that the box in which they were found had been placed on a shelf in an out-of-the-way place in his garage by one of the moving men.

[9, 10] New trials on the grounds of newly discovered evidence are not favored, and even if the showing is apparently a strong one much depends upon the sound discretion of the trial judge. Berkowitz v. Kiener Co., 37 Cal.App.2d 419, 99 P. 2d 578. By subdivision 4 of section 657 of the Code of Civil Procedure it is provided that the newly discovered evidence which will justify the granting of a new trial must be such as could not, with reasonable diligence, have been discovered and produced at the trial. It is established that a party who seeks a new trial upon the ground of newly discovered evidence "will not be allowed a new trial for the purpose of introducing evidence known to him and obtainable at the time of trial, or which would have been known to him had he simply exercised reasonable effort to discover and present it". Dasso v. Bradbury, 39 Cal.App.2d 712, 717, 104 P.2d 128, 131. Since the checks in question were made by defendant personally it must be assumed that he had knowledge of their existence at the time of trial. Notwithstanding this fact no mention of the presumably lost checks was made at the trial and no attempt was made to introduce secondary evidence of their contents. We find no abuse of discretion on the part of the trial court in denying the motion for a new trial.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

DUNGEY et al. v. PACIFIC ELECTRIC RY. CO. et al.

Civ. 12589.

District Court of Appeal, Second District, Division 1, California.

Oct. 1, 1941.

Hearing Denied Nov. 27, 1941.

1. Automobiles ⇐244(43)

In action for injuries sustained by plaintiffs when their automobile collided with defendants' bus at intersection, evidence failed to establish that culvert constructed in the intersection made it impossible for plaintiffs to negotiate a left turn onto the boulevard on which bus was traveling by driving around culvert to the right as required by Vehicle Code, so as to establish that plaintiffs were not guilty of contributory negligence in making left turn without driving around culvert to the right. Vehicle Code, § 540(b), St.1935, p. 184.

2. Automobiles ⇐208

Where it did not appear that it was impossible to make left turn by driving around a culvert in an intersection to the right as required by Vehicle Code, fact that by driving around the culvert to the right would be more inconvenient was no justification for failure to do so. Vehicle Code, § 540(b), St. 1935, p. 184.

3. Automobiles ⇐245(2, 67)

Where the evidence, in action for personal injuries sustained in automobile collision, conclusively established negligence on part of plaintiffs as a matter of law, and wholly failed to establish any negligence on part of defendants, a directed verdict for defendants was proper.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by John E. Dungey and another against the Pacific Electric Railway Company and another, for personal injuries alleged to have been sustained as result of an automobile collision. From a judgment for defendants, following granting of defendants' motion for a directed verdict, the plaintiffs appeal.

Affirmed.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

Lasher B. Gallagher, of Los Angeles, for appellants.

Frank Karr, C. W. Cornell, O. O. Collins, and Randolph Karr, all of Los Angeles, for respondents Pacific Electric Ry. Co. and John A. Batterton.

DORAN, Justice.

This is an action for personal injuries alleged to have been sustained as the result of an automobile collision. Upon the conclusion of the introduction of evidence on the question of liability, a motion for a directed verdict by defendant was granted. This appeal is from the judgment accordingly entered.

It is contended by appellants that the evidence fails to sustain the trial court in the action thus taken. Plaintiffs' auto collided with a passenger bus operated by the defendant corporation at the intersection of Van Alden and Sherman Way in or near Reseda, California. Plaintiffs were travelling south on Van Alden; the bus was travelling west on Sherman Way. At the time the collision occurred plaintiffs were making a left turn from Van Alden into Sherman Way. The dispute results from the manner in which the left turn was made, which, by virtue of the conditions that existed at the intersection, the trial court held in effect was contributory negligence as a matter of law. There can be no question as to the correctness of the court's ruling in this regard.

Sherman Way is a wide boulevard with a single street car track in the approximate center. Van Alden is a comparatively narrow street and apparently ends at Sherman Way. The photographs in evidence show a drainage dip across Sherman Way about the width of Van Alden, apparently constructed for the purpose of disposing of storm water flowing from Van Alden into and across Sherman Way. For about one-third of the width of Sherman Way and in the approximate center thereof, this dip is covered level with the grade, thus allowing a space thereunder (about two feet in height) for the flow of storm water. At the edges of the cover over the dip are erected solid concrete railings or guard walls about two and a half feet high, which, being parallel to the sides, are at right angles to Van Alden and amount to a barrier around which traffic entering Sherman Way from Van Alden must pass either to the right or left.

Appellant contends as follows: 1st: "It is obvious from the facts in this case that

the entity which is responsible for the maintenance of a permanent obstruction which made it impossible for any person to comply with this section of the Vehicle Code was the defendant Pacific Electric Railway Company." 2nd: "Appellants state that it is utterly impossible for any person to execute a left turn within the boundaries of this intersection unless he turns to the left when faced with the permanent obstruction used by the defendant Pacific Electric Railway Company for the passage of its street cars."

[1, 2] The record is entirely destitute of the slightest evidence tending to support either contention. To the contrary the record reveals that appellants failed to negotiate the left turn from Van Alden into Sherman Way according to and in the manner required by the Vehicle Code. Sec. 540(b), Vehicle Code, St.1935, p. 184. The fact that by driving around the culvert to the right would be more inconvenient is no justification for appellants' conduct.

[3] The action of the trial court in directing a verdict for defendants was entirely proper. The evidence conclusively established contributory negligence on the part of plaintiffs as a matter of law and, as well, wholly failed to establish any negligence on the part of defendants.

Judgment affirmed.

YORK, P. J., and WHITE, J., concurred.



47 Cal.App.2d 89

McCORMICK v. RED ARROW BONDED MESSENGER CORPORATION et al.

Civ. 12553.

District Court of Appeal, Second District. Division, 1, California.

Oct. 1, 1941.

1. Municipal corporations ⇐706(5)

In action for injuries sustained by pedestrian struck by messenger boy riding his bicycle between line of automobiles stopped for a traffic signal and curb when pedestrian stepped from curb to walk to loading zone marked on surface of street for accommodation of street car passengers, evidence supported verdict denying recovery, where it appeared that jury might well have found from evidence that pedestrian was guilty of contributory negligence, even if messenger boy was negligent.

2. Appeal and error ⇐215(1), 216(1)

Plaintiff, in personal injury action, could not complain of trial court's instruction with regard to duty of pedestrians at controlled intersections on ground that it was not the law applicable to a pedestrian walking from curb to a loading zone marked on surface of street for accommodation of street car passengers, where no instructions were requested by plaintiff on such point, and no objection was made at the trial to the instructions given.

Appeal from Superior Court; Los Angeles County; Ingall W. Bull, Judge.

Action by Maria McCormick against the Red Arrow Bonded Messenger Corporation and another for personal injuries. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Joseph L. Fainer and Paul Magasin, both of Los Angeles, for appellant.

Schell & Delamer and Joseph H. Wheeler, all of Los Angeles, for respondents.

DORAN, Justice.

In this action for personal injuries, the jury returned a verdict for defendants and plaintiff appeals.

Respondent Jackson, a messenger in the employ of respondent corporation, was riding a bicycle south on Broadway between Third and Fourth streets in the city of Los Angeles. As he approached Fourth street the traffic signal displayed the "stop" semaphore and a line of automobiles traveling south on Broadway had accordingly come to a stop. Jackson rode his bicycle between the automobiles and the west curb and at the same time plaintiff stepped from the curb to walk to the loading zone marked on the surface of the street for the accommodation of street-car passengers. The collision resulted.

[1, 2] The bill of exceptions specifies first, that the evidence is insufficient to justify the verdict. Assuming that Jackson may have been guilty of negligence, the

record on appeal reveals that, nevertheless, the jury might well have found from the evidence that the plaintiff was guilty of contributory negligence. In either case, the evidence would sustain the conclusion reached by the jury. Second, that the court erred by instructing the jury with regard to the duty of pedestrians at controlled intersections. It is contended by appellant in this connection that "this is not the law applicable to a pedestrian walking from the curb to a loading zone". No instructions were requested by plaintiff on this point nor was any objection made at the trial when the instructions about which appellant now complains were given. It does not appear from the record that other and adequate instructions were not given, nor does it necessarily follow that the instructions now assailed were improper.

The appeal is without merit. The judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.



47 Cal.App.2d 88

CONNECTICUT GENERAL LIFE INS. CO. v. STATE et al.

Civ. 11855.

District Court of Appeal, First District, Division 2, California.

Oct. 1, 1941.

1. States ⇐171

After judgment against state has fixed liability to pay, interest is properly allowable.

2. States ⇐215

In action against state to recover interest on certain judgments, allowance of costs against state was error.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Connecticut General Life Insurance Company against the State of California and others to recover interest on three judgments recovered by plaintiff against the Treasurer of the State of California. From an adverse judgment, defendants appeal.

Judgment modified and, as modified, affirmed.

Earl Warren, Atty. Gen., and Neil Cunningham, Deputy Atty. Gen., for appellants.

Hartley F. Peart and Howard Hassard, both of San Francisco, for respondent.

DOOLING, Justice pro tem.

This is an appeal by defendant State of California, from a judgment for $2,131.54 with interest thereon at 7 per cent from the date of entry of judgment and $15.50 costs. The judgment was entered after the overruling of defendants' general demurrer to the complaint and its failure to answer within the time allowed.

The complaint alleges that plaintiff recovered three judgments against the Treasurer of the State of California on August 24, 1938, for the total sum of $32,053.27; that it subsequently filed claims with the State Board of Control for the principal amount of said judgments and for interest thereon from the date of their entry and that the claim for principal was allowed and paid but the claim for interest was rejected.

[1] The Attorney-General argues that no interest can be allowed against the State of California even after judgment. The rule is settled the other way in a long line of California cases. Columbia Savings Bank v. Los Angeles, 137 Cal. 467, 70 P. 308; Miller v. County of Kern, 150 Cal. 797, 90 P. 119; Spencer v. City of Los Angeles, 180 Cal. 103, 115, 179 P. 163; Los Angeles Dredging Co. v. Long Beach, 210 Cal. 348, 362, 291 P. 839, 71 A.L.R. 161; Los Angeles R. & G. Co. v. Los Angeles, 132 Cal.App. 262, 22 P.2d 541. It is true that these cases all involved the recovery of interest after entry of judgment against cities or counties but the principle involved is the same. They all proceed upon the basis that while in a suit against the state or its political subdivisions interest cannot be recovered prior to judgment unless there is express statutory warrant therefor, after judgment has fixed the liability to pay, interest is properly allowable.

[2] The allowance of costs against the State was erroneous. People v. One Plym-

outh Sedan, 21 Cal.App.2d 715, 717, 69 P. 2d 1011. The judgment is modified by striking therefrom the item of $15.50 allowed as costs, and as so modified it is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



47 Cal.App.2d 77

Ex parte CLOUTMAN.

Cr. 616.

District Court of Appeal, Fourth District, California.

Sept. 30, 1941.

Habeas corpus ⇐85(1)

Evidence would not justify discharge of one committed to state hospital as an insane person, where all of testimony of medical witnesses was to effect that person so committed was now insane, and that her mental condition was now worse than it was at time she was committed.

Proceeding in the matter of the application of Carrie C. Cloutman for a writ of habeas corpus to secure the release of petitioner from the Patton State Hospital at Patton, California.

Writ denied.

E. John Eriksson and Homer M. Bail, both of San Bernardino, for petitioner.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

PER CURIAM.

The petitioner was committed to the Patton State Hospital at Patton, California, by an order of the superior court of San Bernardino county, dated June 5, 1941. Her application for a writ of habeas corpus was denied by the superior court of San Bernardino county on August 15, 1941. In a similar proceeding filed in this court she now seeks to be released from restraint under said order of commitment.

While there is some conflict in the evidence presented in this court, all of the testimony of the medical witnesses is to the effect that the petitioner is now insane, that her mental condition is now rather worse than it was at the time she was committed to Patton, that her mentality has been seriously impaired through old age and illness, and that she is now suffering from a disordered brain. It further appears from the testimony that she is now confined to her bed, that she is so far mentally affected as to require someone to look after her and care for her at all times, and that she cannot be safely discharged without someone ready, willing and able to take over the supervision and furnish the care which she is now receiving. The evidence before us is not sufficient to justify an order of discharge.

The application is denied and the petitioner is remanded.



ARTUKOVICH v. ASTENDORF et al.

Civ. 13178.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1941.

Hearing Granted Nov. 27, 1941.

1. Automobiles ⇐230

The section of the Political Code providing that all claims against any county shall be presented before any suit on such claims is brought precludes bringing of action against county for damages for injuries caused by motor vehicle before plaintiff has filed a claim with county. Pol.Code, § 4075; Vehicle Code, § 400, St.1935, p. 152.

2. Automobiles ⇐238(1)

Where statute providing that all claims against any county should be presented before any action could be brought on such claims was in force at time statute was passed providing for liability of counties for negligent acts of drivers of their automobiles and that injured persons might sue counties in manner directed by law, a complaint against county for injuries suffered by minor while being transported in county truck was demurrable where it affirmative-

ly appeared in complaint that plaintiff had not previously filed claim with county. Pol. Code, § 4075; Vehicle Code, § 400, St.1935, p. 152.

3. Automobiles ⇐230

A minor was required to file claim against county for personal injuries suffered while being transported in county truck as "condition precedent" to action therefor, since infancy is not made an exception by statute requiring filing of such claim. Pol. Code, § 4075.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

4. Automobiles ⇐230

Minor plaintiff was not relieved from filing claim as condition precedent to action against county for injuries on ground that Vehicle Code authorized county to insure its liability and insurance company could be called upon to pay amount of judgment, since primary liability for injuries under Vehicle Code was on county itself. Vehicle Code, § 400, St.1935, p. 152.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by Jerry Artukovich, Jr., a minor, against Fred O. Astendorf and others, for damages for injuries suffered while being transported in a county truck driven by defendant Astendorf. From judgment sustaining demurrers to complaint without leave to amend, and dismissing the complaint, the plaintiff appeals.

Affirmed.

J. M. Sinclair, of Los Angeles, for appellant.

Jennings & Belcher, by Stevens Fargo, all of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff, a minor of the age of sixteen years, commenced this action against the county of Los Angeles and its employee, Fred O. Astendorf, to recover damages for injuries suffered by him on May 17, 1940, while he was being transported in one of the county's trucks driven by defendant Astendorf in the discharge of his duties. It was stipulated that the demurrer of defendant Astendorf should be sustained without leave to amend. The court sustained the demurrer of the defendant county without leave to amend and plaintiff has appealed from the judgment of dismissal.

[1,2] It affirmatively appears in the complaint that plaintiff did not file any claim with defendant county or with any of its officers before commencing the action and plaintiff now argues that since section 400 of the Vehicle Code, St.1935, p. 152, the section providing for liability of counties for the negligent acts of the drivers of their automobiles, does not specifically require the presentation of a claim before the commencement of an action, it was not necessary for him to establish that a claim had been presented. It is provided in section 400 that those desiring to take advantage of its provisions "* * * may sue the State, county * * * in the manner directed by law". At the time of the enactment of section 400 it was provided in section 4075 of the Political Code: "* * * all claims against any county * * * shall be presented * * * before any suit may be brought on any such claim * * *." It is manifest that the expression "all claims" includes claims for damages for injuries caused by motor vehicles. The affirmative showing in the complaint of failure to file a claim before commencing the action establishes that plaintiff has not sued in the manner directed by law.

[3] Plaintiff points out that section 4075 of the Political Code makes no reference to minors and contends that since plaintiff is a minor he was not required to file a claim. No decision has been cited by counsel in litigation arising from the code sections involved in this action but many decisions have been rendered by the reviewing courts of California in analogous situations in which it has been held that a minor plaintiff must file a claim with the proper official before commencing an action. Phillips v. County of Los Angeles, 140 Cal.App. 78, 35 P.2d 187; Myers v. Hopland U. E. School Dist., 6 Cal.App.2d 590, 44 P.2d 654; Carpenter v. Eureka O. K. Casualty Co., 14 Cal.App.2d 533, 58 P. 2d 682. The reasons given in those decisions are applicable to the case under review.

[4] Plaintiff refers to the provision in section 400 of the Vehicle Code which permits the county to procure an insurance policy to insure its liability and argues that since an insurance company may be called upon to pay the amount of a judgment that may be rendered he was relieved from fil-

ing the claim. It is of no consequence that the county may have chosen to protect itself by an insurance policy. The primary liability under section 400 is upon the county itself.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.



47 Cal.App.2d 126

McINTOSH v. CRANDALL et al.

Civ. 13287.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1941.

Rehearing Denied Oct. 31, 1941.

Hearing Denied Nov. 27, 1941.

1. Costs ⇐3

The allowance of costs is strictly statutory, costs not being recoverable at common law.

2. Costs ⇐3

One who claims costs must indicate a statute which awards them, and the measure of the statute is the measure of the right to costs.

3. Costs ⇐4

Generally, statutes relating to costs are considered "penal" in nature and are to be strictly construed.

See Words and Phrases, Permanent Edition, for all other definitions of "Penal".

4. Costs ⇐3

In absence of statutory authorization for the recovery of costs, it cannot avail that under circumstances of case it appears to a court that a charge is, as matter of fact, fair and reasonable.

5. Costs ⇐153

There being no statutory provision for costs on a motion for new trial, it was proper to sustain defendants' motion to strike out plaintiff's supplemental cost bill covering items incidental to hearing on defendants' motion for new trial. Code Civ. Proc. § 660.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Suit by George R. McIntosh against Carl C. Crandall and others to foreclose a mechanic's lien. A judgment was awarded plaintiff. From an order granting defendants' motion to strike out a supplemental cost bill filed by plaintiff, plaintiff appeals.

Affirmed.

William H. Brawner, of Los Angeles (Caryl Warner, of Los Angeles, of counsel), for appellant.

Arthur J. Mullen, Raymond Tremaine, and Franklin L. Knox, Jr., all of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiff recovered judgment against defendants in this suit to foreclose a mechanic's lien. Defendants moved for a new trial, which was denied. Plaintiff filed a "supplemental memorandum of costs" for $15, covering items incidental to the hearing on the motion for new trial, including a per diem of $12.50 for the court reporter who had reported during the trial, $2 notary's fee and $1 service fees. Defendants moved to strike this cost bill "upon the ground that there is no statutory authorization for costs upon a motion for a new trial and upon the further ground that it was not served and filed within the time allowed by law". The motion to strike was granted. Plaintiff appeals.

[1-3] It is plaintiff's contention that since the court reporter was required to attend at the hearing of the motion if requested by plaintiff, Code Civ.Proc. § 660, and did so attend, it became a cost chargeable against defendants, and that the other items were similarly a proper part of the adequate presentation of plaintiff's views on that occasion. We find no support for this contention. The allowance of costs is strictly statutory. Sepulveda v. Apablasa, 25 Cal.App.2d 381, 77 P.2d 526. "It must ever be borne in mind that costs were not recoverable at common law. He who would claim costs must put his finger on a statute which awards the same. The measure of the statute is the measure of the right. 'In England it seems that statutes relating to costs were considered penal in their nature and were to be strictly construed, and, with scarcely an exception, this is the rule generally adopted in this country where the question has been raised and considered by the courts.' 15 Corp. Juris, p. 24,

§ 9." Sime v. Hunter, 55 Cal.App. 157, 159, 202 P. 967, 968.

[4] "The right to recover costs exists solely by virtue of statute (Begbie v. Begbie, 128 Cal. 154, 60 P. 667, 49 L.R.A. 141), and warrant for their recovery must be found in some statute. In the absence of statutory authorization, it cannot avail that under the circumstances of a particular case it appears to a court that a charge is, as matter of fact, fair and reasonable." Turner v. East Side Canal & Irr. Co., 177 Cal. 570, 573, 171 P. 299, 300.

[5] There is no statutory provision for costs on a motion for a new trial, and the trial court properly granted the motion to strike the supplemental cost bill on that ground.

The order is affirmed.

MOORE, P. J., and WOOD, J., concurred.



47 Cal.App.2d 108

STORRS v. STORRS.

Civ. 12750.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1941.

1. Divorce ⇐303(3), 309

Where supporting affidavits in proceeding to modify terms of divorce decree with respect to custody and support of children were identical with those in previous proceeding for same purpose in which modification was refused and testimony was taken at both proceedings but was not shown to be the same, defendant was not entitled to reversal of order of modification on ground that court was without jurisdiction because discharge of earlier order was "res judicata".

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Divorce ⇐303(3), 309

Where supporting affidavits are same in two hearings and there is no testimony at second hearing, the granting of modification of divorce decree on the second hearing after refusal on first hearing is equivalent to readjudication upon earlier evidence after court has lost jurisdiction by discharge of first order.

3. Divorce ⇐303(3), 309

In proceeding to modify divorce decree wherein defendant claimed that issues were res judicata upon discharge by court of order in previous proceeding for same purpose supporting affidavits alone did not determine whether issues were res judicata, but court was required to look also to testimony in both hearings.

4. Divorce ⇐303(3), 309

Affidavits supporting second proceeding to modify divorce decree which did not comply with statute as to setting out record of first hearing did not affect jurisdiction of court in second hearing, and, defendant not having required that plaintiff comply with such statute and provide record of first hearing, it was not the duty of the court to do so. Code Civ.Proc. § 1008.

5. Divorce ⇐312½

Trial court can award counsel fees to divorced wife in proceeding by wife to modify divorce decree with respect to support and custody of children.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Proceeding by Mary A. Storrs against Aaron Putnam Storrs. From an order modifying the terms of the interlocutory and final decrees of divorce theretofore awarded to Mary A. Storrs, Aaron Putnam Storrs appeals.

Affirmed.

Sloane & Steiner and John W. Holler, all of San Diego, for appellant.

Fred O. Reed and Richard L. Kirtland, both of Los Angeles (Henry E. Kappler, of Los Angeles, of counsel), for respondent.

HANSON, Justice pro tem.

Defendant appeals from the order entered on April 6, 1939, modifying the terms of the interlocutory and final decrees of divorce theretofore entered on September 2, 1937, and November 10, 1938, respectively.

The main contention of appellant is that the court below did not have jurisdiction to make the order. The record discloses that the decree was awarded to the wife, respondent here, with a provision that each parent have custody of two children for six months in each year and ordering the husband to pay to the wife for her support and that of the children the sum of $100 each month regardless of whether the children were residing with the mother or the father. Within a year of the date upon which the interlocutory decree was entered respondent caused to be served upon appellant an order to show cause why he should not be required to pay her $200 per month during the nine months school period of each year and $100 during the remaining months of the year, and why the custody of the children should not be awarded to her during the entire school period and to him during the vacation period. Upon the hearing, in which oral testimony was given but not preserved, the court discharged the order. Within three months of the hearing the respondent again procured a like order to show cause and had it served upon the appellant. Upon the hearing thereof he objected that the court was without jurisdiction to modify the support and custody provisions of the decree of divorce as the discharge of the earlier order was res adjudicata in that the grounds in the supporting affidavits upon which each of the orders to show cause had issued were identical, or substantially so, and that there had been no change in conditions between the hearings on the two orders. The trial judge, who had not heard the testimony on the first hearing, overruled the objection, and after a hearing modified the provisions of the decree by requiring the appellant to pay to the respondent $150 monthly during the nine school months of the year and $100 during the other three months, and changed the custody provisions of the decree by directing that the children should live with their mother during each school year and with the father during the summer vacation period. Additionally he ordered appellant to pay $75 to counsel for appellant for their services in representing respondent on the then instant hearing.

[1-3] Appellant, in presenting to us his claim of res adjudicata, relies exclusively on the fact that the grounds stated in each of the affidavits upon which each of the orders to show cause issued are the same, or under the facts should by us be deemed to be the same. With that point conceded, if it be, he urges that on the authority of Snyder v. Snyder, 219 Cal. 80, 25 P.2d 403, there must be a reversal. The contention is without merit. In the Snyder case the supporting affidavits on which each of the orders to show cause had issued were identical. There, as here, the trial court had denied a modification on the first hearing but granted it on the second upon the affidavit alone, without a shred of testimony. This was equivalent to a readjudication upon the earlier evidence after the court had lost jurisdiction by a discharge of the first order to show cause. But in the case at bar testimony was taken at both hearings. We have no way of knowing, any more than had the trial judge, whether the testimony on the first hearing was the same as at the hearing before him. That it was the same, in part is indicated by the admissions made by respondent in her cross-examination, but we are not prepared to say that this fragment necessarily encompasses the whole of the testimony on the point of the change in condition of the parties or the needs of the children. It is not upon the supporting affidavits alone but upon the testimony as well that we must look in each instance for the true picture. The affidavits in a case such as this do not serve, as pleadings sometimes do, in determining questions of res adjudicata. If this were not so then an adverse adjudication on a claim that "the children need additional support" would forever bar a similar claim in the future.

[4] It seems to be the thought of appellant that where a hearing has been had denying additional support for the children, that on any subsequent hearing only such changes in that respect as have transpired since the last hearing may be inquired into. In the view we take of the case we have no need to pass on the point, but it would seem proper to observe that in cases such as this one many elements enter into the decision of the trial court which determine whether there should or should not be a modification upwards or downwards in respect of support for children. In a given case the court may conclude an adequate showing has been made for additional support of a child, but because of existing conditions of one parent or both there should at the time be no modification. The showing made by the affidavits upon which the second order to show cause issued did not meet the requirements of section 1008 of

the Code of Civil Procedure. However, the failure was not jurisdictional. Evidently counsel for appellant overlooked or was not familiar with that statute, or else did not care to have of record the showing which might have been made by respondent. Had appellant required that respondent comply with the statute he might now have a record of the testimony on the first hearing, so as to have here a foothold upon which to stand. Not having done so it is not our duty to ferret out error. For want of an adequate record as to what transpired in the way of testimony on the first hearing the claim of res adjudicata, even though it might have been an appropriate contention, as to which we express no opinion, is not here sustained. Snyder v. Snyder, supra, does not determine the point on which we have just reserved our opinion.

[5] A further contention of appellant is that the trial court exceeded its jurisdiction in awarding counsel fees. The point is determined adversely to appellant in Prouty v. Prouty, 16 Cal.2d 190, 105 P.2d 295.

For the reasons stated the order should be and it is affirmed.

MOORE, P. J., and McCOMB, J., concurred.



ELLS et al. v. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.

Civ. 13084.

District Court of Appeal, Second District, Division 2, California.

Sept. 30, 1941.

Hearing Granted Nov. 27, 1941.

1. Insurance ⇐748

A provision in an insurance certificate, issued by fraternal benefit society, that any claim for death allegedly caused by accidental means should be forfeited if insured member's remains were cremated without first giving notice thereof to manager of society's claim department at least 72 hours in advance of intended cremation was intended to afford society opportunity to examine remains of a member with object of determining whether death was caused by accidental means and thereby enable society to avoid payment of fraudulent claims.

2. Insurance ⇐748

Where insurance certificate, issued by fraternal benefit society provided that any claim for death caused by accidental means should be forfeited if insured member's remains were cremated without first giving notice thereof to manager of society's claim department at least 72 hours before intended cremation, and society received no notice of cremation of body of member who died from accidental fall, except notice of one day to secretary-treasurer, beneficiaries could not recover death benefits under certificate. St. 1935, p. 694, § 11121; Gen.Code Ohio, § 9481.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Harry C. Ells and others against the Order of United Commercial Travelers of America to recover death benefits under an insurance certificate issued by a fraternal benefit society. From a judgment for plaintiffs, defendant appeals.

Reversed.

Newlin & Ashburn and Paul Sandmeyer, all of Los Angeles, for appellant.

Thomas P. Walker and Alfred R. Meyers, both of Los Angeles, for respondents.

PER CURIAM.

This is an appeal by defendant from a judgment in favor of plaintiffs in an action to recover death benefits under an insurance certificate issued by the defendant fraternal benefit society.

In 1914 defendant issued an insurance certificate to James Fisk Ells, plaintiffs' father, which provided that he was accepted as an insured member under "Class A" and as such entitled to all of the rights and benefits provided in the constitution of defendant Order for such insured members. The certificate contained the following provision: "This Certificate, the Constitution, By-laws and Articles of Incorporation of said Order, together with the application for insurance * * * shall constitute the contract * * * and shall govern the payment of benefits." Under

the constitution, "Class A" insured members were to be indemnified against the results of bodily injury or death caused by accidental means. On April 2, 1939, the insured accidentally fell in the bathroom of his home and sustained injuries which resulted in his death on April 4, 1939. On April 5th an autopsy was performed upon the body of the insured by the autopsy surgeon of the county of Los Angeles at the request of the county coroner, which revealed that death was caused by contusion of the right lung with traumatic pneumonia. On the same day, but following the post mortem examination, A. J. Loeslein, secretary-treasurer of Los Angeles Council No. 82, the local council of defendant Order, was informed by plaintiffs of the facts concerning the autopsy and of their intention to have the body cremated on the following day. No other notice of the autopsy or cremation was given to the defendant Order. On April 6th, with the express permission of Loeslein, the body of the insured member was cremated. Plaintiffs, as beneficiaries under the insurance certificate, submitted a claim for the death benefits, which was rejected by defendant on the ground that the right to the death benefits was forfeited by plaintiffs' failure to give the manager of defendant's claim department 72 hours notice of the intended autopsy and cremation as required by the constitution.

[1] One of the constitutional provisions in question which was incorporated in the insurance certificate sued on reads as follows: "Any claim for death alleged to have been caused by accidental means shall also be forfeited and rendered null and void should the remains be cremated without first giving notice thereof to the Manager of Claim Department at least seventy-two (72) hours in advance of the intended cremation." That requirement was obviously intended to afford defendant an opportunity to examine the remains of an insured member with the object of determining whether death was caused by accidental means and thus enable defendant to avoid payment of fraudulent claims. Despite the fact that no notice was given the manager of defendant's claim department, the trial court held that plaintiffs' claim was not barred, evidently on the theory that the secretary-treasurer of the local council as agent of defendant waived full compliance with such requirement.

[2] Defendant's contention that the trial court erred in holding that the claim was not barred by plaintiffs' failure to give the required notice must be sustained. Although conceding that the secretary-treasurer of the local council had one day's notice of the proposed cremation, defendant contends that such knowledge was not notice to defendant and that in any event the local secretary-treasurer had no authority to waive any provisions of the constitution relating to insurance. Even if it be assumed, as plaintiffs contend, that Loeslein was the agent of defendant, since the notice given the agent was less than that required by the constitution, plaintiffs' right to recover must still depend upon proof of the agent's authority to waive full compliance. The evidence shows that Loeslein was powerless to waive compliance with the 72-hour notice requirement, for it is expressly provided in the constitution of defendant Order that: "No Grand or Local Council, officer, member or agent of any Local, Grand or the Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance. * * *" A fraternal benefit society is given the right to adopt such a provision by section 11121 of the Insurance Code of this state, St.1935, p. 694, which further declares: "Such provision shall be binding on the society and every member and beneficiary of a member." A similar statutory enactment is to be found in section 9481 of the General Code of Ohio (1938), the state in which defendant is incorporated. Since the provision prohibiting a waiver is expressly declared by law to be binding upon the beneficiaries, we must conclude that plaintiffs have failed to prove performance of a condition precedent to their right to recover. It follows that the judgment in favor of plaintiffs must be reversed.

In view of the conclusion above set forth, it is unnecessary to discuss the remaining contentions raised by defendant.

Judgment reversed.

PEOPLE v. KIRK.

Cr. 3480.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1941.

Hearing Denied Oct. 30, 1941.

1. Criminal law ⇐1144(13)

On defendant's appeal from conviction, evidence was viewed in light most favorable to the people.

2. Embezzlement ⇐11(2)

Where defendant, a clerk in office of park department of city of Santa Barbara, misappropriated to her own use funds which came into defendant's possession and belonged to department, defendant could be convicted for violating statute relating to embezzlement by clerks or servants of municipal corporations or subdivisions thereof, notwithstanding that there was no statute or ordinance which made it defendant's duty to receive misappropriated funds. Pen.Code, § 504.

3. Embezzlement ⇐11(2)

A defendant is guilty of violating the statute relating to embezzlement by clerks or servants of municipal corporations or subdivisions thereof when defendant is a servant or clerk of any municipal corporation or subdivision thereof and fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust any property which defendant has in his possession. Pen. Code. § 504.

4. Embezzlement ⇐11(2)

Under statute relating to embezzlement by clerks or servants of municipal corporations or subdivisions thereof, there is no requirement that misappropriated funds be received by clerk or servant pursuant to a duty imposed by ordinance or statute. Pen. Code, § 504

5. Embezzlement ⇐44(6)

Evidence warranted conviction of defendant, who was a clerk in office of park department of city of Santa Barbara, for violation of statute relating to embezzlement by servants or clerks of municipal corporations or subdivisions thereof. Pen.Code, § 504.

Appeal from Superior Court, Santa Barbara County; Louis C. Drapeau, Judge.

Mary Kirk was convicted for fraudulent appropriation of certain funds, and she appeals.

Affirmed.

Leo T. McMahon, Schauer, Ryon & McMahon, and J. V. Wood, all of Santa Barbara, for appellant.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Percy C. Heckendorf, Dist. Atty., and David S. Licker, Deputy Dist. Atty., both of Santa Barbara, for respondent.

McCOMB, Justice.

From a judgment of guilty on fourteen counts of violating section 504 of the Penal Code after trial by jury, defendant appeals. There is also an appeal from an order denying her motion for a new trial.

[1] Viewing the evidence in the light most favorable to the people (respondent), the essential facts are:

From August, 1935, to January 1, 1940, defendant was employed as a clerk, stenographer, and secretary in the park department of the city of Santa Barbara. Defendant's duties were to be in charge of the office of the department, keep the time of the employees of the department, make out bimonthly pay rolls, answer telephone calls, take care of the correspondence of the office and park board, and keep the minutes of the park board. By custom of the department she also received funds from the recreational facilities of the park department, which she counted and subsequently deposited with the city treasurer. Commencing in 1938 and throughout the period embraced in the indictment, from the funds thus deposited with her she appropriated to her own personal use approximately $1,475.74.

It is conceded that there was no statute or ordinance which made it the duty of defendant to receive the funds which she subsequently misappropriated.

[2] Defendant relies for reversal of the judgment on this proposition:

A person may not be guilty of violating section 504 of the Penal Code by misappropriating funds which have come into his possession, in the absence of a statute or ordinance imposing upon such person a duty to receive and account for the funds which he has misappropriated.

This proposition is untenable. Section 504 of the Penal Code of the state of Cali-

fornia, so far as material here, reads in part as follows: "Every officer of this state, or, of any county, city, city and county, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of any such officer and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession, * * * is guilty of embezzlement."

[3, 4] Defendant is guilty of violating the foregoing section when (1) he is a servant or clerk of any municipal corporation or subdivision thereof, and (2) he fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust any property which he has in his possession. There is no requirement in the statute that the funds misappropriated be received by the clerk or servant pursuant to a duty imposed by ordinance or statute. People v. Knott, 15 Cal.2d 628, 631, 104 P.2d 33, 128 A.L.R. 1367; People v. Tennant, 32 Cal.App.2d 1, 6, 88 P.2d 937.

[5] Therefore, since it is conceded that defendant was a clerk in the office of the park department of the city of Santa Barbara at the times of the alleged misappropriation of funds and there is substantial evidence which defendant does not question to support the finding that she misappropriated funds of the department which were in her possession, there was sufficient evidence to support the jury's implied findings that the necessary elements above mentioned to constitute a violation of section 504 of the Penal Code existed.

San Luis Obispo County v. Farnum, 108 Cal. 562, 41 P. 445, is clearly distinguishable from the facts of the instant case and is not in point, for the case just mentioned was a civil suit on behalf of the county to recover on the official surety bond of the county auditor certain funds received by the auditor from the license tax collector for a license tax due the county and for which the auditor failed to account to the county treasurer. The bond in question covered only official duties of the auditor as set forth in the statute. Since it was not one of his duties under the statute to receive the funds involved, the Supreme Court held that the surety company could not be held on its bond for an act of misappropriation which was committed outside of the duties prescribed for the office by statute.

People v. Shearer, 143 Cal. 66, 76 P. 813, also relied upon by defendant, is inapplicable, for the reason that the only question before the Supreme Court in that case was whether the language in the indictment was sufficient to charge a violation of section 504 of the Penal Code.

The other cases, such as Hartnett v. State, 56 Tex.Cr.R. 281, 119 S.W. 855, 23 L.R.A.,N.S., 761, 133 Am.St.Rep. 971, cited by defendant, are not binding in this state, in view of the decisions of our own appellate courts, supra, to the contrary.

An examination of the record discloses that defendant's rights were fully protected and presented to the trial court by her counsel; and it does not appear that anything has been omitted that might have been urged on her behalf on appeal.

For the foregoing reasons the judgment and order are and each is affirmed.

MOORE, P. J., and WOOD, J., concurred.



47 Cal.App.2d 116

RIES et al. v. REINARD.

Civ. 13016.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1941.

Hearing Denied Nov. 27, 1941.

1. Appeal and error ⇐931(1)

On appeal from judgment for defendant, evidence is viewed favorably to defendant.

2. Physicians and surgeons ⇐14(1, 4), 15

A physician and surgeon is not required to make a perfect diagnosis but is only required to have degree of skill and learning ordinarily possessed by physicians of good standing practicing in same locality and to use ordinary care and diligence in applying that learning to treatment of his patient.

3. Physicians and surgeons ⇐18(8)

In malpractice action against physician who used methylene blue test in diagnosis of gonorrhea, evidence that same slides when

subsequently submitted to independent laboratories for gram negative stain tests showed gonococci and that it was ordinary practice of physicians in community in making diagnoses for gonorrhea to use either methylene blue test or gram negative stain test supported judgment for defendant on ground that defendant had used "requisite skill" in diagnosing complaint.

See Words and Phrases, Permanent Edition, for all other definitions of "Requisite Skill".

4. Physicians and surgeons ⇐15

Where physician upon examination of patient expressed doubt that patient was suffering from gonorrhea but recommended that he return for further examination which patient failed to do, physician's conduct was not actionable on charge of malpractice.

5. Appeal and error ⇐1046(5)

In trial before judge without jury of malpractice action against physician by husband and wife, expression by court of opinion that plaintiffs' case hinged upon wife's cause of action in explanation to ruling against hypothetical question involving husband's cause of action, which hypothetical question the court finally permitted, was not prejudicial to plaintiffs on ground that trial court had reached conclusion and determined rights of parties prior to submission of cause for decision.

6. Trial ⇐29(2)

Trial judge in passing upon questions of law relative to admissibility of evidence, motions to strike, etc., may properly announce reasons upon which he predicates his rulings, although by so doing he necessarily expresses an opinion upon evidence already introduced, since such expressions are not expressions upon ultimate facts to be found but are mere expressions of tentative opinions for benefit and guidance of counsel.

7. Appeal and error ⇐237(2)

In malpractice action against physician for faulty diagnosis and treatment of disease, it was not prejudicial error for court to limit period of time within which plaintiffs' expert could state with scientific certainty by examination that plaintiff did not have the disease and to sustain objection to hypothetical questions which plaintiffs asked their expert witness, where questions were later answered by witnesses and no motions to strike answers were made.

8. Appeal and error ⇐690(6)

In malpractice action against physician for faulty diagnosis and treatment of disease, it was not prejudicial error for court to sustain objection of defendant to question of plaintiffs directed to defendant's expert witness as to merits and demerits of methylene blue and gram negative stain tests for gonorrhea, since question called for "opinion" of an expert and record failed to disclose that witness was an expert on subject relative to which he was questioned.

See Words and Phrases, Permanent Edition, for all other definitions of "Opinion".

9. Appeal and error ⇐232(2)

Where court overruled objection that question directed at expert witness was double question and permitted witness to answer, aggrieved party could not urge prejudicial error on appeal on ground that question contained objectionable matter and was predicated upon state of facts of which no evidence had been received, since objection had been "waived" by not having been called to attention of trial court.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

10. Appeal and error ⇐204(1)

A party cannot urge for first time on appeal objections to evidence, which objections, if made in trial court, might have been obviated.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Stanley G. Ries and another against Dr. Benno Z. Reinard for damages for malpractice. From a judgment for defendant, the plaintiffs appeal.

Affirmed.

C. P. von Herzen, of Los Angeles, for appellants.

John N. Hurtt, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover damages for alleged malpractice, plaintiffs appeal.

Viewing the evidence in the light most favorable to defendant (respondent), the essential facts are:

[1] On December 19, 1938, plaintiff Ruth Ries consulted defendant, a physician and surgeon, relative to an itching in the region of her vagina. After taking said plaintiff's history, defendant made a smear from the vagina, urethra, and cervix, and, after a miscroscopic examination of the smear (known as the methylene blue test) told plaintiff that she had gonorrhea. They then discussed the possible source of her infection, defendant telling her that she could have contracted the disease in all probability only by sexual contact. She informed defendant that the itching had occurred shortly after intercourse with her husband two days previously. Defendant then told plaintiff to talk to her husband or, if she preferred, that he would talk to him. Defendant prescribed treatment for Mrs. Ries which, among other things, consisted of tablets containing sulfanilamide.

On December 21, 1938, plaintiff Stanley G. Ries, the husband of Ruth Ries, consulted defendant who endeavored to obtain a smear from the entrance of said plaintiff's urethra, but was unsuccessful. He, however, obtained an imprint which he examined microscopically, and he expressed doubt to said plaintiff as to whether he was afflicted with gonorrhea but told him that he was convinced that his wife was suffering from the disease and he considered it advisable for Mr. Ries to commence treatment immediately. He asked him to return the following day for further examination. Mr. Ries never returned to defendant for further treatment.

December 22, 1938, both plaintiffs consulted Dr. J. S. Gilbert, who made smears and sent them to a laboratory for examination. The laboratory after a test known as the "gram negative stain" returned them to Dr. Gilbert with a statement that their tests showed the specimens "negative"; whereupon Dr. Gilbert declared that neither plaintiff was suffering from gonorrhea. A few months subsequently plaintiffs commenced the present action against defendant, whereupon defendant sent the slide containing the smear from Mrs. Ries to two laboratories, where the "gram negative stain" test was applied and both laboratories reported a positive reaction showing gonococci.

These are the questions necessary for us to determine:

First: Is the evidence sufficient to sustain a judgment in favor of defendant against plaintiff Ruth Daniels Ries?

Second: Is the evidence sufficient to sustain a judgment in favor of defendant against Stanley G. Ries?

Third: Did the trial court determine the rights of the parties prior to the submission of the cause for decision?

Fourth: Did the trial court commit prejudicial error in (a) limiting the period of time in which plaintiff's expert could state with scientific certainty by examination that Mrs. Ries did not have gonorrhea, (b) sustaining an objection to a hypothetical question which plaintiffs asked one of their expert witnesses and (c) sustaining an objection of defendant to a question asked by plaintiffs of an expert witness of defendant relative to the merit and demerit of the methylene blue and gram negative stain tests?

Fifth: Was it prejudicial error for the trial court to overrule plaintiffs' objection to a hypothetical question which defendant asked one of his expert witnesses?

[2, 3] The first question must be answered in the affirmative and is governed by the rule of law that a physician and surgeon is not required to make a perfect diagnosis but is only required to have that degree of skill and learning ordinarily possessed by physicians of good standing practicing in the same locality and to use ordinary care and diligence in applying that learning to the treatment of his patient. (Engelking v. Carlson, 13 Cal.2d 216, 220, 88 P.2d 695.) The evidence in the instant case discloses that it was the ordinary practice of physicians and surgeons in this community in making diagnoses for gonorrhea to use either the methylene blue test or the gram negative stain test. In the present case the evidence discloses that at the time Mrs. Ries consulted defendant he made the methylene blue test which showed she was suffering from gonorrhea. Subsequently the same slides were submitted by him to two independent laboratories where the gram negative stain tests were made showing the presence of gonococci. It therefore appears that there was substantial evidence to support the finding of the trial court that defendant had used the requisite skill in diagnosing Mrs. Ries' complaint.

[4] The second question likewise must be answered in the affirmative. Defendant testified that after making an examination of Mr. Ries he told him that he did not think that he was suffering from gonorrhea

but recommended that he return for further examination, which Mr. Ries failed to do. Obviously defendant's conduct relative to Mr. Ries was proper and not actionable.

The third question must be answered in the negative. During the course of the trial the following colloquy between court and counsel occurred:

"The Court: Have you got another long hypothetical question?

"Mr. Hurtt: It is about half as long as the other.

"The Court: Another set of facts?

"Mr. Hurtt: It relates to the plaintiff Stanley Ries. The facts are somewhat different.

"The Court: You mean about his coming back? I am not concerned with Mr. Ries at all, because, in view of the testimony of the defendant under 2055, he said in his opinion he did not have it. Just taking extra caution.

"Mr. Hurtt: Yes.

"The Court: His records show that.

"Mr. Hurtt: If your Honor feels that way—

"The Court: The plaintiffs' case hinges upon Mrs. Ries, not upon Mr. Ries.

"Mr. Hurtt: Well, I will forego it.

"Mr. Gold: In that connection, if your Honor please, if you want any argument on that point, I think the very fact that Dr. Reinard now—

"The Court: Go ahead and finish your hypothetical question. It is quicker. I just didn't want another long hypothetical question. There is a conflict on that point, and I thought, in view of his office records, that the case hinges on Mrs. Ries rather than on Mr. Ries. Read it through fast for him."

[5, 6] The trial court's remarks in the foregoing colloquy were not prejudicial to plaintiffs nor did they show that the trial judge had reached a conclusion upon the case. It is not unusual nor is it improper for the trial judge in passing upon questions of law relative to the admissibility of evidence, motions to strike, etc., to announce for the guidance of counsel the reasons upon which he predicates his rulings, although by so doing he necessarily expresses an opinion upon the evidence which has been already introduced. Such expressions of opinion are not intended to be nor are they final expressions upon the ultimate facts to be found in the cause then pending, but are mere expressions of tentative opinions for the benefit and guidance of counsel. (See Reed v. Clark, 47 Cal. 194, 200.)

[7] The queries in paragraphs (a) and (b) of the fourth question must be answered in the negative, for the reason that the questions were in fact answered by the witness and no motion to strike the answers was made. Therefore, the witness' answers stood as evidence in the case, which we must presume the trial judge considered upon the final submission of the cause for his determination.

[8] The query in paragraph (c) of the fourth question must likewise be answered in the negative. During the examination of Mr. Feinberg the following occurred:

"Q. By Mr. Gold: If you were to receive a smear that had already been stained with methylene blue, and if it is reported to be a smear taken some six or seven months before, what would you state as to the reliability of such a diagnosis from a smear of that sort?

"Mr. Hurtt: I object to that; this witness not qualified to answer that question.

"The Court: I will sustain the objection."

The trial court's ruling was correct. The question called for the expression of an opinion of an expert and the record fails to disclose that the witness Feinberg was an expert upon the subject relative to which he was being questioned.

The fifth question must be answered in the negative. During the examination of Drs. Crane and Fagan, expert witnesses called by defendant, a hypothetical question was asked each, after which the following objection and ruling occurred:

"Mr. Gold: Just a moment, to which I object as asking a double question.

"The Court: Overrule the objection and let him answer."

[9, 10] Plaintiffs now urge that the objection to the question should have been sustained for the reason that the question contained objectionable matter and was predicated upon a state of facts of which no evidence had been received. The objections now urged by plaintiffs were not called to the attention of the trial court and, therefore, have been waived. The rule is settled in California that a party cannot urge for the first time on appeal

objections to evidence, which objections, as in the instant case, if made in the trial court might have been obviated. (Matthiesen v. Smith, 16 Cal.App.2d 479, 482, 60 P.2d 873.)

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WOOD, J., concurred.



47 Cal.App.2d 128

SELLERS v. NEIL.

Civ. 13298.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1941.

1. Execution ⇐275(2)

Where judgment creditor failed to follow statutory requirements in regard to execution against homesteads, no interest was gained by judgment creditor who levied upon and purchased at sheriff's sale an undivided half interest in land owned by judgment debtor and declared by her to be her homestead. Civ.Code, §§ 1245–1259.

2. Quieting title ⇐43

In action to quiet title, defendant under general denial may raise issue that plaintiff acquired title in whole or in part through fraudulent transfer affecting her claim to title thereto.

3. Appeal and error ⇐172(3)

In action to quiet title, where defendant did not indicate during trial that she was claiming the conveyance by which plaintiff held the land to be fraudulent as to defendant, defendant was not permitted to urge for first time on appeal that trial court should have found for her on that issue.

4. Fraudulent conveyances ⇐310

In action to quiet title, a finding by trial court, that allegation in answer to effect that defendant was owner of all right, title, and interest in land in question as against plaintiff and her daughter was untrue, was sufficient to negative claim that conveyance of interest in land from daughter to plaintiff was "fraudulent" as to defendant.

5. Fraudulent conveyances ⇐300(2)

Where record on appeal was silent as to what other considerations there may have been for a conveyance of land, evidence, consisting of recital in deed that actual consideration was less than $100 and of testimony that interest conveyed was worth $2,500, was insufficient to establish claim that conveyance was "fraudulent" as to creditors of grantor, so as to justify quieting of title in judgment creditor of grantor who had levied upon land and purchased at sheriff's sale.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraudulent Conveyance".

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Mae E. Sellers against Trinity Neil and others to quiet title to land. Defendant Trinity Neil entered a cross-complaint to quiet the title in her. From judgment for plaintiff, the defendant appeals.

Judgment affirmed.

Ben Van Tress and James R. Jaffray, both of Los Angeles, for appellant.

W. R. Hervey, Jr., of Los Angeles, for respondent.

HANSON, Justice pro tem.

The primary question presented by this appeal is whether a conveyance by one joint-tenant to the other was fraudulent as to a creditor of both, and if so, whether a declaration of homestead filed by the grantee joint-tenant prior to the lien of the creditor's judgment is effective to partially or completely bar that lien.

The creditor—predecessor in interest of appellant—on May 1, 1935, instituted an action to foreclose (and for a deficiency) a trust deed as a mortgage on property, other than the property herein involved, which secured a joint and several promissory note, both of which instruments had been executed by Ione Sellers and her mother, Mae E. Sellers, the latter being the respondent here. At, prior and at all times subsequent to the date the action was instituted the mother and her daughter occupied the property here in controversy as a home. On May 21, 1935, the daughter conveyed her interest therein to the mother, and on May 22, 1935,

the mother made a declaration of homestead on the property and the next day filed both the deed and the declaration for record. In the foreclosure action the decree of foreclosure ordered a sale by a commissioner, but before the sale was held due notice was given of the fact that the mother had filed a declaration of homestead against the property here involved. On July 6, 1935, the commissioner filed his return showing a sale had been made of the mortgaged property to the judgment creditor. Thereafter a deficiency judgment for $793.-93 was rendered and entered against the mother and the daughter, upon which execution issued to the sheriff, who levied on the property here in question and in due course sold the property to appellant. The usual certificate of sale was issued and filed for record on January 13, 1939. Thereafter on May 18, 1939, the mother instituted this action in the court below to quiet title to the homestead property, naming as defendants, among others, the appellant, the original judgment creditor, and the sheriff of Los Angeles County. Appellant, Trinity Neil, entered a general denial to the complaint to quiet title and a cross-complaint to quiet the title in her.

The trial court found that respondent was, and at all times material to the controversy had been, the absolute owner and in possession of the homestead property; that she filed a declaration of homestead on May 23, 1935, and that the various affirmative allegations of title set up by appellant were untrue.

[1] We turn now to appellant's contentions and concessions. First, she concedes that the judgment creditor failed to follow the requirements of Civil Code sections 1245–1259 and hence she has no right of title to the undivided interest which was held by the mother prior to her daughter's conveyance to her. However, appellant maintains that her predecessor, the judgment creditor, was not required to follow the Civil Code sections mentioned in pursuing the interest conveyed by the daughter, if the conveyance may be said to be fraudulent as to the creditor. Accordingly, the pertinent inquiry at this point is whether a fraudulent conveyance was in issue and if so whether it was shown. The trial court made no special finding on the point, and this appellant assigns as error.

[2–5] Error is predicated upon the theory that in a quiet title suit, unlike other actions generally, a defendant under a general denial may raise the issue that the plaintiff acquired title in whole or in part through a fraudulent transfer affecting her claim of title thereto. Contrary to the contention of respondent this, as appellant claims, is the rule in this jurisdiction. Howe v. Johnson, 107 Cal. 67, 40 P. 42; Banning v. Marleau, 121 Cal. 240, 53 P. 692; Bird v. Murphy, 72 Cal.App. 39, 236 P. 154. However, the difficulty for appellant here is that not once during the trial did she, by statement to the court or through any examination of the witnesses, indicate that she was claiming that the conveyance by the daughter to the mother was fraudulent as to her or her predecessor. She may not now contend in this court, for the first time, that the trial court should have found specially on an issue she raises here but did not raise there. Furthermore, the finding of the court that the allegation of appellant's answer reading, "that the said Trinity Neil is by virtue of said certificate of sale the owner of all the right, title and interest in and to the property described in plaintiff's complaint, as against the claim of Mae E. Sellers and Ione Sellers, or either of them", was untrue, was sufficient to negative the claim, if claim there was, that the daughter's conveyance was fraudulent. The only evidence in the record bearing on the question, here shadowed forth for the first time, is the recital in the deed that the actual consideration therefor was less than one hundred dollars and testimony that an undivided one-half interest in the property was of the value of $2,500. As the record is silent as to what other consideration there may have been for the conveyance, it is obvious that the evidence is wholly insufficient.

For the reasons indicated we have no occasion to consider the question whether the declaration of homestead in and of itself was a bar against appellant in her attempt to follow the interest conveyed by the grantor joint-tenant. The purported appeal from the order denying motion for a new trial is dismissed.

The judgment should be and it is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

47 Cal.App.2d 96

GOGO et al. v. LOS ANGELES COUNTY FLOOD CONTROL DIST.

Civ. 12805.

District Court of Appeal, Second District, Division 2, California.

Oct. 1, 1941.

Hearing Denied Nov. 27, 1941.

Appeal and error ⇐1218

Where motion to recall remittitur was based on ground that judgment had been induced by fraud or imposition practiced upon court by a false suggestion as to the facts, which ground had been made basis of petition for rehearing which had been denied by operation of law and an application to the Supreme Court for a hearing had been denied and appellate court was satisfied with decision theretofore given, motion to recall the remittitur would be denied.

On appellant's motion to recall remittitur.

Motion denied.

For former opinion, see 114 P.2d 65.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and Ned Marr, Deputy Co. Counsel, all of Los Angeles, for appellant.

Stephen Monteleone and Wood, Crump & Rogers, all of Los Angeles, for respondents.

WOOD, Justice.

Defendant has presented a motion to recall the remittitur in the above entitled action, heretofore decided adversely to it by this court on June 13, 1941, the decision being reported in 45 Cal.App.2d —, 114 P.2d 65. In support of its motion defendant contends that the judgment of June 13 was induced by "fraud or imposition practiced upon the court by a false suggestion as to the facts". Defendant also complains that during the period within which this court had jurisdiction to pass upon its petition for a rehearing one of the members of the court was on vacation and another was sitting as a justice pro tempore in the Supreme Court.

The plaintiffs recovered a judgment in the superior court and defendant appealed to this court. By our decision of June 13, the judgment of the trial court was affirmed. Thereafter, within the time provided by law, defendant petitioned this court for a rehearing, which petition was denied by operation of law. Thereafter defendant applied to the Supreme Court for a hearing and the application was denied by the Supreme Court on August 11, 1941. The remittitur went down on August 13, 1941.

In making the present motion defendant filed with this court a brief in which it sets forth the same contention that it made in its petition to this court for a rehearing.

No sufficient reason has been shown for the recall of the remittitur. We are satisfied that our decision of June 13, 1941, is based upon a statement of facts supported by the record, that it properly disposes of the issues presented by the appeal and that it was not induced by any fraud or imposition practiced upon the court or by any false suggestion as to the facts.

The motion to recall the remittitur is denied.

MOORE, P. J., and McCOMB, J., concurred.



47 Cal.App.2d 168

WADE v. BUYERS et al.

Civ. 13099.

District Court of Appeal, Second District, Division 2, California.

Oct. 3, 1941.

1. Negligence ⇐134(10)

In action against lessee and overseer of apartment house for injuries to one falling on cement walk along side of building, evidence *held* sufficient to sustain trial court's finding that it was defendant overseer's duty to perform all necessary things to be done in connection with apartment house business and particularly to keep building and its appurtenances in proper state of repair.

2. Negligence ⇐134(3)

In action against apartment house lessee and overseer for injuries to one falling on cement walk along side of building, evidence *held* sufficient to support trial court's finding that walk was maintained so that

tenants of apartments operated by defendants in separate building behind main building could pass in and out.

3. Negligence ⇐32(1, 2)

One intending to reside in apartment occupied by another as tenant was such tenant's "invitee" and hence entitled to exercise of ordinary care for her safety by persons in charge of apartment building while she was walking on cement walk maintained so that tenants of apartments in such building could pass in and out without going through another apartment building operated by such persons.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

4. Negligence ⇐135

In action against lessee and overseer of apartment house for injuries to one falling on cement walk along side of building, plaintiff's testimony that as she was walking in careful manner, she stepped into hole, which caused her to fall, that there was no light on premises, and that she had not walked on such walk before time of accident, justified trial court's finding that plaintiff was not guilty of contributory negligence in using walk instead of going through building to reach apartments operated by defendants in separate building.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Nellie Wade against Mrs. G. Buyers and another for personal injuries. Judgment for plaintiff, and named defendant appeals.

Affirmed.

Edgar T. Fee and W. I. Gilbert, Jr., both of Los Angeles, for appellant Buyers.

Cressaty & Elstein and L. S. Jones, all of Los Angeles, for respondent Wade.

Lyons & Lyons, of Los Angeles, for defendant Rowland.

WOOD, Justice.

Plaintiff recovered a judgment in the sum of $3,750 as damages for injuries suffered by her when she fell upon a cement walk along the west side of the Castle Arms Apartments. Although the judgment is against both Ruby Rowland and Mrs. G. Buyers, the last named defendant alone has perfected an appeal.

[1] Defendant Rowland was the owner of the leasehold of the apartment house in question and appellant, her sister, was employed as "overseer" of the apartment house. The trial court found that it was appellant's duty "to perform all necessary things to be done in connection with said apartment house business, and particularly to keep the said apartment house and its appurtenances in a proper state of repair". It is now contended that this finding is without support in the evidence. Appellant testified that it was part of her duties "to see that the place was kept in good state of repair at all times. * * * It was part of my duty as an overseer to see that the interior was kept in good repair. When I discovered how the exterior was, I still felt it was my duty to have it repaired". Mrs. Rowland testified that it was part of the duties of appellant to see that the place was kept in good repair at all times and that she never gave appellant any particular instructions about any particular repairs. After plaintiff was injured appellant had the walk repaired and the cost of the repairs was charged to the apartment house account. The evidence is ample to sustain the court's finding.

[2] It is also contended that the evidence is insufficient to support the trial court's finding that the cement walk in question was maintained so that tenants of the apartments in the rear of the main building could pass in and out. We find that the evidence is ample to support this finding. The main building contained a number of apartments and to the rear of this building defendant operated four apartments in a separate building. A hallway ran through the main building and the apartments in the rear could be reached by ascending a flight of stairs at the front of the building and descending another flight of stairs at the rear. The walk running along the west side of the building was the only means of ingress and egress for the tenants of the rear apartments except by going through the main building. This walk was approximately 3½ to 4 feet wide. At the front part of the walk there were several steps each about 3 inches in height. A number of witnesses testified that the walk was commonly used by the tenants of the rear apartments as the usual means of ingress and egress.

[3] Appellant also contends that no duty was owed plaintiff to use ordinary care, basing the contention upon the assertion

that plaintiff intended to reside in one of the rear apartments occupied by the tenant Fulds and that Fulds did not have the right to sub-let the apartment without the permission of the owner. Whether plaintiff intended to become a sublessee need not be considered since she unquestionably was an invitee of the tenant Fulds and as such she was entitled to the exercise of ordinary care on the part of those in charge of the premises. Brown v. Pepperdine, 53 Cal. App. 334, 200 P. 36.

[4] The contention that plaintiff was guilty of contributory negligence as a matter of law is without merit. Plaintiff testified that as she was walking in a careful manner she stepped into a hole in the passageway in question, which caused her to fall and strike the next step; that there was no light on the premises; and that she had not walked on the passageway prior to the time of the accident. The trial court was justified in finding that plaintiff was not guilty of negligence in thus using the cement walk in preference to going through the main building to reach the Fulds apartment.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.



47 Cal.App.2d 132

PEOPLE v. HERNANDEZ et al.

Cr. 3470.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1941.

Rehearing Denied Oct. 15, 1941.

Hearing Denied Oct. 30, 1941.

1. Robbery ⇐24(3)

Evidence was sufficient for jury to find that defendant participated in robberies of three liquor stores.

2. Witnesses ⇐274(1)

In robbery prosecution, district attorney's questions asking defendant's character witnesses whether their opinion would be the same if they knew that defendant had previously been arrested for assault with a deadly weapon, and had also been arrested and "served time" for carrying concealed weapons, were objectionable, and the trial court erred in not sustaining defendant's objections thereto.

3. Witnesses ⇐274(1)

The cross-examination of an accused's character witness should be limited to the witness' knowledge of specific acts inconsistent with the element of good character relative to which the witness has testified.

4. Criminal law ⇐1170½(5)

In robbery prosecution, trial court's error in not sustaining objections to district attorney's questions asking defendant's character witnesses whether their opinion would be the same if they knew that defendant had previously been arrested and "served time" was not prejudicial where each witness answered that if defendant had been guilty of offenses mentioned, it would not change his opinion that defendant had a good reputation for honesty, and trial court charged that jury should consider only charges set forth in information, and that cross-examination of character witnesses went only to weight and value to be given to character testimony. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Ernest Hernandez, Ray Holguin, and others were convicted of robbery in the first degree, and Ray Holguin appeals from three judgments and from orders denying a motion for new trial.

Judgments and orders affirmed.

John P. Tobin, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From three judgments of guilty of robbery in the first degree after trial by jury, appellant appeals. There are also appeals from the orders denying his motion for a new trial.

Viewing the evidence in the light most favorable to the people (respondent), the essential facts are:

On November 14, 1940, appellant with two other men entered a liquor store owned by Mr. Hardisty, and, while ap-

pellant held a gun against Mr. Hardisty's stomach, his companions took money from Mr. Hardisty and also took a quantity of liquor from the store. On November 15, 1940, appellant and another man entered a liquor store owned by Mr. Demetriou and, while appellant's companion pointed a gun at James Demetriou, a son of the proprietor, appellant opened the cash register and took money therefrom. On November 16, 1940, appellant and two other men entered Frank Boros' liquor store and, while appellant placed a gun against the proprietor, one of appellant's companions took money from the cash register.

Appellant relies for reversal of the judgments on these propositions:

First: There is no substantial evidence to sustain the finding of the jury that appellant participated in the robberies of which he was convicted.

Second: The trial court committed prejudicial error in permitting the district attorney in cross-examining appellant's character witnesses, who had testified that he had a good reputation for honesty, to ask them if they knew that appellant (a) had previously been arrested for assault with a deadly weapon, and (b) had also been arrested and "served time" for carrying concealed weapons.

[1] Appellant's first proposition is devoid of merit. An examination of the record discloses substantial evidence taken together with inferences which the jury may have reasonably drawn therefrom to sustain each and every material finding of fact upon which the judgments were necessarily predicated, including the identity of appellant as the perpetrator of the crimes of which he was convicted. For example, the victim of the crimes in each instance identified appellant as a participant in the robberies. Further discussion of the evidence is therefore unnecessary. See, for a complete statement of the rule on this subject, People v. Pianezzi, 42 Cal. App.2d 265, 269, 108 P.2d 732.

[2-4] Appellant's second proposition is also untenable. After witnesses for the appellant had testified that his reputation for honesty in the community in which he resided was good, the district attorney was permitted to ask such witnesses whether their opinion would be the same if they knew that appellant (a) had previously been arrested for assault with a deadly weapon, and (b) had also been arrested and "served time" for carrying concealed weapons. These questions were objectionable and it was error for the trial court not to sustain appellant's objections thereto. The law is established in California that in cross-examining appellant's character witness such examination should be limited to the witness' knowledge of specific acts inconsistent with the element of good character relative to which the witness has testified. In the instant case the crimes of assault with a deadly weapon and carrying concealed weapons are not acts inconsistent with a good reputation for honesty. However, after an examination of the record, we are of the opinion that the error was not *prejudicial* to any of appellant's substantial rights. In each instance appellant's character witnesses in reply to the district attorney's improper questions answered that if appellant had been guilty of the offenses mentioned in the questions, it would not change the witnesses' opinions that appellant had a good reputation for honesty. Likewise, immediately after the examination of the first character witness the trial court instructed the jury as follows:

"The Court: Now, ladies and gentlemen of the jury, the only purpose for which those questions containing the alleged previous trouble with the law that this defendant had were asked merely for the purpose of testing the value and effect of the evidence of the witness, Mrs. Clarke. We are not here trying this defendant for anything other than the charges mentioned in the information in this case."

Again at the close of the trial the trial court in its charge to the jury further instructed the jury thus:

"You are here, ladies and gentlemen of the jury, for the purpose of determining the guilt or innocence of defendant, Raymond Holguin, of the charges set forth in the Information, namely, robbery. You are not to consider any evidence of any other alleged offense in determining the guilt or innocence of the charges in the Information. When a defendant offers testimony of his good reputation for the basic character trait involved in the charges, the People may cross-examine such character witnesses as to defendant's character and reputation and may seek to determine how extensive their knowledge of said defendant's reputation is by inquiring of them of matters in the life of the defendant. However, you are instructed that

such evidence only goes to the weight of the value that you should give, in your best judgment, to such character testimony and shall not be considered by you in determining the issues presented in this case, to-wit, the guilt or innocence of the defendant of the matters set forth in the Information."

In view of the fact that the error was not prejudicial, a reversal of the judgment may not be predicated thereon (art. VI, § 4½, Const. of Cal.).

For the foregoing reasons the judgments and orders are and each is affirmed.

MOORE, P. J., concurred.

WOOD, Justice (concurring).

I concur in the judgment. The evidence of appellant's guilt is so convincing that it is not probable that a different verdict would have been returned if the errors in the cross-examination of the witnesses had not been made. There has been no miscarriage of justice.



47 Cal.App.2d 164

SCHLEMMER v. STOKES.

Civ. 13071.

District Court of Appeal, Second District, Division 2, California.

Oct. 3, 1941.

1. Appeal and error ⇐1015(1)

Where the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party, an order granting a motion for a new trial must be reversed.

2. Innkeepers ⇐10

An innkeeper is not an "insurer" of the safety of a guest, but owes him the duty of exercising reasonable care to keep the premises in a safe condition.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurer".

3. Innkeepers ⇐10

One suing an innkeeper for personal injuries has the burden of establishing that innkeeper negligently failed to exercise reasonable care to keep the premises in a safe condition.

4. Evidence ⇐5(2)

It is common knowledge that a screen is not placed in a window for the purpose of keeping persons from falling out.

5. Innkeepers ⇐10

In action against innkeeper for injury of child of three years who was injured when window screen against which child was leaning gave way, where it was undisputed that innkeeper's employee had inspected, painted, and repaired screen and had noticed nothing wrong with it, and that infant's mother in opening and closing screen had noticed nothing wrong with it, evidence of infant's father that after the accident the wood appeared to be rotten and that the particles drawn from the hole in screen looked like bread crumbs could not give adequate support for a finding of failure by innkeeper to use reasonable care.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Jackie Schlemmer, etc., against Myra Stokes, for injuries received when plaintiff fell through a window of an apartment in building which had been rented by plaintiff's parents from defendant. From an order granting the plaintiff a new trial, the defendant appeals.

Order reversed.

Crider, Runkle & Tilson, of Los Angeles (John J. Ford, of Los Angeles, of counsel), for appellant.

Charles A. Thomasset, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff commenced this action to recover damages for injuries suffered when he fell through a window of an apartment in defendant's apartment house which had been rented by his parents. It is alleged in the complaint that a screen in the window had been placed in a defective frame and that it was negligently attached to the window sill. A jury returned a verdict in favor of defendant but the trial court granted a new trial. The appeal is taken from the order granting the new trial.

The apartment in which the minor plaintiff resided with his parents consisted of a living room, kitchen, bathroom and bedroom, all on the second floor of the building. The parents paid for the apartment the sum of $27.50 per month, half of which was paid every two weeks. When they rented the apartment they stated that they would probably occupy it for two or three months. Defendant testified that apartments in the building were rented by the week and by the month but once in awhile she rented for the night if it was somebody she knew. She retained keys to all of the apartments, which were completely furnished, but the tenants took care of the laundering of the linen. A register of the tenants was kept. Gas, light and water were supplied by defendant.

At the trial the court, being of the opinion that the evidence was insufficient to sustain a finding that defendant was an innkeeper, instructed the jury concerning the general rules applicable to the relation of landlord and tenant. On the presentation of a motion for a new trial the trial court concluded that there was evidence from which an inference might be drawn "that plaintiff's parents were guests of the defendant's apartment house" and that error had been committed in the refusal to give instructions concerning the obligations of an innkeeper. In granting the motion for a new trial the court filed a written memorandum in which it is set forth: "Notwithstanding the fact that I believe the great weight of the evidence supports the giving of the instructions that were given as to the relationship of such parties and that it also supports the inference that more pressure was exerted on the screen than any ordinarily safe window screen would have resisted, still inasmuch as in my opinion the jury might not have so inferred from the evidence if such instructions had not been refused and the issue had not been limited by the instructions as they were given, I am forced to grant a motion for new trial on the ground of errors in law committed by the trial court, as well as on the ground that the evidence does not justify the verdict."

[1] Without conceding that the evidence would support a finding that she was an innkeeper, defendant contends that the evidence is insufficient to support a finding in plaintiff's favor in any event, whether the defendant be regarded as an innkeeper or as one occupying the position of an ordinary lessor of real property. This contention must be sustained. Where the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party an order granting a motion for a new trial must be reversed. Henderson v. Braden, 35 Cal.App.2d 88, 94 P.2d 625.

At the time of the accident plaintiff was three years of age. When his parents rented the apartment no screens were on the bay window and plaintiff's mother asked the owner for screens "on account of the baby". Soon thereafter defendant installed the screens on the two side windows of the bay window, the middle window being stationary. At the time of the accident plaintiff climbed on the arm of a davenport, being attracted by children playing below. As plaintiff from this position leaned against the screen it gave way and he fell out of the window.

The screen in question was not a new one. Shortly after it was installed it was removed and painted. The screen opened at the bottom, where it was fastened to the sill by means of a hook and two screw-eyes, one of the latter being embedded in the cross bar at the bottom of the screen, the other in the sill of the window itself at the bottom of the window. From outward appearances the screen was normal. Plaintiff's father testified that he examined the screen after the accident; that "where the hook pulled out the hole was a lot bigger than the hook * * * the wood looked rotten to me * * * the pieces of wood that were on the window sill which had come out of that cross bar of the screen * * * looked like bread crumbs". Plaintiff's mother testified that she had hooked and unhooked the screen on several occasions to dust and clean but had found nothing wrong with it. The workman who had removed and painted the screen testified that he had painted and fixed the screens "that needed it" and that he had "replaced the hooks and fasteners on the screens that needed it and put new wires—screen wires that were torn replaced with new screen". It is conceded by respondent that "the defect in the screen was latent and that the owner did not have actual notice of its existence".

[2-5] Even if considered as an innkeeper, defendant was not an insurer of the safety of plaintiff, but she owed to him the duty of exercising reasonable care to keep the premises in a safe condition. The bur-

den was upon plaintiff to establish that defendant was negligent in this regard. Goldstein v. Healy, 187 Cal. 206, 211, 201 P. 462; Robertson v. Weingart, 91 Cal. App. 715, 721, 267 P. 741; Dye-Washburn v. Aldridge, 207 Ala. 471, 93 So. 512; 28 Amer.Jur. 578. It is a matter of common knowledge that a screen is not placed in a window for the purpose of keeping persons from falling out. The record before us discloses positive and uncontradicted evidence that defendant's employee inspected, painted and repaired the screen but noticed nothing wrong with it. Plaintiff's mother in opening and closing the screen for the purpose of dusting noticed nothing wrong with it. The statement of plaintiff's father that after the accident the wood appeared to him to be rotten and that the particles drawn from the hole looked like bread crumbs, could not give adequate support for a finding of failure by defendant to use reasonable care, in view of the other evidence presented and the admitted fact that the defect in the wood, if any, was latent.

The order is reversed.

MOORE, P. J., and McCOMB, J., concurred.



47 Cal.App.2d 98

YOKOHAMA SPECIE BANK, Limited, v. S. KITASAKI et al.

MASAMI SASAKI v. YANA KAI.

Civ. 12964.

District Court of Appeal, Second District, Division 2, California.

Oct. 1, 1941.

1. Execution ⇐188

The statute providing for determination of title to property levied on is applicable only in cases involving personalty, and title to realty could not be determined in a proceeding thereunder. Code Civ.Proc. § 689.

2. Execution ⇐283

The remedy of a person claiming to be owner of realty sold under execution for debt of another is an action to quiet title to the realty sold.

3. Appeal and error ⇐790(3)

An appeal from orders purporting to release the levy of attachment on realty will not be dismissed as involving "moot questions" because of a judgment in an action for declaratory relief by appellant against respondent settling the rights of the parties in the real property where appeal was pending from the declaratory judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by the Yokohama Specie Bank, Limited, against S. Kitasaki and others, wherein the plaintiff recovered a judgment which was assigned to Masami Sasaki, who caused a writ of execution to be issued on the judgment and caused the sheriff to levy on all the right, title, and interest of M. Kai in certain realty. Yana Kai, without being made a party to the action, filed a motion for an order directing that the writ of "attachment" be discharged. From orders purporting to release the levy and attachment of realty, Masami Sasaki appeals.

Orders reversed.

A. E. Coger, of Los Angeles, for appellant.

John Y. Maeno, of Los Angeles, for respondent.

WOOD, Justice.

Appeals are prosecuted from orders purporting to release "the levy and attachment of real property standing in the record and name of Yana Kai".

The Yokohama Specie Bank on September 11, 1930, recovered a judgment in the sum of $8,000.25 against M. Kai and others. This judgment was assigned to Masami Sasaki in July, 1940. Yana Kai was not a party to the action. On July 26, 1940, Masami Sasaki caused a writ of execution to be issued on the judgment and caused the sheriff to levy upon "all the right title and interest of M. Kai" in certain real estate in Montebello. No attempt was made to levy upon any interest that Yana Kai might have in this property. Without being made a party to the action, Yana Kai presented

to the court on August 20, 1940, a motion "for an order directing that the writ of attachment in this case be discharged, and/or that the writ of attachment of the property described in the writ be released as to any and all right, title and interest in and to the said described property up to and including April 12, 1940, and that the writ of attachment, if any, be limited specifically to any right, title or interest of the defendant, M. Kai, in and to said described property as acquired subsequent to April 12, 1940: On the ground that the matter is res adjudicata as to any and all right, title and interest in and to said described property up to and including August 12, 1940." She filed an affidavit in which she stated that the Yokohama Specie Bank had filed a separate action against her and others to determine title to the real estate described in "the present attachment" and that the action had been settled and dismissed with prejudice. Apparently all the parties and the court treated Yana Kai's motion to release the "attachment" as a motion to release the real property from the levy of July 26, 1940.

[1, 2] It is apparent that respondent has attempted to apply the provisions of section 689 of the Code of Civil Procedure to a case in which a levy has not been made upon personal property. It has been held that section 689 is applicable only in cases involving personal property and that title to real property cannot be determined by proceedings under the section. First National Bank v. Kinslow, 8 Cal.2d 339, 65 P.2d 796. The remedy of a person claiming to be the owner of real property sold under execution for the debt of another is an action to quiet title to the real property sold.

[3] Respondent has filed a brief herein in which it is set forth that appellant "meanwhile" commenced an action in the superior court against respondent "to have a declaratory judgment entered, determining all the right, title and interest of the parties in and to said real property". It is set forth in the brief that this action was tried in the superior court and judgment rendered in favor of respondent on June 25, 1941. The findings of fact upon which the last-mentioned judgment is based are set forth in the brief and respondent now argues that the issue involved in this appeal has become moot. Assuming that the matter set forth in respondent's brief can be considered by us in view of the record, it is nevertheless apparent that no showing is made that the judgment of June 25, 1941, has become final. Indeed, counsel for appellant has filed in this court a statement from which it is apparent that an appeal has been duly taken from the judgment of June 25, 1941. It is evident that the issue has not become moot.

The orders are reversed.

MOORE, P. J., and McCOMB, J., concurred.



47 Cal.App.2d 82

SALES et al. v. BACIGALUPI.

Civ. 11516.

District Court of Appeal, First District, Division 2, California.

Oct. 1, 1941.

Hearing Denied Nov. 27, 1941.

1. Evidence ⇐540

A physician who had practiced in Oakland for several years was qualified to testify to method customarily used to treat an infection, in San Francisco, notwithstanding that physician had never practiced in latter city.

2. Evidence ⇐571(3)

In action against physician for malpractice with respect to treatment of infection developing in patient's foot after sole of foot was pierced by nail in shoe, testimony of patient's witness, a physician, was sufficient to support verdict for patient.

3. Evidence ⇐574

In action for malpractice, testimony of a physician in answer to a hypothetical question based on facts in record is sufficient to support a finding contrary to testimony of other physicians who had seen and examined patient, notwithstanding that physician's testimony conflicts with all other medical testimony.

4. Evidence ⇐598(1)

The testimony of one credible witness, if believed by jury, is sufficient to support a verdict although opposed by testimony of other witnesses.

5. Physicians and surgeons ⇐18(9)

In action against physician for malpractice with respect to treatment of infection de-

veloping in patient's foot after sole of foot was pierced by nail in shoe, whether patient was contributorily negligent in treating foot before calling physician was for jury.

6. Physicians and surgeons ⇐18(8)

Evidence supported finding that physician's negligent treatment of infection developing in patient's foot after sole of foot was pierced by nail in shoe was the proximate cause of loss of patient's baby, which was born prematurely, and amputation of part of patient's leg.

7. Evidence ⇐558(8)

In action for malpractice with respect to treatment of a streptococcic infection developing in patient's foot, sustaining objections to defendant's cross-examination of patient's witness, a physician, respecting witness' failure to diagnose correctly Berger's disease in a patient under treatment by witness with consequent loss of a leg was proper, where there was no contention that Berger's disease was a streptococcic infection.

8. Evidence ⇐558(8)

In action for malpractice with respect to treatment of infection developing in patient's foot, sustaining objections to defendant's cross-examination of patient's witness, a physician, respecting witness' knowledge of the drug aconitine was proper, where there was no showing as to how knowledge of aconitine would affect case.

9. Evidence ⇐560

Where plaintiff's witness, a physician, was asked on cross-examination whether witness' federal license to prescribe liquors was revoked during prohibition and witness gave a negative answer, sustaining objection to defendant's attempt to introduce in evidence a certified copy of an order revoking license was proper.

10. Witnesses ⇐344(1)

A witness' credibility could not be attacked by evidence of specific wrongdoing.

11. Witnesses ⇐319

Where defendant's inquiry on cross-examination of plaintiff's witness was directed to a collateral matter, defendant was bound by witness' answer.

12. Physicians and surgeons ⇐18(10)

In action against physician for malpractice, an instruction that if jury found that injuries, if any, to patient could have been avoided by exercise of ordinary care on physician's part, the injuries were not result of an unavoidable accident, and that physician, if he failed to exercise care, could not avoid liability on ground of unavoidable accident was proper, where physician and his witnesses testified that from time when physician first saw patient nothing that physician could have done would have prevented injuries.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Alfonso Sales and another against David E. Bacigalupi for alleged malpractice. From a judgment for plaintiffs, defendant appeals.

Geo. K. Ford and Simpson Finnell, Jr., both of San Francisco, for appellant.

A. Brooks Berlin and Philander B. Beadle, both of San Francisco, for respondents.

DOOLING, Justice pro tem.

Defendant, a physician, appeals from a judgment upon a verdict in favor of plaintiffs in the sum of $7,500 in an action against him for malpractice.

On May 26, 1934, plaintiff, Angelina Sales, a 26-year-old woman, was in her seventh month of pregnancy; during that day a nail in her shoe pierced the sole of her foot so that it pained her when she walked. Plaintiff removed her shoe and stocking, found blood where the nail had entered the flesh, and thereupon bathed the foot in a warm water and lysol solution. The injury did not bother her for the next few days and she carried on her usual household duties; on May 30, 1934, she even took a long walk to see a parade. On May 31, plaintiff felt a pain "which seemed to shoot upward" from her foot and she noticed a pimple on the top of her foot directly over the place where the nail had entered. Plaintiff burned the point of a needle with a match, pricked the pimple and then soaked her foot again in lysol solution. Subsequently the pain became more severe and her husband coplaintiff, called defendant to treat the foot. When defendant arrived about 9 o'clock in the evening he found a dark red, hot area around the pimple about the size of a 50-cent piece, noticed some pus and saw that the foot was swollen. The evidence is in conflict as to whether defendant stated

that it was blood poisoning and whether he advised hospitalization. He did not take her temperature but recommended that she soak the foot in epsom salts and warm water for 20 minutes every two hours. Defendant testified that there was no localized abscess at this time. Certain other San Francisco doctors testified in answer to a hypothetical question that there was no localized abscess at any time, that there would be no reason to make an incision and that the customary treatment was wet heat.

Plaintiff followed the treatment recommended by the defendant but the pain grew worse and the redness became darker, spreading from the ankle higher up the leg. Plaintiffs' witnesses testified that they telephoned to defendant at 2 a. m. and 5 a. m. to tell him that the patient was getting worse but defendant merely instructed them to continue with the same treatments; defendant had no recollection of such telephone calls. The doctor visited plaintiff about 6 a. m., at which time the foot was more discolored and the red area extended up the leg; defendant did not operate on the foot but prescribed a wash solution and opiates. At 8 a. m. he recommended the same treatments. At 10:30 a. m. defendant returned with Dr. Caglieri, who looked at the foot and stated that it should be placed in a high position. Dr. Caglieri testified that there was no evidence of an abscess but that the foot was badly swollen and discolored; he saw no necessity for an incision. Defendant told plaintiffs that he would order an ambulance immediately to take the patient to the hospital, but the vehicle did not arrive that morning in spite of Mr. Sales' telephone call to defendant at 11:30 a. m. At 1:30 p. m. plaintiff's baby was born prematurely without medical aid, but the child died shortly thereafter. The ambulance arrived at 2 p. m. and plaintiff was taken to the City and County Hospital; she was in great pain, her foot was discolored and badly swollen and the redness ran high up her leg. The doctors who examined her found infection, early gangrene and chain streptococci; they testified that there was no evidence of an abscess or localization of pus but that the infection was general and hence there was no need for an incision. However, on cross-examination, some of defendant's expert witnesses admitted in answer to hypothetical questions that the symptoms found on appellant's first call would indicate an abscess which if present should be drained, but qualified this admission by stating that if an abscess had been present at that time some evidence of it would have appeared when they later examined Mrs. Sales, and that they found no evidence of abscess. Dr. Foote saw Mrs. Sales in the hospital on June 1, 1934; he testified that she had cellulitis of the right foot but no localized abscess or collection of pus. On June 2, 1934, Dr. Foote performed a guillotine amputation of the right lower leg and later some skin was transplanted to that leg. Plaintiff was discharged from the hospital on July 16, 1934.

Dr. Carr who made a laboratory examination of the amputated foot and leg testified that he found no evidence of an abscess in the foot at that time, and all of appellant's medical witnesses testified that if there had been an abscess in the foot on appellant's first call some evidence of it must have persisted to the time of the amputation.

Opposed to this medical testimony for appellant was the testimony of Dr. Ruedy of Oakland. Dr. Ruedy testified in answer to a long hypothetical question embodying the entire history of the case from the original injury to the foot to the amputation, including all the symptoms and appearance of the foot, that at the time of appellant's first call on Mrs. Sales there was an abscess present in the foot, and that in the exercise of that degree of care and skill ordinarily possessed and exercised by physicians and surgeons in San Francisco "the only method of choice (was) the prompt opening of the primary point of infection, draining the point of infection under antiseptic methods, and by local anesthesia." He further gave it as his opinion that the infection was afterwards generalized, spreading up the leg through the system and that this resulted in the loss of the baby and the necessity for the amputation, and that these would not have occurred if the abscess had been promptly opened and drained. On cross-examination he further testified that when the infection had become generalized all evidence of the existence of the abscess might disappear.

[1] Because Dr. Ruedy had never practiced in San Francisco appellant claims that he was not qualified to testify to the method customarily used to treat such an infection in San Francisco. Dr. Ruedy had practiced in Oakland for many years. In view of the close proximity of the two

cities and the metropolitan character of the entire area this sufficiently qualified him. Warnock v. Kraft, 30 Cal.App.2d 1, 85 P.2d 505; Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99.

[2-4] Dr. Ruedy's testimony created a conflict in the evidence and is sufficient to support the verdict. The testimony of a medical witness in answer to a hypothetical question based on the facts in the record is sufficient to support a finding contrary to the testimony of other medical witnesses who have seen and examined the patient. Nielsen v. Industrial Acc. Comm. 220 Cal. 118, 29 P.2d 852; Alaska Packers' Ass'n v. Industrial Acc. Comm., 1 Cal.2d 250, 34 P.2d 716. Nor can the fact that Dr. Ruedy's testimony conflicted with all the other medical testimony affect this rule since the testimony of one credible witness if believed by the jury is sufficient to support a verdict. Sim v. Weeks, 7 Cal.App. 2d 28, 37, 38, 45 P.2d 350.

[5, 6] The question of Mrs. Sales' contributory negligence in treating her foot as she did before calling appellant was for the jury. Dr. Ruedy's testimony supports the finding that appellant's negligent treatment was the proximate cause of the serious results that followed.

[7, 8] Appellant sought to cross-examine Dr. Ruedy on the following matters: (a) His failure to diagnose correctly Berger's disease in a patient under treatment by him with the consequent loss of a leg; (b) his knowledge of the drug aconitine. There was no contention that Berger's disease was a streptococcic infection and it was not pointed out how a knowledge of aconitine would affect the case in hand. There was no error in sustaining objections to these questions. McCollum v. Barr, 38 Cal.App. 411, 428, 176 P. 463.

[9-11] Dr. Ruedy was asked on cross-examination if during prohibition his federal license to prescribe liquors was not revoked. He answered: "No." Appellant then attempted to introduce a certified copy of an order revoking this license. The trial court properly sustained an objection to this. The credibility of the witness could not be attacked by evidence of specific wrong doing, if this could be so construed (27 Cal.Jur. pp. 132–134), and the inquiry having been directed to a collateral matter, appellant was bound by the witness' answer. 27 Cal.Jur. pp. 106, 107.

[12] The court gave an instruction on unavoidable accident which concluded "if you find from the evidence in this case that the injuries, if any, to plaintiff Angelina Sales could have been avoided by the exercise of ordinary care and skill, as herein defined, on the part of the defendant, then I instruct you that this was not an unavoidable accident, and the defendant, failing to exercise care and skill, if you find that he did so * * * may not avoid liability on that ground". The instruction was proper. Appellant and his witnesses testified that from the time he first saw Mrs. Sales nothing that he could have done would have prevented the injuries that followed.

Other specifications are already sufficiently answered.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.



47 Cal.App.2d 139

PEOPLE v. NORTON.

Cr. 1773.

District Court of Appeal, Third District, California.

Oct. 2, 1941.

1. Parent and child ⇐17(6)

Evidence sustained conviction of divorced father for failure to provide necessary food, clothing and medical care for his minor child who was living with mother whose second husband earned insufficient money to keep family off relief during the winter months. Pen.Code, § 270.

2. Parent and child ⇐17(6)

Under provision of Penal Code making failure to provide necessary food, clothing and medical care for minor child a misdemeanor, failure to make required provision constitutes prima facie evidence of violation of statute without any proof that father has actually abandoned or deserted his child. Pen.Code, § 270.

3. Parent and child ⇐17(1)

The defendant could not excuse himself from failure to furnish necessary food, clothing and medical care for his minor child as required by Penal Code on ground of inability to pay, where he was receiving at least $50 per month. Pen.Code, § 270.

4. Parent and child ⇐17(1)

The claim of defendant that he was willing to support his minor daughter if she would come and live with him was no defense to prosecution for failure to provide necessary food, clothing and medical care for the girl. Pen.Code, § 270.

5. Parent and child ⇐17(1)

Where defendant had failed to provide necessary food, clothing and medical care for his minor daughter, his offer, made subsequent to filing of criminal complaint, that he would send $10 per month and furnish a wardrobe was no defense to prosecution for failure to provide necessary support. Pen. Code, § 270.

Appeal from Superior Court, Merced County; James D. Garibaldi, Judge.

A. E. Norton was convicted of failure to provide necessary food, clothing and medical care for his minor child, and he appeals both from the order denying his motion for a new trial and from the judgment of conviction.

Judgment and order affirmed.

Chester B. Anderson, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

Appellant was convicted after trial by jury of violation of section 270 of the Penal Code, which provides that a father who wilfully omits without lawful excuse to provide the necessary food, clothing and medical care for his minor child is guilty of a misdemeanor. The appellant was placed on probation for a period of two years on condition that he pay the amount of $15 per month for the support and maintenance of his minor child, Winnie May Norton, with the further condition that he furnish a bond in the amount of $350 as a guarantee for such payments.

This appeal is from the order denying the motion for a new trial and from the judgment of conviction.

[1] The mother of Winnie May Norton and her father, the appellant, were married in 1920 or 1921. There were two children by this marriage, one of whom was Winnie May. Appellant and his wife were divorced in 1932, and at that time Winnie May was four years of age. She lived with her father until July 19, 1940, when she left him and went to her mother's home in the county of Merced. The mother had been remarried and there were two children as a result of this marriage. On July 26, 1940, the mother petitioned for and was appointed guardian of the person and estate of Winnie May. The appellant was present in court at the time of the guardianship proceedings, but did not oppose the mother's petition for guardianship. Between July 26, 1940, and March 22, 1941, at which time the complaint was filed against appellant by the mother, appellant had failed to send any money to the mother for the support of Winnie May. Mr. Sutherland, to whom the mother was remarried, a painter by trade, earned very little money, and the family were on SRA relief during the winter months, receiving $39 per month. Winnie May was taken care of by receiving support from a portion of this relief money.

The appellant admitted, rather evasively, upon cross-examination that his earnings from carpenter work averaged $50 a month during the period Winnie May had been with her mother. He admitted that in February, 1941, he had earned $100. Except for $15, which appellant sent directly to his minor daughter, which was used to pay transportation fare to appellant's home in Compton, California, on two occasions when Winnie May visited her father, no other moneys were sent to Winnie May or her mother for any purpose by the appellant. In answer to the question as to how he expected his daughter to receive support, the appellant replied by saying, "Well, she has got a home here to come to if she wants to come to it". The mother testified that the only offer for support of the daughter, made by appellant, was received some time after the complaint for failure to support had been signed. The offer of appellant was that he would make monthly payments of $10 and the purchase of a wardrobe for Winnie May. Mrs. Sutherland testified that because of past experience she refused this offer as there was no guarantee she would receive the money.

The appellant contends the verdict is contrary to law and unsupported by the

evidence. It is also urged that the court committed error in refusing to permit evidence offered to the effect tthat the minor daughter had abandoned her father's home; that evidence should have been admitted disclosing the fact that the father was willing to support his daughter if she would return to him; and that it was error to exclude evidence as to the disposition of the minor child upon the divorce of her parents.

We cannot agree with the contentions of appellant. The record discloses sufficient evidence in support of the verdict and we find no errors of law.

Section 270 of the Penal Code provides in part as follows:

"A father * * * who wilfully omits without lawful excuse to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor and punishable by imprisonment in the county jail not exceeding two years or by a fine not exceeding one thousand dollars, or by both. * * This statute shall not be construed so as to relieve such father from the criminal liability defined herein for such omission merely because the mother of such child is legally entitled to the custody of such child nor because the mother of such child, or any other person, or organization, voluntarily or involuntarily furnishes such necessary food, clothing, shelter or medical attendance or other remedial care for such child, or undertakes to do so.

"Proof of abandonment or desertion of a child by such father, or the omission by such father to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is prima facie evidence that such abandonment or desertion or omission to furnish necessary food, clothing, shelter or medical attendance or other remedial care is wilful and without lawful excuse.

* * * * * * * * * *

"The provisions of this section are applicable whether the parents of such child are married or divorced, and regardless of any decree made in any divorce action relative to alimony or to the support of the child."

[2] This section of the Penal Code provides that the omission of the father to furnish "necessary food, clothing, shelter or medical attendance" for his child is prima facie evidence that such omission is wilful and without lawful excuse. The section of the code imposes the duty upon the father to furnish these necessities and there is prima facie evidence of a violation thereof by a failure to provide in this respect without any proof that the father has actually abandoned or deserted his child. The validity of section 270 of the Penal Code has been upheld in Re Bryant, 94 Cal.App. 791, 271 P. 926, and in People v. Nelson, 42 Cal.App.2d 83, 108 P.2d 51.

In the Nelson case, supra, at page 86, of 42 Cal.App.2d, at page 52 of 108 P.2d, the following language appears: "It is argued that defendant is a man of less than average intelligence and stability, and consequently his earnings are small, but he is not being punished because he did not earn more, but that out of those earnings he did not contribute a fair share for the necessary food, clothing, shelter and medical care of his children. They were his children, and the primary care for their support and protection was his."

[3] In the present action the appellant by his own admission earned and received at least $50 per month during the period that his minor daughter was with her mother. The appellant cannot claim "lawful excuse" because of inability to pay.

[4] Whatever circumstances the legislature may have intended to constitute "lawful excuse" as a defense to a prosecution for violation of section 270 of the Penal Code, we are unable to accept the arguments of appellant as excuse for his failure to furnish the necessities for his child. The language of section 270 of the Penal Code certainly does not contemplate as "lawful excuse" such justification as contended for by appellant. It is quite evident that appellant has been wholly indifferent as to the support of his daughter.

[5] There was a violation of the provisions of section 270 of the Penal Code prior to the filing of the criminal complaint, and appellant's offer to send $10 per month and furnish a wardrobe cannot now be deemed a defense to the action.

The judgment and the order are affirmed.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. v. DUER et al.

Civ. 13118.

District Court of Appeal, Second District, Division 2, California.

Oct. 1, 1941.

Rehearing Denied Oct. 21, 1941.

Hearing Denied Nov. 27, 1941.

1. Execution ⇐161
Judgment ⇐899

Where judgment creditor and assignee of judgment filed satisfactions thereof as to only one of two judgment debtors, in consideration of such debtor's payment of sum less than full amount of judgment, Superior Court erred in granting other debtor's motion to recall writ of execution levied on her realty and satisfy judgment as against her.

2. Judgment ⇐899

The filing of instrument purporting to satisfy judgment against only one of two judgment debtors does not operate to satisfy judgment as to debtor not released by its terms.

3. Release ⇐28(3)

Notwithstanding the strict common law rule that a release of one of several joint debtors operates as release of all the others, such result is avoided where release shows that it was not intended to discharge other debtors except to extent of payment made by released debtor.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by the Bank of America National Trust & Savings Association against Iva B. Duer and Lizzie D. Woosley to foreclose a trust deed securing a note. Judgment for plaintiff, and from an order granting defendant Duer's motion to recall a writ of execution levied on her realty and to satisfy the judgment as against her, the Indemnity Mortgage Securities Company, assignee of the judgment, appeals.

Reversed.

S. Oliver Bletz and LaVerne M. Hayes, both of Los Angeles, for appellants.

David P. Hatch, of Los Angeles, for respondents.

WOOD, Justice.

This is an appeal from an order of the superior court granting the motion of defendant Duer to recall a writ of execution levied upon her real estate and to satisfy the judgment against her.

A judgment was obtained on July 7, 1939, by Bank of America National Trust and Savings Association against defendants Duer and Woosley in the total sum of $8,678.87. The judgment was based upon a deficiency arising after foreclosure of a trust deed upon real estate given to secure a promissory note executed by the defendants. On April 15, 1940, defendant Woosley for herself alone paid to the plaintiff bank the sum of $1,000 and on the same date, in accordance with its agreement with defendant Woosley, the bank caused to be filed in the office of the county clerk a satisfaction of the judgment in the following language: "The undersigned hereby acknowledges full satisfaction of the judgment obtained in the above entitled action, and which was entered on the 7th day of July, 1939, as to the defendant, Lizzie D. Woosley, only, and so far as the same can be done without releasing or discharging the judgment debtor, Iva B. Duer, from the balance due on said judgment."

The bank assigned its judgment on June 6, 1940, to Indemnity Mortgage Guaranty Company and on September 3, 1940, the last mentioned company assigned the judgment to Indemnity Mortgage Securities Company, the appellant herein, and the present owner and holder of the judgment. Thereafter, on November 4, 1941, at the request of the deputy in charge of the judgment department of the county clerk's office a satisfaction of judgment executed on October 31, 1940, on form No. 5 of the official forms of the clerk's office was filed by Indemnity Mortgage Securities Company in the following words and figures: "For and in consideration of $1,000.00 to me in hand paid by Lizzie D. Woosley, full satisfaction is hereby acknowledged of the judgment in the above entitled action as to Lizzie D. Woosley, only, for $8,678.87, and $49.75 costs, entered July 7th, 1939, judgment in favor of Bank of America, and against Lizzie D. Woosley only, but not releasing Iva B. Duer, and the clerk is hereby authorized and directed to enter the said satisfaction as above." On application of appellant the presiding judge of the superior court wrote upon the face of this satisfaction of judgment: "Satisfactory to file this satisfaction and to issue execution against Iva B. Duer." The

clerk thereupon entered the following record: "In consideration of the sum of $1,000.00 an acknowledged satisfaction of the within judgment was filed Nov. 4, 1940, fully releasing Lizzie D. Woosley only." Thereafter appellant caused a writ of execution to be issued and caused the levy to be made upon the real property of defendant Duer. The motion to recall the execution and to satisfy the judgment was thereupon made, resulting in the order from which the appeal is prosecuted.

[1-3] The court erred in granting the motion. In the instruments filed it is clearly made to appear that it was the intention of the holder of the judgment and the judgment debtor making partial payment that the judgment should be satisfied as to one judgment debtor only. It appears to be settled that where an instrument is filed purporting to satisfy a judgment against one only of two judgment debtors the filing of the instrument does not operate to satisfy the judgment as to the judgment debtor not released by its terms. Williams v. Riehl, 127 Cal. 365, 370, 59 P. 762, 78 Am.St.Rep. 60. In Johnson v. Stewart, 1 Wash.2d 439, 96 P.2d 473, 474, the holder of a joint and several judgment against joint and several makers of promissory notes executed a "Release of Judgment as to Particular Defendants", reciting that judgment was satisfied "as against" named defendants. A motion was presented by the judgment debtors not released to compel a satisfaction of the judgment as to them. The motion was denied and on appeal the order was affirmed, the reviewing court observing that "the strong trend of modern authority is to carry out the intention of the parties, if such intent can be determined from their acts, agreements, or documents signed, and to follow the rule that where it clearly appears that the releasor intended to release a particular joint obligor only and to retain his rights against others, that intent will be given effect". The author of the opinion quoted 2 Freeman on Judgments, 5th Ed., 2377, in which it is pointed out that notwithstanding the strict common law rule that a release of one of several joint debtors operates as a release of all the others, "the prevailing rule now is that this result is avoided where the release shows that it was not intended to discharge other debtors except to the extent of the payment made, if any, by the one released".

The decision in Barnum v. Cochrane, 139 Cal. 494, 73 P. 242, 243, seems to be determinative of the question before us. In that case judgment was entered in favor of the plaintiff in the sum of $1,450 and costs in the sum of $466.15 against two defendants for fraud. The defendant McLeod presented a motion asking that satisfaction of judgment be entered as to him, basing his motion on the ground that plaintiff had released the other defendant, Cochrane, and that the judgment being joint, a release of one operates as a satisfaction of the judgment as to both. The release of Cochrane recited the payment by him of a sum less than the total amount of the judgment and stated: "I hereby release said James W. Cochrane from the judgment heretofore rendered herein and recovered by me in the above-entitled cause, so far as the same can be done without releasing or discharging said Angus McLeod from the payment of the balance thereof." It will be noted that the operative language contained in the lease is almost identical with the language used in the release executed by the plaintiff bank in the case now under review. In affirming the order Mr. Justice Shaw, speaking for the court, stated: "It is obvious from the terms of this release that it could not, under any circumstances operate as a release or discharge of McLeod. It was expressly made conditional, and by the condition it was not to be a release of Cochrane unless such release could be made without releasing McLeod. If, therefore, the legal effect of a release of Cochrane would be to release McLeod also, then this agreement, by force of its own limitations, was not a release of Cochrane, and hence, in that event, it could not operate to release McLeod. If, on the other hand, the release of Cochrane, one of the joint judgment debtors, did not, in law, release McLeod also, then, necessarily, although Cochrane is released, McLeod still remains liable for the balance, and is not entitled to satisfaction of the judgment. Upon either theory the action of the court below was correct."

The order is reversed.

MOORE, P. J., concurred.

McCOMB, J., deemed himself disqualified and took no part in the consideration or decision of this case.

47 Cal.App.2d 61

STEELE v. INTERNATIONAL AIR RACE ASS'N OF AMERICA (CARRASCO, State Labor Com'r, Intervener).

Civ. 11777.

District Court of Appeal, First District, Division 2, California.

Sept. 30, 1941.

1. Appeal and error ⇐654

Where a bill of exceptions has been duly certified and engrossed, the reviewing court will not entertain proceedings to amend it in order that matter outside the record may be added thereto. Code Civ.Proc. § 953.

2. Appeal and error ⇐654

Section 953 of the Code of Civil Procedure cannot be used to permit a party to build up a new record upon matters which were not presented to or considered by the trial court in the determination of the issues out of which the appeal arose. Code Civ.Proc. § 953.

3. Appeal and error ⇐654

A reviewing court will not order documents to be added to the record except on a showing that they are material to and will assist in a determination of the appeal on its merits even though such documents may have been before the trial court. Code Civ. Proc. § 953.

4. Appeal and error ⇐654

Where bill of exceptions was duly certified and allowed after both parties had stipulated that it was a full, true, and correct engrossed bill of exceptions to be used on the appeal and movant did not controvert showing that documents sought to be incorporated into the bill of exceptions were not before trial court on hearing, and that they were not material to a determination of the issues on appeal, motion to have such documents incorporated into the record would be denied. Code Civ.Proc. § 953.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by J. A. Steele against International Air Race Association of America, wherein H. C. Carrasco, as State Labor Commissioner, etc., intervened. From an adverse judgment, plaintiff appeals. On motion of the State Labor Commissioner for an order incorporating into the record on appeal certain notices of preferred labor claims, objections thereto, and order for payment of certain labor claims made prior to the entry of judgment appealed from.

Motion denied.

L. L. Steele and John Jewett Earle, both of Oakland, for appellant.

Fred G. Goldsworthy and Olney L. Huff, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

The respondent moves for an order to have incorporated in and made a part of the record on appeal four designated notices of preferred labor claims; objections to preferred labor claims; and order for payment of certain labor claims made prior to the entry of the judgment which is the subject of the appeal. His affidavit states "that other and separate claims for labor were filed in said action * * * prior to the filing of the claims for which the judgment appealed from was made and entered". It does not state that any of the documents which he asked to be incorporated in the record "was before the trial court" and does not show that "an examination of such paper or record will assist in a determination of the appeal on its merits" as required by section 953 of the Code of Civil Procedure.

The respondent concedes that his motion is made under this section of the code and does not controvert the appellant's counter-showing that the documents were not before the trial court on the hearing below and that they are in no wise material to a determination of the issues on this appeal. The record was made upon a bill of exceptions duly certified and allowed after both parties stipulated that it was a "full, true and correct engrossed bill of exceptions to be used on appeal herein".

[1, 2] It is the settled rule that when a bill of exceptions has been duly certified and engrossed the reviewing court will not entertain proceedings to amend it to add matter outside the record. Shively v. Kochman, 20 Cal.App.2d 688, 691, page 692, 68 P.2d 255. The same case is authority that section 953 may not be used to permit a party to build up a new record upon matters which were not presented to or considered by the trial court in the determina-

tion of the issues out of which the appeal arose.

[3, 4] But though documents sought to be incorporated in the record may have been before the trial court, the reviewing court will not order them to be added to the record except on a showing that they are material to and will assist in a determination of the appeal on its merits. Dresser v. Southern California Edison Co., Ltd., 28 Cal.App.2d 510, 82 P.2d 965.

The motion is denied.

SPENSE, J., and DOOLING, Justice pro tem., concurred.



47 Cal.App.2d 52

CARLSTON v. SHENSON.

Civ. 11726.

District Court of Appeal, First District, Division 2, California.

Sept. 30, 1941.

1. Evidence ⇐271(1)

A self-serving sworn declaration of party to action in a collateral and independent matter may not be introduced in evidence as proving or tending to prove truth of such statement.

2. Evidence ⇐271(17), 317(18)

In action against executrix of deceased partner's will to recover on partnership notes, claimed by defendant to have been fully paid, bankruptcy court records, showing decedent's omission of notes from his schedule of liabilities in proceedings for composition with his creditors, and partnership's federal income tax return, omitting notes as liabilities, were inadmissible in evidence as hearsay and self-serving.

3. Appeal and error ⇐1067

In action against executrix of deceased partner's will to recover on partnership notes, trial court's refusal of defendant's requested instruction that if jury found that decedent, at time of signing waivers of right to plead statute of limitations, said that he did not owe any money on notes and that they had been paid, but not returned to him, such statement might be considered in arriving at verdict, was error, which was aggravated by trial court's statements indicating his belief that such waivers constituted admission of liability, though court admonished jury tc disregard such statements.

4. Limitation of actions ⇐145(1)

A promise not to plead statute of limitation, whether made before or after debt is barred, does not amount to an acknowledgment thereof or a promise to pay it.

5. Limitation of actions ⇐145(5)

If a promise not to plead the statute of limitation is made before debt is barred in consideration of forbearance to sue and creditor does forbear to sue upon the faith of the promise, it is binding on the debtor.

6. Limitation of actions ⇐200(1)

In action on notes, defendant was entitled to have jury instructed on the rules of law applicable to evidence relied on regarding waiver of right to plead statute of limitation.

7. Appeal and error ⇐1046(5)

No amount of admonition will completely wipe from minds of jury positive statements of trial judge.

8. Trial ⇐253(11)

Instructions to jury that all witnesses, in court's opinion, testified truthfully and honestly according to their best recollection, and that jury must determine whether their recollection was good or bad, were erroneous as withdrawing from jury consideration of every test of witnesses' credibility except that of strength or weakness of their recollections.

9. Trial ⇐253(11)

It is error to single out, in instruct'on to jury, a particular test of witnesses' credibility and exclude all other tests from consideration.

10. Evidence ⇐107

In action on note, question on direct examination of plaintiff as to whether she was dependent on her employment as stenographer for her support was improper and her affirmative answer thereto inadmissible in evidence.

11. Trial ⇐133(6)

Where plaintiff's counsel, after objection to improper question on direct examination of plaintiff as to whether she was dependent on her employment for support and

her affirmative answer thereto, restated question, error was prejudicial, so as to require reversal of judgment on verdict for plaintiff, though court promptly instructed jury to disregard question and answer.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Jessie B. Carlston against Frances Shenson, executrix of the will of Gustave Weissbaum, deceased, for a balance of principal and accumulated interest due on two notes. Judgment for plaintiff, and defendant appeals.

Reversed.

James M. Thomas and Gus C. Ringole, both of San Francisco, for appellant.

Young, Hudson & Rabinowitz, of San Francisco, and Roscoe D. Jones, of Oakland, for respondent.

DOOLING, Justice pro tem.

Defendant, executrix of the last will of Gustave Weissbaum, deceased, appeals from a judgment for $67,346.84. The action was tried before a jury and represented a balance of principal and accumulated interest found to be due upon two promissory notes, executed and delivered to Anglo and London Paris National Bank as payee by G. Weissbaum & Co., a copartnership, in which decedent Weissbaum was one of the partners. One note was for $35,575.15 dated June 30, 1919 and the other for $70,000, dated August 31, 1920. The notes were purchased by Joseph F. Carlston, husband of the plaintiff, from the payee bank, and after Carlston's death they with another note were bought by plaintiff at a probate sale for $25.

The testimony showed that decedent Carlston was the president of the Central National Bank of Oakland, that at the time the notes were executed G. Weissbaum & Co. had already borrowed to the limit allowed from the bank of which Carlston was president, that Carlston was interested with G. Weissbaum & Co. in a proposed shipment of rails to the Orient and that in order to raise a part of the money necessary in that transaction the two notes here in issue were executed and their payment guaranteed by Carlston.

The ship which had been chartered to transport the rails to the Orient failed to carry out its contract and a libel in admiralty was filed against the Robert Dollar Co. for this breach. To secure its indebtedness to the Central National Bank of Oakland G. Weissbaum & Co. assigned to that bank its claim against the Robert Dollar Co. and transferred to the bank its business, giving the bank at the same time a promissory note for $75,000 with an agreement that upon the payment of this note the business would be retransferred to G. Weissbaum & Co. One W. F. Clark, who had theretofore been an accountant for G. Weissbaum & Co. was employed by Carlston to look out for his bank's interest in the Weissbaum & Co. business and continued in that capacity from December 31, 1921 to April, 1932.

Plaintiff admitted the following payments on the two notes in issue: $61,467.82 and two payments of $15,000 each and claimed a balance due of $14,107.33 on the principal of the two notes. The balance of the judgment is for accrued interest.

To show payment in full the defendant relies, among other things, upon evidence that in 1922 Clark with the knowledge and consent of Carlston wrote the two notes off of the books of G. Weissbaum & Co. and thereafter presented periodical financial statements to Carlston upon which the two notes did not appear as liabilities of G. Weissbaum & Co. and to which Carlston at no time made any objection; that in 1928 a settlement was made with Robert Dollar Co. from which the Central National Bank of Oakland received a balance after deducting all expenses of litigation which with other cashiers checks brought the total in the bank to the credit of G. Weissbaum & Co. to $283,565.35. That of this amount $61,467.82 was paid to Carlston. The deposition of Raymond Benjamin that he collected $55,618.82 for Weissbaum from the United States Government in 1932 on a contract to wreck Camp Kearny; that Carlston had previously informed Benjamin that he personally held an assignment from Weissbaum of this claim and that at the direction of Weissbaum and Carlston he paid this sum of $55,618.82 to the Central National Bank of Oakland; and the testimony of Clark that in April, 1932 after this payment Carlston informed Clark that "they had no further interest in Weissbaum". From these facts the jury could have found that the notes in suit had been fully paid.

[1, 2] Appellant attempted to introduce into evidence certain records of the bank-

ruptcy court to show that Weissbaum in proceedings to obtain a composition with his creditors had omitted these notes in his schedule of liabilities. An objection that this was hearsay and self-serving was sustained. Appellant argues that this was error and cites Simonton v. Los Angeles T. & S. Bank, 205 Cal. 252, 270 P. 672, 675. The case is not in point. In that case a widow had omitted certain property from the inventory in her husband's estate, which after the estate was distributed it was claimed should have been included as community property. The very fact in issue was whether this was a part of the husband's estate and should have been inventoried and the court said:

"To have fraudulently omitted the property would have been a crime. The law presumes a person is innocent thereof, which presumption is applicable to civil and criminal cases alike. Where, therefore, in a civil action a question arises the determination of which involves the establishment of a fact that a party has been guilty of fraud or criminal act, the other party, in order to obtain a determination of such question in his favor, must overcome, by at least a fair balance of evidence * * * the legal presumption of innocence which exists in every case."

The language quoted above distinguishes the Simonton case from this. In that case a question arose, i. e. whether the property should have been inventoried in the estate, the determination of which involved the establishment of the fact that a party had been guilty of fraud or a criminal act. In this case the schedule of debts in the bankruptcy proceeding was not an issue in the case. It was entirely collateral, independent and disconnected from any issue in the case. It has never been the law that a self-serving sworn declaration of a party in a collateral and independent matter may be introduced as proving or tending to prove the truth of such statement. The objection was properly sustained. The same rule is equally applicable to the omission of these notes as liabilities from a partnership return made to the federal government for income tax purposes.

[3] Gustave Weissbaum in his lifetime had executed a series of waivers of the right to plead the statute of limitations to each of these notes of which the following is typical:

"In consideration of the forbearance of the holder of the within note dated June 30, 1919, in the original sum of $35,575.15, payable to the Anglo & London Paris National Bank of San Francisco, California, to sue thereon during a period of six months from the date hereof, this day promised by the holder, at our request, we hereby agree to waive all statutes of limitation and all right to plead the same, in any action hereafter brought within four years from the date hereof by the holder of the within note or obligation, or by his or its assigns.

"Dated: This 21st day of May, 1934.

"G. Weissbaum and Co.

"By G. Weissbaum."

These waivers were relied upon to toll the statute of limitations. The last of them were signed after Joseph Carlston's death in the office of Mr. Roscoe D. Jones, attorney for the plaintiff herein.

The witness Wells, who was a business associate of Weissbaum, testified that in May, 1934, he went with Weissbaum to Mr. Jones' office and was present when the waivers were signed. That at that time Weissbaum told Jones "about obtaining a judgment for over $300,000 against the Robert Dollar Company, and said 'We collected it, but the Central National Bank of Oakland took all the money, but I never got my notes back'. Mr. Jones made no comment. Weissbaum further told Mr. Jones about getting a judgment against the United States Government, amounting to $60,000.00 * * * and remarked that Mr. Carlston got the money. Mr. Weissbaum further said, 'I had a settlement with Mr. Carlston * * * and Mr. Carlston gave me my business back, but I didn't get my notes back'."

At the time of defendant's opening statement to the jury the following occurred:

"The Court: These waivers are just what I thought they were. They are signed 'G. Weissbaum & Co., by G. Weissbaum', the one I have in my hand—

"Mr. Ringole: But there is no admission that he owes any money in those waivers.

"The Court: Why should a man extend a note from time to time that it is now claimed he did not owe? * * *

"The Court: Why should a man ask for an extension of an obligation? If he was alive he would say he did not owe it at all. * * *

"Mr. Ringole: As a matter of law I am going to ask that your honor strike from the record the remarks with reference to the implications flowing from the waivers, as not a statement of the law. * * *

"The Court: It simply occurred to me, I think I am right; as you say it is a question of law and the jury will be instructed to disregard the statement I made. It is a matter that does not concern them and by reason of my having made it they are not to infer or get any wrong impressions."

Thereafter counsel for defendant made a motion for mistrial on the ground, among others, of these statements of the court. In denying the motion the court said:

"Now, if there are any other matters which require corrections or instructions, counsel for defendants is at liberty to submit any instructions that he thinks necessary to be given to the jury at the conclusion of the trial that will cover the various situations that he has mentioned and if the instructions are in my opinion proper, I will give them to the jury."

The defendant requested the following instruction on this subject which the court refused to give:

"You are further instructed that if you find from the evidence that when Gustave Weissbaum signed the waivers of the statute of limitations with respect to said notes sued upon in this action, on May 21, 1934, said Weissbaum then stated to Mr. Jones, one of the attorneys for the plaintiff in this case, that he would sign said waivers of the statute of limitations, but that he did not owe any money on said notes; that the said notes had been paid from the collections made by Central National Bank and Carlston from the Robert Dollar Company and Camp Kearny; that his business had been returned to him, and that the notes should have been returned to him, you have the right to consider said statement made in arriving at your verdict."

[4, 5] The failure to give this instruction was error. It is said in Wood on Limitations, 3d Edition, section 76:

"While a promise not to plead the statute, whether made before or after the debt is barred, does not amount to an acknowledgment thereof or a promise to pay it, yet, if made before the debt is barred, and consideration of forbearance to sue, and the creditor does forbear to sue upon the faith of the promise, it is binding upon the debtor, and at least has the effect to keep the debt on foot until the statutory period, dating from such promise, expires, either by way of estoppel, or as a conditional promise to pay the debt in case the plaintiff proves it. * * * Usually, perhaps, where there is a promise not to plead the statute, there will be found in the context something further which will amount to an acknowledgment of indebtedness from which a promise to pay may be implied; but in the absence of such context it seems on the authority of the cases cited, and upon a strict application of the present theory of the doctrine of acknowledgment, that a promise not to take advantage of the statute will have no efficacy in itself as an acknowledgment of a debt."

Even in the case of the renewal of a note, which ordinarily might be taken as an admission of the debt, the court held in Newark Trust Co. v. Kriebel, 49 Cal. App. 614, 193 P. 962, 965, that all defenses could be reserved to the indebtedness and "the question of the intent of the parties, in such case, is one of fact, to be determined by the jury from all the evidence relating to the transaction".

[6, 7] Counsel for respondent do not question these rules of law, but argue that the waivers were relied on by them solely to toll the statute and not in any respect as admissions of the debt. The jury, however, was not so informed. The waivers were before them and they were not instructed at all on the subject of their weight or effect as evidence. The defendant was entitled to have the jury instructed on the rules of law applicable to this particular type of evidence and we may not assume that they did not give to it the same effect that the trial judge had stated that he thought it should bear, i. e., that it was or constituted an admission of liability.

The trial court's statements, even though withdrawn from the jury, only aggravated the error in refusing to instruct on the subject. It is a truism, so often repeated as to need no citation of authority, that no amount of admonition to a jury will completely wipe from their minds positive statements of a trial judge. The effect of what occurred was to impress the jury that the judge drew a certain inference from the evidence. They were in effect told to disregard the judge's inference, but

they were not told, as they should have been, that they were not at liberty to draw the same inference independently if they saw fit.

[8, 9] The court gave the following instructions:

"Every witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which a witness testifies, by the character of the witness' testimony, or his or her motive, or by contradictory evidence.

"There are a lot of instructions along these lines, ladies and gentlemen, but I don't care about giving them to you because I don't think I am committing any error when I express my opinion that all of the witnesses who have appeared in this case have given the best recollection, truthfully and honestly, as to what occurred, these many years ago. It is for you to determine whether or not their recollection is good or bad as to the incidents to which they testified. Therefore I am not even going to give you the customary instruction as to the falsity or possible falsity of any witness' testimony, because there was no intentional falsity indicated by the testimony of any of the witnesses in the case."

By these instructions the court clearly withdrew from the jury the consideration of every test of credibility of the witnesses except the single test of the strength or weakness of their recollections. It is error to single out a particular test of credibility and exclude all others from consideration. Fries v. American Lead Pencil Co., 141 Cal. 610, 612, 75 P. 164.

[10, 11] On the direct examination of plaintiff the following occurred:

"Mr. Hudson: Q. What is your occupation? A. Stenographer.

"Q. Are you employed in San Francisco? A. Yes.

"Q. Dependent upon your employment for your support? A. Entirely.

"Mr. Ringole: I am surprised at Mr. Hudson injecting that into the case. It is incompetent, irrelevant and immaterial.

"Mr. Hudson: I asked the lady if she was dependent on this employment for her support.

"The Court: I will sustain the objection.

"Mr. Ringole: I am sorry that this has come up.

"The Court: I will ask the jury to disregard it. You can see I am looking after your interests in this regard.

"Mr. Ringole: I don't like that attitude.

"The Court: I was about to instruct the jury to disregard the implication that might follow from the question being asked."

The question should not have been asked nor the answer given. Ensign v. Southern Pacific Co., 193 Cal. 311, 322, 223 P. 953. It is true that the court promptly instructed the jury to disregard them, but counsel after objection aggravated the effect by restating his question. Standing alone, in view of the prompt admonition to the jury, this misconduct might not call for a reversal, although where the misconduct is deliberate, as it obviously was here, courts have reversed in spite of a timely admonition. Citti v. Bava, 204 Cal. 136, 266 P. 954; Squires v. Riffe, 211 Cal. 370, 295 P. 517. In any event, taken with the other errors hereinabove discussed, we are satisfied that appellant was denied a fair trial and we cannot say on the record that the errors were not prejudicial.

The judgment appealed from is reversed.

STURTEVANT, J., and NOURSE, P. J., concurred.



47 Cal.App.2d 122

SARGENT v. COPPAGE.

Civ. 13286.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1941.

As Amended Oct. 31, 1941.

Hearing Denied Dec. 1, 1941.

1. Licenses ⇐18½

The Corporate Security Act, requiring permit from corporation commissioner to issue any security and declaring security issued without such permit void, was passed to protect investors against unprincipled promoters, as well as to keep valueless securities off the market. Gen.Laws 1937, Act 3814.

2. Licenses ⇐18½

In action to recover money paid for interest in mining claims on ground that parties' agreement constituted sale of a security within Corporate Security Act and hence was void for lack of permit from corporation commissioner to make sale, trial court had right to construe agreement in light of all circumstances, including subsequent events. Gen.Laws 1937, Act 3814.

3. Licenses ⇐39

In action, based on violation of Corporate Security Act, to recover money paid for interest in mining claims under agreement providing that sellers should have right to form a corporation, to which plaintiff agreed to assign such interest in return for corporation stock equivalent thereto, after which parties organized a corporation to which plaintiff and others transferred their interests in return for shares of its stock, trial court properly found that agreement was only temporary expedient made for sole purpose of providing record of parties' interests pending formation of corporation. Gen.Laws 1937, Act 3814.

4. Licenses ⇐39

A delay of less than a month more than 90 days between giving of check for interest in mining claims and formation of mining corporation pursuant to agreement for sale of such interest was not such a violation of Corporate Security Act, providing that subscriptions for shares of corporation's stock before incorporation shall be deemed made and accepted on condition that corporation be incorporated within 90 days thereafter, as to make parties' original agreement void from beginning. Gen.Laws 1937, Act 3814, § 33.

5. Licenses ⇐39

One sharing in incorporation of gold mining company and securing of permit to issue stock therein, receiving shares representing his proportionate interest in mine, and watching expenditure of money during ten months' period for intended purpose of equipping and developing such mine, may not then rescind his contract, made with other incorporators before incorporation, for purchase of such interest and recover money paid thereunder because corporation was not formed by parties, pursuant to such contract, within 90-day period fixed by statute after subscription for shares of corporation's stock. Gen.Laws 1937, Act 3814, § 33.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Julian Sargent against C. L. Coppage and others to recover money paid for a share in a gold mine. From a judgment for named defendant, plaintiff appeals.

Affirmed.

Hearing denied; EDMONDS, HOUSER, and CARTER, JJ., dissenting.

J. Howard Ziemann, of Los Angeles, for appellant.

Binford & Binford, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

From judgment for defendant in a suit involving money paid for a share in a gold mine plaintiff appeals.

In March, 1937, plaintiff entered into an agreement with defendant Coppage, William A. Martin, Jr., and Elbert Whitney by which plaintiff paid in $4,000 and was to receive a 4 per cent interest in the mine. The agreement provided as follows:

"That for and in consideration of the sum of one ($1.00) dollar, receipt of which is hereby acknowledged and the convenants and agreements hereinafter set forth, the first parties hereby sell, assign, set over and transfer to said second party, all their right, title and interest in and to an undivided four (4%) per cent. interest in the following described mining claims. * *

"It being understood between the parties hereto that one of the said parties shall manage the said claims without the interference of any of the other parties hereto, said parties hereby agree that C. L. Coppage shall at all times have the right to manage the operation of said mining claims.

"The second party hereby agrees that the first parties shall have the right at any time during the life of this agreement to form a corporation, the said corporation to be incorporated for the sum of One Hundred Thousand ($100,000) dollars and the said second party hereby agrees to assign the second party's said four (4%) per cent. interest to said corporation and in return receive and accept stock of said corporation equivalent thereto, or in the amount of four (4%) per cent. of the total stock of the corporation.

"Said second party hereby further agrees that said stock so received shall be non-voting, in order that said C. L. Coppage shall have voting control."

In July, 1937, plaintiff, defendant Coppage and the two other owners met, organized and signed the articles of incorporation for the Victory Mining Company. Pursuant to an application therefor made by the directors, including plaintiff, a permit was granted to the corporation to issue stock. Plaintiff and the others transferred their interests in the mine to the corporation and received in escrow shares of its stock. In May, 1938, plaintiff gave notice of rescission of the contract of March, 1937, to Coppage and the other two parties and filed this suit against them shortly thereafter, seeking to recover the $4,000 which he had paid in. During the trial plaintiff dismissed as to two of the defendants and judgment was granted in favor of the remaining defendant, Coppage.

It is plaintiff's contention on appeal that the agreement of March, 1937, constituted the sale of a "security" and required a permit from the corporation commissioner, and that for lack of such permit the transaction was illegal and void and he is entitled to the return of his money.

[1-3] The Corporate Security Act of the state of California in effect in 1937 and at the time of the transactions complained of required a permit to issue any security, and provided that a security issued without such permit was void. Deering, Gen.Laws, Act 3814; Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal.2d 501, 86 P.2d 102; Pollak v. Staunton, 210 Cal. 656, 293 P. 26. "The law was passed to protect the investors against unprincipled promoters, as well as to keep valueless securities off the market." People v. Oliver, 102 Cal.App. 29, 282 P. 813, 817. In this case, after construing the agreement in the light of all the circumstances, including subsequent events, as it had the right to do (Lenn v. Stillwater L. & C. Co., 217 Cal. 474, 19 P.2d 785, the trial court properly found that the agreement of March, 1937 "was a temporary expedient only and was recognized by the parties as being made for the sole and only purpose of providing a record of the interests of the parties thereto pending the formation of the corporation".

[4] Plaintiff suggests that the transaction cannot be considered a subscription to shares prior to incorporation because such incorporation was not within ninety days of such agreement. Section 33 of the act permitted subscriptions for shares of a corporation prior to incorporation but provided that "such subscription shall be deemed to have been made and accepted upon the condition that such corporation shall be incorporated within ninety days thereafter, and, when incorporated, shall with reasonable diligence apply for and secure from the commission a permit authorizing the issue of the shares so subscribed for". The agreement was dated March 9, 1937. Plaintiff gave his check to defendant on March 16, 1937. The corporation was formed July 13, 1937, with plaintiff present as one of the incorporators. The application for a permit was filed July 28, 1937, with plaintiff present at the meeting where the resolution was passed authorizing it. No authority has been brought to our attention which would support the view that under the facts of this case the delay of less than a month over the ninety days' statutory period between the giving of plaintiff's check and the formation of the corporation would be such a violation of the act as to make the original agreement of the parties void from the beginning. We do not state nor do we mean to imply that a delay beyond the 90 days in incorporating a company would not be in violation of a subscription agreement, entitling an aggrieved party to relief under proper circumstances.

It should be observed that although the period of ninety days is fixed as the proper time within which the corporation should be formed, reasonable diligence is all that is required thereafter in applying for the permit to issue stock, and such diligence was used in this case. No complaint is made concerning the findings of the trial court that there were no misrepresentations of fact nor actual fraud by defendants, and it appears that the money was expended to develop, equip and operate the mine as contemplated by the parties.

[5] The question, then, is whether the plaintiff, having shared in the incorporation of the Victory Mining Company and the securing of the permit to issue stock, having received shares representing his proportionate interest and having watched the expenditure of the money over a period of ten months for the intended purpose of equipping and developing the mine, may then rescind the original contract and recover his money paid under it because the corporation was not formed by the parties within the precise ninety-day period fixed by the act. Nothing in the language of the act nor in the decisions interpreting it justifies a construction which would enable the plaintiff to thus extricate himself from an unsatisfactory investment.

Judgment affirmed.

MOORE, P. J., and WOOD, J., concurred.

WITHINGTON et al. v. SHAY et al.

Civ. 2919.

District Court of Appeal, Fourth District, California.

Sept. 30, 1941.

Rehearing Denied Oct. 28, 1941.

Hearing Denied Nov. 28, 1941.

See 119 P.2d 1.

1. Mechanics' liens ⇐291(6)

In mechanic's lien foreclosure proceeding, the court after issue joined should have determined the matters between the parties and provided for disposition of surplus proceeds of sale, if any, in accordance with parties' respective rights, and decree which contained no provision for disposition of surplus should have been modified to make provision therefor. Code Civ.Proc. § 727.

2. Deposits in court ⇐1

In a foreclosure action, the court may order the surplus remaining after satisfying plaintiff's debt and costs to be paid into court to be distributed to the respective parties in interest as their interests may subsequently be made to appear and as the court may subsequently determine. Code Civ.Proc. § 727.

3. Mechanics' liens ⇐1, 245(2)

A mechanic's lien is in the nature of a "mortgage" and is a charge on the land, and an action for its foreclosure is a "proceeding in equity" and resembles a proceeding to foreclose a mortgage or equitable lien.

See Words and Phrases, Permanent Edition, for all other definitions of "Mortgage" and "Proceeding in Equity".

4. Mechanics' liens ⇐246

Under statute, the rules relating to civil actions generally apply to proceedings for the foreclosure of mechanics' liens except in so far as the statutes relating to mechanics' liens have changed that procedure. Code Civ.Proc. § 1198.

5. Mechanics' liens ⇐246

Under the code provisions relating to the foreclosure of mechanics' liens, the only way of enforcing a judgment is by a sale of the property and docketing a deficiency judgment against the defendant who may be liable therefor. Code Civ.Proc. § 691.

6. Judicial sales ⇐7

A decree or decretal order for the sale of certain specific property made by an equity court does not, like a common law judgment, run against the entire property of the judgment debtor, but it specifies the property which the court directs to be sold for the purpose of carrying its judgment into effect, and the officer in executing the order acts under the direct mandate of the court without the power or necessity of taking any property from the possession of the defendant.

7. Judicial sales ⇐7

The commissioner appointed in a foreclosure proceeding to conduct the sale derives his authority from statute and from the order of sale. Code Civ.Proc. § 691.

8. Attachment ⇐64
Execution ⇐55
Mechanics' liens ⇐308

In mechanic's lien foreclosure proceeding, surplus funds from sale remaining in sheriff's hands after discharging lien were in his hands as agent of the court and were in "custodia legis" and hence they were not subject to attachment or writ of execution. Code Civ.Proc. §§ 691, 727.

See Words and Phrases, Permanent Edition, for all other definitions of "Custodia Legis".

9. Mechanics' liens ⇐308
Sheriffs and constables ⇐112

In mechanic's lien foreclosure proceeding, sheriff had no power to do anything with surplus funds from sale remaining in his hands after discharging lien except to return them to the court or hold them as agent for the court subject to its further order, unless something in decree rendered would justify the exercise of such power, and where decree recited that trust deed lien of certain parties to proceeding was subject and subordinate to mechanic's lien, that in itself imparted notice to sheriff of those parties' claim to part of sale price, and hence sheriff became liable to parties injured by his action in levying execution on surplus. Code Civ. Proc. §§ 691, 727.

10. Mechanics' liens ⇐298

Where vice president of debtor corporation was a party to litigation affecting not only corporation but also corporation's particular property subject to foreclosure in mechanic's lien proceeding, trust deed beneficiaries were parties to that proceeding, and their lien was adjudged subject and subordinate to mechanic's lien, vice president, who purchased property at execution sale, could not contend that he lacked notice of beneficiaries' claim to an interest in part of price realized at sale.

11. Mortgages ⇐590

A trust deed is not merged or extinguished in a judgment of foreclosure of a prior mortgage where no foreclosure of the trust deed is attempted or ordered by the court and the party secured thereby when made a party to the foreclosure merely asks for an application of any surplus to the reduction of his debt.

12. Attachment ⇐178
Execution ⇐111, 268, 269

The lien of an execution and attachment attaches to the real and not to the apparent interest of a judgment debtor in his property, and a purchaser at an execution sale takes subject to such existing liens and equities as the property was subject to in the hands of the debtor unless he can show that he purchased the property without notice, either actual or constructive, of the existence of such liens or equities.

13. Trusts ⇐247

A beneficiary may sue to preserve the trust property or enforce an obligation which exists in favor of the trust estate.

14. Appeal and error ⇐174

Respondents could not contend for the first time on appeal that appellants because they were beneficiaries under trust deeds were not proper parties plaintiff in an action for money wrongfully withheld, for a declaration of rights, and to restrain the sale of property.

15. Mechanics' liens ⇐308

Where surplus in defendants' hands remaining from execution sale after discharging mechanic's lien was still in the custody of the equity court, that court could determine its proper distribution in foreclosure proceeding, and if defendants refused to return money to the actual custody of the court, they could be compelled to do so.

16. Appeal and error ⇐110

An order denying a motion for new trial is not an appealable order.

Appeal from Superior Court, San Bernardino County; Harry C. Westover, Judge.

Action by Dennet Withington and another against E. L. Shay and another for money wrongfully withheld, for declaration of rights, and to restrain the sale of property. From a judgment for defendants and from an order denying a motion for new trial, plaintiffs appeal.

Appeal from order dismissed and judgment reversed.

Hert & Withington and Robert Mack Light, all of San Bernardino, for appellants.

Howard A. Andrews, of Los Angeles, for respondents.

GRIFFIN, Justice.

This cause was submitted upon an agreed statement of facts. So far as those facts are material to the questions here involved, they may be thus summarized: M. J. Nolder Distilleries, Inc., owned certain real property upon which Fox-Woodsum Lumber Company placed a mechanic's lien, and suit was started to foreclose. Ten months and eighteen months thereafter respectively, two purported trust deeds covering the same property were executed by the owner and recorded, one Davis being the trustee and the plaintiffs and appellants being the beneficiaries named therein. Thereupon, Fox-Woodsum Lumber Company made Davis and appellants defendants in its suit for foreclosure of the mechanic's lien and they appeared and contested that action, seeking a determination of the priority of rights.

Fox-Woodsum Company obtained judgment in its foreclosure suit holding that the trust deeds of appellants were subject and subordinate to the mechanic's lien and ordering that the sheriff sell the property "in the manner prescribed by law" and "pay to plaintiff or its attorney the aforesaid sum so found due to plaintiff". A writ of execution was issued. A copy of the decree containing these recitals and ordering sale of the property was attached. The sheriff was not directed by the writ or by the judgment as to what disposition he was to make of any surplus derived from the sale if the selling price was in excess of the amount required to satisfy the judgment.

After the sale had been ordered and advertised, but before the day of sale, respondent Schluter became the owner of the judgment. At the execution sale Schluter purchased the property for $6,169.94, which he paid by satisfying the judgment which then amounted to $2,039.91, and gave his personal check for $4,130.03.

In another action Schluter had previously obtained a judgment against the same

judgment debtor, N. J. Nolder Distilleries, Inc., for more than $4,130.03. By virtue of that judgment he levied execution on the excess $4,130.03 cash in the sheriff's hands, and three weeks later it was paid over to him, less costs, by county warrant.

Appellants never gave any notice to the sheriff or Schluter that appellants claimed any interest or right in any part of the sale price realized at the execution sale until they brought this action.

At a previous sale under writ of execution previously issued in another action respondent Schluter had purchased the real properties of the Nolder Distilleries, Inc., for a nominal sum, subject to the mechanic's lien and the trust deeds. Schluter had also brought another and separate suit against Nolder Distilleries, Inc., and recovered judgment thereon. That judgment was assigned by Schluter to one Danziger. Under that judgment execution was levied against the right of the Nolder Distilleries, Inc., to redeem their real property from that execution sale and that right of redemption was purchased at the sale thereof by Schluter.

Schluter was vice-president and director of the N. J. Nolder Distilleries, Inc., up to the time of his bringing his said action against the said corporation.

The complaint in the instant action was drawn in three counts: (1) for money wrongfully withheld; (2) a prayer for declaration of rights; and (3) to restrain the sale of property of the buyer. The trial court gave judgment on the pleadings and the stipulated facts in favor of Shay and Schluter from which judgment plaintiffs now prosecute this appeal.

Appellants argue that the excess funds from the foreclosure sale were in custodia legis when the execution, in the sum of $4,130.03 was levied on by the sheriff, and that the sheriff, in his official capacity as such, could not rightfully and effectively levy upon the money which he himself held as a surplus from the foreclosure proceedings. That even assuming that the levy was effective, Schluter could not hold the funds so acquired as against the present suit of the declared junior lien holders.

Respondents contend that the trust deeds were not adjudicated to be junior liens and appellants were not adjudged to be junior incumbrancers; that appellants could have notified the sheriff or the judgment creditor that they claimed an interest in or right to any surplus realized at the sale, thus putting respondents on notice; that appellants appeared in the foreclosure action but failed to foreclose, by cross-complaint, their trust deeds and thereby have their validity and effect determined; that they could have had the judgment provide that any surplus from the execution sale, up to the amount due them, be paid over to them if they were entitled to it; that appellants lost their claimed lien on the land when the prior lien was foreclosed and did not acquire a lien on the proceeds of the sale of the lands; that appellants lost their rights, if any they had, by sleeping on them; that under section 691 of the Code of Civil Procedure it was the duty of the sheriff under the foreclosure proceedings to sell the property, pay to the plaintiff or his attorney so much of the proceeds as would satisfy the judgment, and if there were any excess of the proceeds over the judgment and accruing costs, it was his duty to return this excess to the judgment debtor, unless otherwise directed by the judgment or order of the court; that thereby under such directions, the surplus, after the sale, was the property of the judgment debtor and was subject to levy, by execution, on Schluter's judgment.

[1] After issue joined in the foreclosure proceeding, the court should have determined the matters between the parties to the action and provided for a disposition of the surplus proceeds of sale, if any there be, in accordance with the rights of the respective parties. The decree containing no provision for disposition of the surplus, should have been modified to make provision therefor.

[2] It is a general rule of law that a court may order the surplus remaining after satisfying a plaintiff's debt and costs, to be paid into court to be distributed to the respective parties in interest as their interests may subsequently be made to appear and as the court may subsequently determine. Code Civ.Proc. § 727; Hibernia Savings, etc., Society v. Fella, 54 Cal. 598; Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620; 18 Cal.Jur. p. 638, § 843.

[3, 4] We will first determine the effect of the purported levy of execution by Schluter on the surplus funds in the hands of the sheriff. A mechanic's lien is in the nature of a mortgage and is a charge on the land. An action for its foreclosure is a proceeding in equity and resembles a proceeding to foreclose a mortgage or equitable lien. Curnow v. Happy Valley, etc. Co., 68 Cal.

262, 9 P. 149. The rules relating to civil actions generally apply to proceedings for the foreclosure of mechanics' liens, except in so far as the chapter of the Code of Civil Procedure relating to mechanics' liens has changed such procedure. § 1198, Code Civ.Proc.

[5-8] The code provisions relating to the foreclosure of mechanics' liens provide no mode of enforcing a judgment other than by a sale of the property and docketing a deficiency judgment against the defendant who may be liable therefor. Central L. & M. Co. v. Center, 107 Cal. 193, 40 P. 334. The sale in the instant case was based upon an order of the court. A decree or decretal order for the sale of certain specific property made by a court of equity, differs materially from a common-law judgment. Instead of running against the entire property of the judgment debtor, it specifies the property which the court directs to be sold for the purpose of carrying its judgment into effect; and the officer, in executing this order, acts under the direct mandate of the court without the power or necessity of taking any property from the possession of the defendant. 15 Cal.Jur., p. 300, § 2. The distinction between an order directing a sale and a writ of execution issued on a money judgment has been judicially recognized in the case of Hager v. Astorg, 145 Cal. 548, 79 P. 68, 104 Am.St.Rep. 68, and Southern California Lumber Co. v. Ocean Beach Hotel Co., 94 Cal. 217, 29 P. 627, 28 Am.St.Rep. 115. The source of the officer's power as defined in and circumscribed by the court's order is clearly recognized in the cases of Heyman v. Babcock, 30 Cal. 367 and Spaulding v. Howard, 121 Cal. 194, 53 P. 563. The commissioner thus appointed derives his authority from the statute and the order of sale. 15 Cal.Jur. p. 302, § 4. Section 691 of the Code of Civil Procedure, relied upon by respondents, applies to proceeds of a sale under a writ of execution, as distinguished in Southern California Lumber Co. v. Ocean Beach Hotel Co., supra. The funds, therefore, in the sheriff's hands were in his hands as agent of the court in the foreclosure proceeding. They were in custodia legis. Being in custodia legis, they were not subject to attachment or writ of execution. Bisconer v. Billing, 71 Cal.App. 779, 236 P. 329; Union Bank & Trust Co. v. Los Angeles County, 2 Cal.App.2d 600, 38 P.2d 442; North v. Evans, 1 Cal.App.2d 64, 36 P.2d 133.

In Clymer v. Willis, 3 Cal. 363, 58 Am. Dec. 414, it was held that money in the hands of the sheriff collected on execution is not a debt due to the plaintiff in execution but is in the custody of the law until properly disposed of, and is not the subject of attachment or garnishment. It was also held in that case that the sheriff cannot attach money collected on execution in his own hands and that if at any time such money is subject to any other process in his hands such process must be executed by the coroner.

[9] We therefore must conclude that the surplus funds held by the sheriff were not subject to execution. The funds in the sheriff's hands were in his hands as agent of the court in the foreclosure proceeding. He had no power to do anything with such surplus except to return it to the court or hold it as agent for the court subject to its further order, unless he could point to something in the order to justify the exercise of such power. The decree itself recited the fact that appellants' lien or encumbrance (describing the trust deeds) was "subject and subordinate to" the lien of the plaintiff in that action. This in itself should impart notice of such claim to the sheriff. Respondent Shay, therefore, became liable to the parties injured by his action.

[10] From the stipulated facts it is clear that Schluter, as vice president and director of the debtor corporation and as a party to various other pieces of litigation affecting not only the debtor corporation but also the particular property of the corporation subject to the foreclosure which has been here considered, as well as in his capacity as purchaser of the senior lienholder's interest, cannot claim that he lacked notice of the position of Withington and Nolder in reference to the junior liens or encumbrances.

[11] In Camp v. Land, 122 Cal. 167, 54 P. 839, it was held (quoting from the syllabus) that "A trust deed is not merged or extinguished in a judgment of foreclosure of a prior mortgage, if no foreclosure of the trust deed was attempted or ordered by the court, and if the bank secured thereby, when made a party to the foreclosure, merely asked for an application of any surplus to the reduction of its debt."

[12] In Richman v. Bank of Perris, 102 Cal.App. 71, at page 88, 282 P. 801, at page 809, this court said: "The lien of an execution and attachment proceedings attaches to the real and not to the apparent interest of a judgment debtor in and to his property, and the purchaser at an execution sale

takes subject to such existing liens and equities as the property was subject to in the hands of the debtor, unless he can show he purchased the same without notice, either actual or constructive, of the existence of such liens or equities", citing cases.

The case of Griffith v. List, 122 Cal.App. 125, 9 P.2d 529, upon which respondents mainly rely, involved the question of laches. It was there held that under somewhat similar evidence a lien could not be asserted against the surplus after it had been disbursed pursuant to order of the court and that order had become final; that a delay of 23 months in asserting the claim for the surplus caused the claim to be barred by laches. The holding in that case is not applicable to the facts here involved and therefore not controlling.

[13, 14] Respondents' additional contention that appellants, being beneficiaries under the trust deeds, are not proper parties plaintiff is untenable. A beneficiary may sue to preserve the trust property or enforce an obligation which exists in favor of the trust estate. Estate of Finch, 202 Cal. 612, 262 P. 34; 25 Cal.Jur. p. 354, § 199. However, this question cannot be raised for the first time on appeal. 2 Cal. Jur. p. 252, § 76.

Appellants have established sufficient evidence under the pleadings and prayer for relief authorizing a court of equity to compel respondents to return to the custody of the court the surplus funds wrongfully converted. Appellants' respective rights in and to any such surplus funds held under the foreclosure sale were not fully determined in the foreclosure decree. This question still remains undecided and should be disposed of in an appropriate proceeding before appellants will become entitled to recover a money judgment as prayed for in this action. This does not necessarily apply as to the count for declaratory relief.

The action to foreclose the mechanic's lien was equitable in its nature. The beneficiaries under the deeds of trust appeared and set up the liens of the deeds of trust.

[15] As we have said, the surplus remaining from the sale after discharging the mechanic's lien was and still should be in the custody of the court. That being true, the court of equity having jurisdiction over that money may complete its task and determine its proper distribution in the foreclosure proceeding. If the respondents refuse to return the money to the actual custody of the court they may then be compelled to do so.

[16] The attempted appeal from the order denying the motion for new trial, not being an appealable order, is dismissed. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301.

The judgment is reversed.

BARNARD, P. J., and MARKS, J., concurred.



51 Cal.App.2d 739

DONNELLY v. UNDERWRITING MEMBERS OF LLOYD'S.

Civ. 11581.

District Court of Appeal, First District, Division 2, California.

Oct. 1, 1941.

Rehearing Granted Oct. 31, 1941.

1. Insurance ⇐426

Where stallion was not suffering to such a degree as to necessitate its destruction, insured could not destroy trotting stallion, rendered incapable of racing or performing any work by reason of an unknit broken bone in leg, and recover under policy insuring against loss by reason of death of stallion resulting from enumerated causes or from the necessity of its destruction arising from any of such causes, but expressly excluding from coverage loss due to horse becoming unfit for purpose for which kept.

2. Insurance ⇐426

Where policy, insuring against loss by reason of death of trotting stallion resulting from enumerated causes or from the necessity of stallion's destruction arising from any of such causes, excluded from coverage loss due to cost of maintenance and care of stallion rendered unfit for racing and expressly prohibited slaughter of horse unless deemed necessary on advice of veterinary surgeon, destruction of horse, rendered unfit for racing, on the ground of commercial necessity because of expense of care and maintenance did not entitle insured to indemnity.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by J. W. Donnelly against Underwriting Members of Lloyd's, an unincorporated association, to obtain declaratory relief with respect to plaintiff's right under policy of insurance issued by defendant, insuring plaintiff against loss resulting from death of a horse. From an interlocutory decree in favor of plaintiff, defendant appeals.

Judgment reversed and judgment in favor of defendant ordered entered.

Bronson, Bronson & McKinnon, of San Francisco, for appellant.

Livingston & Livingston, of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff commenced an action to obtain declaratory relief. The defendant answered and after a trial before the court sitting without a jury the court made an interlocutory decree in favor of the plaintiff. From that decree the defendant has appealed.

The plaintiff is the owner of Galesworthy D, a trotting stallion. On November 23, 1938, the defendant insured the horse for a period of one year. On July 9, 1939, the horse fractured a bone in his left hind leg. The break was of the bone between the fetlock and the hoof. Some union was made but in the language of a layman it was a gristle union. The horse is and will continue to be wholly incapacitated from racing or any other kind of work. The plaintiff claims that under the terms of the policy he is entitled to kill the horse and to collect the insurance. However, his counsel stated in open court and many times repeated, "I am not contending * * * the horse is suffering to such degree that his suffering requires his slaughter." Accepting such statement the defendant thereupon contends that the plaintiff had no claim under the clear provisions of the policy.

The policy consists of a written proposal and a written acceptance. The proposal is in the form of a questionnaire. From it we quote, "2. For what purpose kept or employed? (a) Racing (trotting)." The acceptance, among others, contains these provisions: (1) "We hereby agree to indemnify the said J. W. Donnelly in the above sums against the death by natural causes and/or fire and/or lightning and/or accident and/or the act of God or man as well as from the necessity of its destruction arising from any of the above causes of the said Stallion Trotter which may occur during that time, anywhere within the limits of the U. S. of America. * * * (2) This insurance does not cover loss occasioned through an animal becoming unfit or incapable of fulfilling the functions or duties for which it is kept or employed unless expressly agreed to by endorsement hereon, and no insured animal shall be used for purposes other than those stated in the proposal form, nor be operated upon, nor be slaughtered unless deemed necessary on the advice of a qualified Veterinary Surgeon, and any contravention of these conditions shall render the policy null and void." For convenience of reference we have placed the numbers on said paragraphs. The plaintiff produced the written statement of a veterinary surgeon, Dr. Arburua, in which he stated: "I have been asked whether in my judgment it is necessary to destroy this horse. My answer is that this depends upon the sense in which the word 'necessary' is used. From a business standpoint the horse is no longer useful. He cannot be ridden or driven and whatever is spent on his keep will be money wasted. Therefore, if 'necessary' means commercially necessary, I say that it is necessary to destroy the horse. On the other hand, if 'necessary' means necessary from the sentimental or humanitarian side, then it is not necessary to destroy the horse. If he does no work but is simply allowed to remain in pasture, he may live the normal number of years without any great pain. So long as the affected part is kept at rest and not used there will be no great amount of suffering and if one is ready to pay the expense of keeping the horse for sentimental reasons I advise that this can be done. Therefore, looking at the question as one of humanity or sentiment, it is not necessary to destroy the horse."

[1] The plaintiff also quotes his own testimony to the effect that it now costs him $22.50 for feed and $25 for care of the horse each month. The plaintiff contends that under the terms of the policy it has become necessary for him to destroy the horse and that he will then be entitled to collect $2,500, the amount set forth in the policy. The defendant controverts that contention by asserting that

under the clear terms of the policy (paragraph 2, supra) no claim exists against it. We think that assertion must be sustained. Said paragraph is in effect as though it provided: "This insurance does not cover loss (cost of maintenance), through an animal becoming unfit or incapable of fulfilling the functions or duties (race trotting), for which it is kept or employed. * * *" If the horse developed a spavin, or ring-bone, or became wind-broken, or severed a tendon, no one would claim it was necessary to destroy it nor that the insured would have a claim. Galesworthy D suffers from an unknit broken bone from which, as admitted above, he does not so suffer as to require that he be destroyed. It follows that he falls in the same class as horses afflicted with spavin, ring-bone, suffering from being wind-broken or suffering from a severed tendon. In the absence of a claim that for humanitarian reasons the horse should be destroyed, the clear terms of said paragraph (2) do not authorize that act, and on the other hand, clearly limit defendant's liability under the policy.

[2] The plaintiff most earnestly contends that "necessity of destruction" of the horse, among other things means commercial necessity. The policy contains provisions to the contrary. One provision is the horse shall not "be slaughtered unless deemed necessary on the advice of a qualified veterinary surgeon", that is, on medical, not commercial, advice. Again the policy (paragraph 1) is clearly a contract insuring against loss from death. In so far as a commercial question is presented the loss is limited to the stipulated value of the horse and, by omission, excludes the cost of care and maintenance. The contention that "necessity of destruction" presents a question of commercial necessity is true, in part, but not exclusive. The concept, "necessity of destroying" a fine horse, includes, among others, reasons humanitarian, medical, commercial, and personal. To the minds of different owners each of such factors may have different weight. A person having much sentiment will have a different reaction in reaching his personal or humanitarian conclusions from one who has less sentiment. As to the medical question the policy clearly vests it in the advice of a qualified veterinary surgeon. The humanitarian, personal, and medical reasons in the instant case are each eliminated by the admissions made at the trial. As to the commercial question the policy clearly limits the liability of the insurer to the stipulated value of the horse and not to the cost of maintenance and care.

The judgment appealed from is reversed and judgment is ordered entered in favor of the defendant.

NOURSE, P. J., and DOOLING, J., pro tem., concurred.



47 Cal.App.2d 47

LORBER v. TOOLEY.

DOLLAR v. SAME.

DOLLAR et al. v. SAME.

Civ. 11626.

District Court of Appeal, First District, Division 2, California.

Sept. 30, 1941.

1. Executors and administrators ⇐513(3)

Where probate court in framing decree settling final account and decree of distribution in the administration of an estate actually and necessarily determined the legal effect of claims against estate for assignment of which decedent's widow had executed notes, no irregularity appeared on face of decree, and no appeal had been taken from decree when actions on notes were commenced against widow's executor, that decree was a "final decree" and was "res judicata" and was not subject to attack by executor.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Decree" and "Res Judicata".

2. Bills and notes ⇐92(1)

The delivery of notes by decedent's widow to assignors of claims against the estate was the "consideration" moving from widow, the delivery of assignments to widow was the consideration moving from assignors, and those two acts constituted the "contract", and, in absence of a charge of fraud, the

value of the notes or the value of the assignments was immaterial.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration" and "Contract".

3. Executors and administrators ⇐449

In actions against widow's executor on notes which widow had executed for the assignment to her of claims against her deceased husband's estate, rights and obligations under notes were the sole questions involved, and executor could not raise questions concerning the probate court's jurisdiction over certain joint tenancy stock which upon husband's death became widow's property. Probate Code, §§ 579, 580.

4. Bills and notes ⇐98

Where decedent's widow executed notes for the assignment to her of claims against decedent's estate, widow at no time objected to notes or questioned their validity but instead made payments on notes, and there was no charge or proof of fraud, undue influence, or misrepresentation, widow, and after her death her executor, were "estopped" from contending that there was a want and failure of consideration for notes. Code Civ. Proc. § 1963, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Three consolidated actions by H. M. Lorber, by R. Stanley Dollar, and by Robert Dollar, 2d, and others, against Homer H. Tooley, executor of the estate of Carrie M. Botts, deceased, to recover the balances due on three notes. From judgments for plaintiffs, defendant appeals.

Affirmed.

See, also, Cal.App., 117 P.2d 39.

Byron Coleman, Abraham Setzer, Carl E. Day, and Robert E. Hatch, all of San Francisco, for appellant.

Keith R. Ferguson, Robert E. Burns, and Brobeck, Phleger & Harrison, all of San Francisco, for respondents.

STURTEVANT, Justice.

The plaintiffs in three separate actions sued to recover the balances due on three promissory notes. The actions were consolidated. A separate set of findings was made in each action and a separate judgment was entered. From each judgment the defendant has appealed.

The controversy arose out of the following facts:

Carrie M. Botts, deceased, the maker of the three promissory notes upon which these actions were instituted, was the wife of James M. Botts, who died in March, 1934. By his will James M. Botts appointed R. Stanley Dollar his executor, left nothing to his wife Carrie M. Botts, except her community interest, and left legacies of 20 per cent of the capital stock of the American Marine Paint Company to John Parker; $20,000 to R. Stanley Dollar, and bequeathed the balance of his estate to his brothers and sisters.

R. Stanley Dollar, as the executor of the last will and testament of James M. Botts, appointed Keith R. Ferguson as his attorney, and informed him that he would not sign any petitions or approve any claims unless such petitions and claims were approved in writing by the widow, Carrie M. Botts. Mrs. Botts desired to obtain full control of the American Marine Paint Company, and for that reason she wanted to pay all claims against the estate and obtain assignments for them. She wanted the title to all the stock, and to have no claims against it. Having made arrangements for the assignment of all three claims, on July 2, 1934, Mrs. Botts executed the three notes payable to R. Stanley Dollar and J. Harold Dollar, each in the sum of $12,000, and a note to H. M. Lorber, in the sum of $5,200. Each of the notes being payable within one year, Mrs. Botts commenced the payment of the notes by monthly installments on August 2, 1934, of $205 each on the R. Stanley and J. Harold Dollar notes, and $90 on the H. M. Lorber note and made such payments each month thereafter to and including January 2, 1938, a period of three and one-half years, her death occurring on January 20, 1938.

In August, 1934, the first inventory was filed, listing the assets of the estate of James M. Botts, which were appraised at $1,969.92.

The matter of drawing up the claims of the plaintiffs against the James M. Botts estate was placed in the hands of Keith R. Ferguson, who was delayed in preparing the claims by reason of certain legal work so that the claims were not

prepared until October 16, 1934. The claims were presented to Theodore M. Levy, associated with Ira S. Lillick of the San Francisco bar, who were acting as the attorneys for Mrs. Botts. They obtained the approval of Mrs. Botts to the claims, and then returned them to Mr. Ferguson, who presented them to Mr. Dollar for his approval. The endorsement of approval of Mrs. Botts appears on the bottom of each of the three claims.

After the claims had been approved and verified, they were filed with the court. Thereafter, assignments of each of the claims were prepared by Mrs. Botts' attorneys, signed by each of the plaintiffs and presented to Mr. Levy, attorney for Mrs. Botts, and were thereafter filed.

After the filing of the first inventory there arose a serious question as to whether the 1,749 shares of American Marine Paint Company stock, which was not listed in the first inventory, were community property or the separate property of Mrs. Botts as a surviving joint tenant of her deceased husband, James M. Botts, Mr. Schafer, an attorney representing some of the heirs of James M. Botts, made the contention that there was no joint tenancy, and to settle this matter Mrs. Botts thereafter made a settlement with Mr. Schafer, through her attorney Theodore M. Levy, and took an assignment of all the rights of the heirs under the will.

The 1,749 shares of stock not having been listed in the original inventory, an amended inventory which included the 1,749 shares of the American Marine Paint Company stock, listing them as community property, was filed at the suggestion and advice of Mr. Levy as the attorney for Mrs. Botts and Homer H. Tooley, the defendant in this case, who was at that time employed as a tax accountant for the estate of James M. Botts.

The assets of the estate of James M. Botts, as shown by the amended inventory, were appraised at $206,509.18.

On July 23, 1936, the first and final account and petition for distribution in the estate of James M. Botts was placed in the hands of Mrs. Botts' attorney, who obtained the written approval of Mrs. Botts on said account reading "Approved (Signed) Carrie M. Botts", and the account was thereupon filed in the court.

The property of the estate was distributed as decreed and the executor discharged and no appeal having been taken from said decree at the time of the trial it had become final.

Carrie M. Botts died on January 20, 1938, and by her will named Homer H. Tooley, the defendant herein, as her executor. These three actions were brought after plaintiffs' claims on the notes were rejected by the defendant Homer H. Tooley as executor.

At no time from the date of execution of the notes until her death in 1938 did Carrie M. Botts object to these notes or question their validity, but, on the other hand, she paid monthly the sum of $500 on account of the principal and interest on all of the notes, $205 being paid on each of the notes of R. Stanley Dollar and J. Harold Dollar and $90 on the H. M. Lorber note. There was no charge or proof of fraud, undue influence or misrepresentation, the defendant presenting only one defense on this appeal, that is, want and failure of consideration for the notes.

In making the contention just stated the defendant asserts (1) the alleged claim of each payee was barred by the statute of limitations; (2) the account which was the subject of each claim was not attached to the claim filed in Estate of James M. Botts, deceased; (3) the acts constituting an approval did not precede but followed the act of delivering the notes; and (4) the claims of the payees against the Estate of James M. Botts were invalid on their face.

[1] No one of the foregoing contentions has any merit. Each one is based on the face of a certain written instrument. Each of said instruments presumably came before the probate court and the legal effect of said instrument was actually and necessarily determined by that court in framing its decree settling the final account and framing the decree of distribution in the administration of the Estate of James M. Botts, deceased. No irregularity appears on the face of the decree. That decree was rendered and had become final when the instant actions were commenced. It was not subject to the attacks of this defendant. Estate of McDougald, 146 Cal. 191, 195, 79 P. 878. Each of the above attacks which the defendant makes is obviously an attempt to show that the decree of the probate court was, as to the parts so attacked, erroneous and invalid. The ruling of the trial court that the decree was res judicata was clearly correct.

[2] The defendant also contends that the assignments to Mrs. Botts by the payees of the claims which they had filed in the probate proceedings in the matter of the estate of her deceased husband were not a good and valuable consideration to support such contracts. We find no merit in that contention. When Mrs. Botts delivered her note it is not claimed any fraudulent word was said or any fraudulent act was done by the payee. The delivery of said note was the consideration moving from her. At the same time the payee delivered to her an assignment in due form of his claim against the Estate of J. M. Botts, deceased. That was the consideration moving from the payee to Mrs. Botts. Those two acts constituted the contract. Newcomb v. Newcomb, 239 Ill.App. 256; Seth v. Lew Hing, 125 Cal.App. 729, 14 P.2d 537, 15 P.2d 190. In the absence of a charge of fraud the value of the note or the value of the assignment is immaterial. Newcomb v. Newcomb, supra. The law will not attempt to measure the value of either. Seth v. Lew Hing, supra.

[3] The defendant claims that the joint tenancy stock upon the death of Mr. Botts became the property of Mrs. Botts, that later it was "dumped" into the estate of the former, that the probate court never had any jurisdiction over it, and that said decree did not, and could not, affect the title thereto. The making of that claim is to present a false issue. If this were a proceeding brought under Probate Code, sections 579, 580, such questions might arise. But it is not such a proceeding. It does not involve the title nor the history of the title to any shares of stock. The rights and obligations under three promissory notes are the sole questions involved.

[4] The defendant concedes that if Mrs. Botts was estopped by her conduct that this defendant is estopped, but the defendant asserts no estoppel was created. 10 Cal.Jur. 626, 638-639. An examination of that text discloses that it contains nothing supporting the defendant's assertion. That an estoppel was created, it is sufficient merely to cite Davis v. Wakelee, 156 U.S. 680, 15 S.Ct. 555, 39 L.Ed. 578, and Bixby v. Security-First Nat. Bank, 7 Cal.2d 424, 60 P.2d 862; and Code of Civil Procedure, section 1963, subdivision 3.

The judgments appealed from are affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concurred.

47 Cal.App.2d 91

PEOPLE v. MEAD.

Cr. 3458.

District Court of Appeal, Second District, Division 1, California.

Oct. 1, 1941.

Hearing Denied Oct. 30, 1941.

1. Criminal law ⇐1159(1)
 Robbery ⇐26

In prosecution for armed robbery, whether alibi and fact that no gun, mask, nor money was found upon defendant when arrested raised reasonable doubt of defendant's guilt so as to preclude conviction was question for jury, and when determined by jury conclusion could not be disturbed on appeal.

2. Robbery ⇐24(1)

Evidence *held* sufficient to sustain conviction for armed robbery.

3. Criminal law ⇐650

In prosecution for armed robbery where identity of defendant was in question, refusal to permit defendant to walk, as example of his natural style for benefit of witness for people then under cross-examination was not error, since such questions are addressed to trial court's discretion and no abuse thereof resulting in manifest prejudice was shown.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Elzia Edward Mead was convicted of armed robbery, and he appeals.

Affirmed.

Elzia Edward Mead, in pro. per., for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was accused by information of three counts of armed robbery and with three prior felony convictions of larceny and burglary. The three felony convictions were admitted by the defendant before trial. The jury adjudged defendant guilty of the three offenses as alleged and judgment was entered accordingly.

The appeal is from the judgment and an order denying defendant's motion for a new trial.

The record reveals that upon the evening of September 28, 1940, a man wearing a

mask entered the Safeway Store in El Monte, California, walked up to the cashier and, pointing a revolver at him, said, "This is a stick up". He then removed the money from the cash register and in addition took $29 from the cashier. Defendant was identified afterwards and at the trial by the cashier and also by the meat cutter, who witnessed the robbery.

Count II alleged in substance, and it was so established at the trial, that on the morning of October 2, 1940, about 8 o'clock an employee of the gas company was sitting in his parked car back of the company's office waiting to go to work when a man, later identified as defendant, approached, pointed a revolver at the employee and ordered him to open the office door. When informed by the employee that he, the employee, had no key, defendant sat in the same car and waited until another employee arrived and opened the office door. Defendant approached the door at the same time demanding that the door be left open. The other employee, however, closed the door whereupon defendant returned to the car, ordered the owner out and drove away. Both of these witnesses identified defendant.

The third count alleges and the evidence established that on the night of October 5, 1940, defendant robbed another market in El Monte. Upon this occasion defendant fired a shot into the floor, struck the cashier with the gun, obtained $153 and escaped in an automobile, the license number of which was obtained, by which means the defendant was later arrested. Defendant was identified by five witnesses of this robbery.

The defendant did not testify at the trial.

[1, 2] It is contended on appeal that the evidence is not sufficient to establish defendant's guilt beyond a reasonable doubt, a contention based in part upon the argument that no gun, mask, money, etc., was found upon defendant when he was later arrested; also evidence of an alibi conflicts with the evidence of the witnesses who identified defendant, which, it is urged by appellant, in effect is sufficient to raise a reasonable doubt. Manifestly, there can be no merit to such contentions. Assuming that a true conflict existed, it was for the jury to determine the issue thus raised and having done so, such conclusion cannot be disturbed on appeal. The evidence abundantly sustains the judgment.

[3] It is also urged that the court erred with relation to a ruling refusing to permit defendant to walk, as an example of his natural style, for the benefit of a witness for the people then under cross-examination by defendant. The court ruled against defendant, which is assigned as error. Such questions are addressed to the trial court's discretion and unless an abuse thereof is shown, resulting in manifest prejudice, a ruling of the nature here involved is not error. An examination of the record reveals that no prejudice resulted from the ruling.

The record reveals no prejudicial errors. The judgment and order are affirmed.

YORK, P. J., and WHITE, J., concurred.



47 Cal.App.2d 34

PEOPLE v. BAYLOR.

Cr. 3467.

District Court of Appeal, Second District, Division 2, California.

Sept. 29, 1941.

1. Criminal law ⇐1186(4)

In prosecution for murder where it appeared that deceased had attempted to have unnatural sexual intercourse with defendant's mistress on night of killing, admission of testimony that on previous night when deceased was not present witness and defendant's mistress had sexual intercourse in presence of defendant, who then had both natural and unnatural sexual intercourse with his mistress in witness' presence, was reversible error under evidence permitting a finding of killing in self-defense. Const. art. 6, § 4½.

2. Criminal law ⇐369(1)

A defendant cannot be tried for any offense other than that set forth in the information and other acts of criminality or immorality cannot be dragged into the case to prejudice the defendant or to create a probability of his guilt of the charge.

3. Criminal law ⇐371(1, 12), 372(1)

An exception to the general rule that evidence of other immoral or criminal acts is not admissible is that such evidence is admissible to prove intent, motive, system, or malice.

4. Criminal law ⇐661

A defendant is entitled to be tried on evidence properly admissible to establish the crime with which he is charged.

5. Criminal law ⇐683(1)

In prosecution for murder, fact that defendant brought out on cross-examination that deceased had attempted to have unnatural sexual intercourse with defendant's mistress on night of killing did not open door for admission on rebuttal of testimony that on previous night, when deceased was not present, witness and defendant's mistress had sexual intercourse in presence of defendant, who then had both natural and unnatural sexual intercourse with mistress in witness' presence.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Jack Preston Baylor was convicted of manslaughter, and he appeals.

Reversed and new trial ordered.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and John Dockweiler, Dist. Atty., and Charles Hollopeter, Deputy Dist. Atty., both of Los Angeles, for respondent.

WOOD, Justice.

Defendant was accused by information of the crime of murder. A jury returned a verdict finding him guilty of manslaughter and he has appealed from the judgment of conviction and from the order denying his motion for a new trial.

At about 1 o'clock in the morning of December 21, 1940, Howard Perks, who had been working on the afternoon shift at an airplane factory, entered Curley's cafe on South Western avenue near 149th street in the city of Los Angeles, where defendant was employed as a member of the orchestra. At the cafe Perks became acquainted with Ann Lorraine, a waitress employed in a Long Beach cafe, who had been living with defendant in a cottage in Long Beach. Shortly after 2 a. m., defendant Perks and Miss Lorraine left the cafe. Defendant and Miss Lorraine entered Miss Lorraine's automobile and drove south on Western avenue. They had gone but a short distance when Perks drove alongside in his own car and called to them to stop. He invited them to have a drink and they accepted. They then proceeded down the street for about a mile and a half, when Perks again stopped them and suggested that they all go in one car to a place where they could finish a bottle of liquor which was in his possession. They all entered Perks' car, leaving Miss Lorraine's car parked in the street, and defendant thereafter drove Perks' car. They stopped at an auto camp, but for some reason were unable to rent a cabin, and proceeded on to the house in Long Beach where defendant and Miss Lorraine lived, arriving there at about 3:15 a. m.

At the Long Beach house they had several drinks, finishing the bottle, and Perks and Miss Lorraine became intoxicated. Miss Lorraine asked for coffee and defendant went into the kitchen to make coffee. Miss Lorraine testified that Perks threw her backward on the bed and bit her several times on the leg and "on the left side on the privates". Defendant returned from the kitchen and "grabbed Mr. Perks by the front of the shirt". Miss Lorraine testified:

"When Mr. Perks was in the reclining position on the bed, and Mr. Baylor grabbed him by the front of the shirt, Mr. Perks reached up and grabbed the zipper on the front of his trousers and tried to open his trousers.

"Q. And then what happened? A. Then Mr. Baylor asked him if he was crazy.

"Q. What did he say? A. I do not know what Mr. Perks said, if anything.

"Q. Now, what did Mr. Baylor do then, if anything? A. Mr. Baylor slapped him."

Perks fell from the bed and received a laceration on his eye, causing blood to flow. Perks apologized for his conduct, which he attributed to his drinking, and Miss Lorraine bathed his face. They all thereupon left the house and drove back to the place on Western avenue where Miss Lorraine's car had been left and stopped about two car lengths back of the Lorraine car.

Defendant and Miss Lorraine entered the Lorraine car and were in the act of starting the motor when Perks drove his car past the Lorraine car, bringing it to a stop a few feet ahead of and to the left of the Lorraine car. He then put his car into reverse and with considerable force backed it into the Lorraine car, smashing the left front fender and crushing the radiator grill. When Perks moved his car forward defendant drove the Lorraine car away from the curb and Perks made an ineffectual attempt to again ram the car. Defendant drove rapidly south on Western avenue, but Perks overtook him and crashed into the rear of the Lorraine car with such violence that the bumper of the two cars became locked together. Almost immediately after the two cars became locked Perks appeared on the driver's side of the Lorraine car, his arm upraised in a striking position and holding a bright object in his hand. Miss Lorraine called to defendant to watch out and defendant "ducked his head and opened the door on his side of the car and jumped out". The two men then began fighting. Defendant testified that Perks "swung" at him before he left the car, that he thereupon immediately got out of the car and he and Perks "started to fight in the street". He testified:

"Well, all of a sudden I connected with a blow to his face or chin, and he had stepped off to the side of the road, on the east side, and there seemed to be a little ditch there, and as he stepped in there, he started to fall towards the east, off the highway.

"Q. And what did you do when he started to fall? A. Immediately I ducked back to my car, back to Ann's car."

Defendant testified that he then drove away and did not return to the scene of the fight. Miss Lorraine testified that after the car was driven south for a while she felt the motion of the car turning around and that presently she heard defendant scream, and say, "Christ, I have run over something, I think it is a man or that man". She further testified that she felt "like he had run over a bump"; that defendant kept on driving and went to their home in Long Beach.

Esteban Estrada testified that at about ten minutes before six in the morning of December 21 he saw a body lying in the street, that "the biggest part of that object was west of the white line". He saw a car coming from the south at the rate of about twenty miles per hour and as it approached the body the car turned toward the white line, passed over the body a little to the left of the white line, then turned to the east and proceeded in a northerly direction. Soon after two other approaching cars "turned out" and missed striking the body but a third car ran over the body. This was the body of Perks.

Investigating officers found near Perks' body the head of a flashlight, which was identified as one which Perks carried in the glove compartment of his car. An expert testified that a slight smudge found on the flashlight head was blood.

Dr. Frank Webb, the autopsy surgeon, testified that the immediate cause of the death of Perks was a "comminuted fracture of his skull and subdural hemorrhage"; that the subdural hemorrhage was a hemorrhage between the brain and the dura of the brain; that a comminuted fracture requires the application of force and that from the extent of the fracture the witness would infer that considerable force was applied. The witness further testified: "I would judge that it was due to a blow on the head in that region by something that made a definite laceration of a semicircular type rather than a spread out and extensive laceration. * * * Any object with an oval or curved surface could have created that lesion". He further testified that such an injury would cause immediate unconsciousness and death within five or ten minutes. Dr. Webb also testified that he found a laceration in the region of one of Perks' eyes.

The principal contention now made by defendant is that the trial court erred in admitting the testimony of Neal Busch concerning certain occurrences which took place about twenty-four hours before defendant met Perks. This witness was called after the close of defendant's evidence. He testified, over the objection of defendant, that early in the morning of December 20 he left Curley's cafe with defendant, Miss Lorraine and a friend of the witness and the party went to his (Busch's) apartment. The friend, whose name was unknown to Busch, left shortly after the group reached the apartment. Busch testified that he then had an act of sexual intercourse with Miss Lorraine in the presence of defendant; that immediately thereafter defendant had an act of sexual intercourse with Miss Lorraine;

and that defendant and Miss Lorraine then indulged in an unnatural sex act. No connection was shown between these acts and the events of the following day. There was no evidence that Busch and Perks were acquainted with each other or that any of the matters related by Busch were known to Perks. A motion to strike out the testimony of Busch was denied. Miss Lorraine and defendant both denied the statements made by Busch.

[1-4] The trial court committed prejudicial error in admitting the testimony of the witness Busch. It is a rule universally recognized that a defendant in a criminal action cannot be tried for any offense other than that set forth in the information. Other acts of criminality or immorality cannot be dragged into the case for the purpose of arousing an atmosphere of prejudice against the defendant or to create a probability of his guilt of the charge of which he is on trial. There are certain exceptions to this general rule, among which might be mentioned instances in which it is necessary to admit evidence of other offenses for the purpose of proving intent, motive, system or malice. People v. James, 40 Cal.App.2d 740, 105 P.2d 947. In the case under review there is no evidence to bring it within any of the recognized exceptions to the general rule. There was no connection between the occurrences related by the witness Busch and the occurrences relied upon by the prosecution to establish the crime of murder or manslaughter of Perks, nor is there anything in the testimony of Busch from which the guilt of defendant of the charge on which he was being tried could be logically inferred. It is only necessary to make a mere statement of the degrading testimony of Busch to convince that it was highly prejudicial and tended to inflame the minds of the jurors against defendant. He was on trial for murder, and not for immoral conduct, and was entitled to be tried on evidence properly admissible to establish the crime with which he was charged. In People v. Wright, 144 Cal. 161, 77 P. 877, 878, the defendant was accused of murder and was convicted of manslaughter. Although the defendant claimed that the killing was in self defense, the prosecution was allowed to present evidence of sex relations between the defendant and the former wife of the deceased. The reviewing court reversed the conviction, holding that "this mass of testimony admitted against the defendant was meaningless as to motive, and could have but inflamed—as doubtless it was expected it would inflame—the minds of the jurors against the defendant".

[5] Respondent seeks to justify the admission of the testimony of Busch on the ground that defendant was the first to elicit testimony concerning the sex acts which occurred in the Long Beach house. Respondent points to the fact that in the direct examination of the witness Lorraine the deputy district attorney purposely refrained from asking the witness any questions which tended to bring out the abnormal sex actions of Perks and he now claims that since defendant's counsel brought out such matters on cross-examination of the witness he thereby "opened the door" for the testimony of Busch in rebuttal. We cannot agree with this contention. Defendant was on trial on the charge of murder, a charge in which the prosecution must necessarily prove malice. Perks had been killed and defendant was attempting to justify his conduct in the eyes of the jury. He naturally expected the jury to accept his version of the occurrences which took place immediately preceding the death of Perks and he could not expect the jury to accept his version of the affair unless he frankly brought out all the surrounding circumstances. The prosecution had established by the direct examination of Miss Lorraine that Perks' eye was injured in defendant's residence and Miss Lorraine's testimony on this point was supported by the findings of the autopsy surgeon. Respondent would have defendant refrain from bringing out on cross-examination that the injury to the eye resulted from Perks' misconduct. Since the prosecution failed to show all the material facts, it was necessary for defendant to present to the jury the circumstances surrounding the receipt of this injury by Perks. In doing so he brought out the fact that Perks himself had made an assault upon defendant's female companion and had made an unnatural gesture towards defendant. The fact that he presented all of these details to the jury in an endeavor to explain the injury to Perks' eye, which had been established by the prosecution, did not open the door for the prosecution to debase his character in an effort to show disconnected acts of improper sex conduct by defendant on a previous occasion. It is far more reasonable to conclude that the prosecutor, by failing to bring out very material facts concerning the important oc-

currences in the Long Beach cottage, attempted to entrap the defense into a position which would form the basis for the offer of improper testimony. The trial court erroneously permitted the prosecutor to follow this course and in so doing deprived defendant of a fair trial. A judgment resulting from such procedure must not be allowed to stand.

Section 4½ of article VI of the Constitution of California is not applicable to the present situation. According to the testimony of defendant and of the principal witness for the prosecution, Perks made a felonious assault upon them, thereby endangering their lives. It could be reasonably concluded that defendant seized the flashlight head from Perks and killed him in self defense; and that if defendant drove over the body of Perks, which defendant denies, Perks was at that time dead.

The judgment and the order denying a new trial are reversed and a new trial is ordered.

MOORE, P. J., and McCOMB, J. concurred.



47 Cal.App.2d 79

NELSON v. ENOS et al.

Civ. 11399.

District Court of Appeal, First District, Division 2, California.

Oct. 1, 1941.

1. Venue ⇐53

An offer in defendant's counter-affidavit, opposing plaintiff's motion for change of venue, to stipulate that witnesses, whose convenience motion alleged would be promoted by change, would testify as stated in plaintiff's affidavit if personally present at trial, was insufficient to defeat motion, as offer was not to stipulate to truth of testimony set forth in plaintiff's affidavit. Code Civ.Proc. § 397, subd. 3.

2. Venue ⇐53

To defeat plaintiff's motion for change of venue on ground that witnesses' convenience would be promoted thereby, defendant must offer to stipulate, not merely that witnesses would testify as stated in plaintiff's affidavit, but that facts sought to be established by such witnesses will be admitted on trial. Code Civ.Proc. § 397, subd. 3.

3. Venue ⇐70

An offer in affidavit, signed by only one of two defendants, to stipulate that witnesses, for whose convenience plaintiff sought change of venue, would testify as stated in plaintiff's affidavit supporting motion for change, was not binding on other defendant. Code Civ.Proc. § 397, subd. 3.

4. Venue ⇐53

In absence of offer by both defendants in action to stipulate to truth of testimony of witnesses, for whose convenience plaintiff sought change of venue, as set forth in plaintiff's affidavit supporting motion for such change, court did not abuse discretion in granting motion. Code Civ.Proc. § 397, subd. 3.

5. Appeal and error ⇐965

The fact that plaintiff's motion for change of venue to promote convenience of witnesses was not made until after cause was set for trial was for consideration of trial court, whose order granting motion should not be disturbed on appeal, in absence of clear abuse of discretion. Code Civ.Proc. § 397, subd. 3.

Appeal from Superior Court, Santa Clara County; Charles W. Davidson, Judge.

Action by Robert M. Nelson against Dorothy Graham Enos and another, as executrix and executor of the will of Elizabeth A. Nelson, deceased, to recover realty conveyed to deceased by plaintiff. From an order granting plaintiff's motion for a change of venue, defendants appeal.

Affirmed.

Bohnett, Hill, Cottrell & Boccardo and L. D. Bohnett, all of San Jose, for appellants.

Tobin & Tobin and Charles R. Collins, all of San Francisco, and Richard V. Bressani, of San Jose, for respondent.

SPENCE, Justice.

Plaintiff made a motion for change of venue from Santa Clara county to the city and county of San Francisco upon the ground that the convenience of witnesses and the ends of justice would be promoted

by such change. Code Civ.Proc., § 397, sub. 3. From the order granting said motion, defendants appeal.

This litigation involved the alleged procurement by Elizabeth A. Nelson, since deceased, of a gift deed from plaintiff to certain real property at a time when plaintiff was in Stanford Hospital in San Francisco and was about to undergo a serious operation. The defendants are the executor and executrix of the last will of said Elizabeth A. Nelson, deceased. Defendant Enos resides in the city and county of San Francisco and defendant Riggs resides in the county of Santa Clara.

In support of the motion, plaintiff filed his affidavit showing that plaintiff and all witnesses to be called by him were residents of San Francisco and that he knew of no person residing outside of San Francisco who could give any relevant testimony at the trial. In said affidavit, plaintiff set forth the names of the several witnesses residing in San Francisco and the testimony which would be given by each of said witnesses. Defendant Riggs alone filed a counter-affidavit. In said affidavit he stated that it was impossible to know what testimony would be required to defend the action and further stated that "whatever witnesses" were required resided in Santa Clara county. He failed, however, to name any such witness and failed to give the substance of the testimony of any such witness. The counter-affidavit further contained an offer to stipulate that certain of the witnesses named by plaintiff would testify as stated in plaintiff's affidavit.

Defendants contend that the trial court abused its discretion in granting said motion but we find no merit in said contention. In their briefs, defendants divide the witnesses named in plaintiff's affidavit into four classifications as follows: (1) plaintiff; (2) witnesses whose testimony was the subject of the offer to stipulate contained in the counter-affidavit of defendant Riggs; (3) witnesses whose testimony was claimed to be irrelevant; and (4) witnesses whose names and residences were not specifically set forth but were merely referred to as the representatives of Stanford Hospital who would be called to produce the hospital records. Defendants then argue that the convenience of the persons named in classifications 1, 3 and 4 should not have been considered by the trial court. As to the witnesses named in classification 2, defendants argue that the offer to stipulate constituted a complete answer but we believe that defendants are in error on this point and we shall confine our discussion to a consideration thereof.

[1-4] The offer to stipulate was not an offer to stipulate to the truth of the testimony set forth in plaintiff's affidavit but was merely an offer to stipulate that the witnesses would testify as stated in plaintiff's affidavit "if personally present at the trial". Said offer to stipulate was insufficient to defeat the motion. As was said in Ingal v. Stoddard, 35 App.Div. 539, 54 N.Y.S. 813, at page 814, "To defeat such a motion, the stipulation must go beyond this. It must be to the effect that the facts sought to be established by the witnesses will be admitted upon the trial. An admission that a witness will testify to a fact is of little or no value, because the party could not safely go to trial without calling the witness, inasmuch as the correctness of his statement would be determined by the court and jury in no small degree from his appearance upon the stand and the manner in which he gave his testimony". See, also, Rhodes v. Wheeler, 48 App.Div. 361, 63 N.Y.S. 177; Thompson v. Walker, Sup., 180 N.Y.S. 100. Furthermore, the offer to stipulate was made in an affidavit signed by only one of the two defendants. Plaintiff contends that such offer was in no way binding upon the other defendant. Defendants make no answer to this contention and we know of none. In the absence of an offer by both defendants to stipulate to the truth of the testimony said witnesses as set forth in plaintiff's affidavit, we find no abuse of discretion in the granting of the motion.

[5] Defendants further call our attention to the fact that said motion was not made until after the cause was set for trial. This fact was one for the consideration of the trial court and it requires no citation of authority to sustain the proposition that the order of the trial court granting the motion should not be disturbed on appeal in the absence of a showing of a clear abuse of discretion. We find no such showing here.

The order is affirmed.

NOURSE, P. J., and DOOLING, J. pro tem., concurred.

47 Cal.App.2d 148

PEOPLE v. GALLANTIER.

Cr. 2201.

District Court of Appeal, First District, Division 2, California.

Oct. 3, 1941.

1. Criminal law ⇐311

Where defendant entered a plea of guilty approximately one week before being adjudged insane, and there was nothing in record to contrary, it would be assumed that defendant was insane on date when plea was entered.

2. Criminal law ⇐625

One cannot be tried, adjudged to punishment, or punished for a public offense while insane. Pen.Code, § 1367.

3. Criminal law ⇐274, 1167(5)

Refusal of defendant's motion for leave to withdraw plea of guilty was reversible error where defendant had been adjudged insane approximately one week after plea was entered and claimed to have been insane at time of entry of plea, and record contained nothing to show that such claim was not well founded. Pen.Code, § 1367.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Robert Gallantier was convicted of robbery, and he appeals.

Reversed.

Robert Gallantier, in pro. per., for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

STURTEVANT, Justice.

The defendant was tried, convicted and sentenced on three different felonies. Thereafter the district attorney in San Francisco filed an information against him charging the crime of robbery. The defendant entered a plea of guilty. After numerous proceedings had in the municipal court and in the superior court, acting on and accepting the plea of guilty, the latter court entered a judgment against the defendant convicting him of robbery in the first degree. Among other things the sentence contained a provision that the defendant "* * * be punished by imprisonment in the state prison at San Quentin, California, said sentence to run concurrently with all other sentences heretofore imposed". From the latter judgment the defendant appealed and has brought up typewritten transcripts.

The defendant presents two points, (1) failure of the court to find that the defendant had been restored to sanity, and (2) refusal of the court to entertain a motion to withdraw his plea of guilty and to enter a plea of not guilty. As we are of the opinion that the second contention is well founded it will not be necessary to discuss the first contention.

The record discloses that the defendant at the time the offense was committed was a drug addict. At said time, September 22, 1939, the alleged offense of robbery was committed. On September 25, 1939, a complaint was filed against him in the municipal court. On the same day the defendant appeared in the municipal court accompanied by his counsel, Mr. Toner the public defender. His counsel suggested to the court that the defendant plead not guilty. Upon being asked what his plea was the defendant answered, "Guilty". The cause was then certified to the superior court. Thereafter in the superior court the case was called on many different dates and many different proceedings were had. On September 27, 1939, the defendant applied for probation. While that application was pending, on September 29, 1939, the trial court directed that the defendant be taken to the psycopathic hospital for observation. On October 4, 1939, the insanity commissioners certified to the court that the defendant was insane and he was committed to the Mendocino State Hospital. Whether he was released on parole, discharged as cured, or otherwise, does not appear from the record, but the record does show that on September 18, 1940, the above entitled cause was restored to the calendar in the superior court for further proceedings. Thereafter numerous continuances were had.

At times the defendant was represented by the public defender and at other times, in the absence of his counsel, he represented himself. On numerous occasions he orally asked permission to withdraw his plea of guilty, to enter a plea of not guilty, and to have his case tried by a jury. True it is that at no time did he support his mo-

tion by an affidavit. However, all of the facts hereinabove set forth appear of record in the action.

[1] The proceedings show a running discussion participated in at times by the defendant personally, his counsel, the district attorney, and the judge of the trial court. At all times the defendant was asking permission to change his plea and to go to trial before a jury, and was claiming that he was insane at the time he entered a plea of guilty. There is nothing in the record showing that that claim was not well founded. On the other hand the facts stand out prominently that on October 4, 1939, he was adjudged insane and that his plea of guilty was entered September 25, 1939, approximately one week prior thereto. Nothing to the contrary appearing in the record it must be assumed that he was insane the date he entered a plea of guilty.

[2, 3] It is statutory that one "* * * cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane". Pen.Code, § 1367. Obviously a trial had under such conditions would be erroneous. No reason appears why a plea entered under the same conditions would not be equally erroneous. Under a set of facts almost parallel the court so held. People v. Scott, 59 Cal. 341.

Resting our decision on the authority of that case the judgment is reversed.

NOURSE, P. J., and DOOLING, J. pro tem., concurred.



47 Cal.App.2d 63

REMILLARD BRICK CO. v. DANDINI et al.

Civ. 11854.

District Court of Appeal, First District, Division 2, California.

Sept. 30, 1941.

Rehearing Denied Oct. 30, 1941.

1. Process ⇐48

Personal service of process may be waived. Code Civ.Proc. § 416.

2. Appearance ⇐24(5)

When a party voluntarily appears generally and without objection to manner of service of process, he is deemed to have "waived" objection to service of process and to have consented to subsequent proceeding although there had been no service of notice upon him. Code Civ.Proc. § 416.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

3. Appeal and error ⇐183

Where counsel for both parties and the court assumed at all times that application for temporary injunction was properly before the court, and counsel for defendants made no objection to hearing but on contrary demanded that it proceed, defendants were precluded on appeal from contending that they were not properly in court and that court had no jurisdiction over subject matter, since they had "waived" any defect in issuance of summons. Code Civ.Proc. § 406.

4. Appearance ⇐20
Injunction ⇐143(1)

The statutory requirement that a temporary injunction cannot be issued except in response to an order to show cause is one for benefit of defendant which he may waive, since he may waive the issuing of summons as well as waive its service by voluntary general appearance. Code Civ.Proc. § 406.

5. Injunction ⇐152

The statute providing that preliminary injunction shall not be granted without notice to opposite party and that if petitioner be not ready at designated time for hearing temporary restraining order will be dissolved distinguishes between "preliminary injunction" and "temporary restraining order" and does not prohibit court from issuing preliminary injunction, although plaintiff is not ready at designated time for hearing. Code Civ.Proc. §§ 526, 527.

See Words and Phrases, Permanent Edition, for all other definitions of "Preliminary Injunction" and "Temporary Restraining Order".

6. Injunction ⇐152

Where plaintiff had not filed points and authorities two days prior to hearing on preliminary injunction as required by statute and asked for more time to do so, but defendants' objection was sustained, defendants' demand of immediate hearing without plaintiff's points and authorities "waived"

objection that none were on file. Code Civ. Proc. §§ 526, 527.

7. Appeal and error ⇐1170(1)

Where failure to dismiss proceeding for preliminary injunction had been invited by defendants' demand of an immediate hearing and entire matter could have been heard on subsequent date pursuant to legal notice and in compliance with statute, failure to dismiss could have been no more than error committed within court's jurisdiction and could not have been "prejudicial error" within meaning of constitution. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Prejudicial Error".

8. Injunction ⇐118(3)

Direct allegations in complaint of fraudulent misappropriations, misconduct and mismanagement of corporation supported issuance of preliminary injunction as allegations of material facts and not mere "conclusions of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

9. Appeal and error ⇐1032(1)

Where nothing pointed to abuse of discretion in issuance of preliminary injunction except assertion of defendants that court abused its discretion in rejecting evidence of defendants' affidavits controverting allegations of complaint, there was no prejudicial error justifying reversal of issuance of preliminary injunction, since it was incumbent upon defendants to affirmatively show an abuse of discretion, and assertion alone did not present a debatable question on appeal.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by the Remillard Brick Company against A. O. Dandini and others for appointment of a receiver and other relief. From an order granting a preliminary injunction, the defendants appeal.

Order affirmed.

George P. Tobin, of Oakland, for appellant Dandini and others.

Laurence D. Benamati, of San Francisco, for appellant Tobin.

Johnson & Harmon, of San Francisco, for respondent.

NOURSE, Presiding Justice.

From an order granting a preliminary injunction upon a complaint asking for the appointment of a receiver and other equitable relief, in which order the trial court also denied without prejudice the application for the appointment of a receiver, the defendants appeal upon a typewritten transcript. The grounds of appeal are: (1) that as to two of the five named defendants, the court had not acquired jurisdiction; (2) that as to all defendants, the court had no jurisdiction of the subject matter; (3) that the provisions of section 527 of the Code of Civil Procedure were not followed; and (4) that the order was an abuse of discretion.

The complaint was filed on August 18, 1939, and an order to show cause and temporary restraining order was issued on the same day. The order was directed to three of the named defendants, and was served, together with a copy of the complaint on all five. On the return day all five defendants appeared, filed separate affidavits in opposition to the order, opposed an application for a continuance, and demanded an immediate hearing. No objection was made at any time to the form of the order to show cause, the failure to cite two of the defendants to appear, or to the want of due service upon all five defendants. After a full hearing of two days the order granting the preliminary injunction was entered, which recites: "it appearing that due, legal and timely notice was given to the defendants herein who entered their appearance and filed counter affidavits * *". No attack is made upon the verity of these recitals.

[1, 2] Since the first question presents the question of jurisdiction of the person the answer is that personal service of process may be waived, § 416, Code Civ. Proc. and that, when a party voluntarily appears generally, and without objection to the manner of service, he will be deemed to have waived objection and to have consented to the subsequent proceeding though there had been no service of notice upon him. People v. Macken, 32 Cal.App.2d 31, 38, 89 P.2d 173; Burrows v. Burrows, 10 Cal.App.2d 749, 751, 52 P.2d 606; Farmers' & Merchants Nat. Bank v. Peterson, 5 Cal.2d 601, 606, 55 P.2d 867.

[3, 4] The second question is one of jurisdiction of the subject matter. The argument is that, since the order cited the defendants to appear and show cause why

a receiver should not be appointed, the court was without jurisdiction to proceed with an application for a temporary restraining order. The same principles of law are controlling here because, from the opening of the hearing to the end, counsel for both parties, and the court, assumed that the application for a temporary injunction was properly before the court; counsel for the defendants made no objection to the hearing, but, to the contrary, demanded that it proceed upon the complaint and the counter affidavits which he had filed in opposition to the application. Upon the authorities cited it must be held that he may not at this time complain that the defendants were not properly in court upon the order to show cause. The requirement of the statute that a temporary injunction cannot be issued except in response to an order to show cause is one for the benefit of the defendant which he may waive as he may waive service of process. And, of course, a defendant may waive the issuing of summons, as he may waive its service, by voluntary general appearance. § 406, Code Civ.Proc.

[5, 6] The failure to comply with the strict terms of section 527 of the Code of Civil Procedure is conceded. That section provides in part: "No preliminary injunction shall be granted without notice to the opposite party; * * * if he [petitioner] be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order." It should be noted that the section makes a clear distinction between the temporary restraining order and the preliminary injunction. It declares that, if the petitioner has failed to comply with the section, the temporary restraining order shall be dissolved. It does not prohibit the court from issuing a preliminary injunction. That power is conferred by the constitution, and by section 526 of the same code. Here the objection is that the plaintiff had not filed the points and authorities two days prior to the hearing as required by the code section. It requested additional time to do so, and the defendants' objection was sustained. It was then that the defendants demanded an immediate hearing, without any points and authorities on file. That was the time they should have remanded a dissolution of the temporary restraining order, but, having demanded that the matter be heard without points and authorities they must be deemed to have waived the objection that none were on file, just as in the case of process and notice. People v. Macken, supra.

[7] But, if it should be held that the proper course was for the trial court to dismiss the entire proceeding notwithstanding the waiver, it would have been a simple matter to have heard the entire matter on a subsequent date pursuant to legal notice and in compliance with the statute. Failure to dismiss could be nothing more than error committed within the court's jurisdiction and, having been invited by the defendants, it cannot be held prejudicial error within the meaning of section 4½ of article VI of the Constitution.

[8, 9] Lastly, the defendants urge that the trial court abused its discretion in issuing the preliminary injunction. The argument is based upon the assertion that the material portions of the complaint were alleged on information and belief and that they were mere conclusions of law. The defendants are in error in both contentions. The complaint is full of direct allegations of fraudulent misappropriations, misconduct, and mismanagement of the affairs of the corporation. These are not conclusions of law, but are direct allegations of material facts. In the course of the argument on this point the defendants appear to concede this to be so when they argue that all charges of claims of misappropriation of funds, fraud, insolvency, and threats to destroy corporate records "were positively denied by the affidavits presented by the defendants". We have nothing on this point but the assertion that the trial court abused its discretion in rejecting the evidence of defendants' affidavits controverting the allegations of the complaint. This does not present a debatable question on appeal. It is incumbent on an appellant to affirmatively show an abuse of discretion, otherwise there is no prejudicial error justifying a reversal. Pavilion Ice Rink v. O'Brien, 60 Cal.App. 185, 186, 212 P. 632; Metropolitan Laundry Co. Ltd. v. Greenfield, 20 Cal.App.2d 246, 248, 66 P.2d 722.

The order is affirmed.

SPENCE, J., and DOOLING, J. pro tem., concurred.

47 Cal.App.2d 104

BURCH v. LEVY BROS. BOX CO. et al.

Civ. 13096.

District Court of Appeal, Second District, Division 1, California.

Oct. 2, 1941.

Hearing Denied Nov. 27, 1941.

1. Trial ⇐33, 311

Where plaintiff in personal injury action sought special damages for sums paid by plaintiff to his niece for niece's services in caring for plaintiff, and services could have been rendered by any lay person, plaintiff was not bound to offer proof that amount which plaintiff agreed to pay niece for services was reasonable, since jury from their own experience could say whether pay was reasonable.

2. Evidence ⇐112

In personal injury action where plaintiff sought special damages for sums paid by plaintiff to his niece for niece's services in caring for plaintiff, the amount which plaintiff agreed to pay niece for her services was some evidence of reasonable value of services.

3. Automobiles ⇐243(8)

In action for injuries sustained when pedestrian was struck by right rear end of defendant's truck as it was backing up to curb, sustaining defendant's objections to pedestrian's cross-examination of defendant's driver respecting whether driver could have seen to rear of right side of truck if there had been a rear-view mirror on right hand door and whether such a mirror had been installed after accident and whether driver had requested defendant to install such a mirror before accident was proper, since matters respecting installation of mirror were incompetent and immaterial.

4. Evidence ⇐5(2)

It is common knowledge that a truck driver can see to rear of right side of truck if there is a rear-view mirror on right hand door of truck and driver looks into mirror.

5. Appeal and error ⇐1047(4)
Trial ⇐62(2)

In action for injuries sustained when pedestrian was struck by right rear end of defendant's truck as it was backing up to curb, testimony of pedestrian's investigator regarding an alleged conversation with defendant's truck driver wherein driver said that he would have seen pedestrian if he had had a rear-view mirror on right side of truck at time of accident and that he had requested defendant to put such a mirror on truck before accident but that defendant had refused to do so was not proper rebuttal, but such testimony was not prejudicial against defendant where driver had previously testified on cross-examination that except by looking through his left rear-view mirror he had "no view", and that such mirror did not aid him in seeing anything on right side of truck.

6. Appeal and error ⇐933(4)

Where defendants made a motion for new trial on ground of alleged irregularity in proceedings by plaintiff by which defendants were prevented from having a fair trial, and alleged misconduct of plaintiff's counsel was urged at hearing of motion, and motion was denied, trial court would be deemed to have concluded that no prejudice was suffered by defendants by reason of claimed misconduct.

7. Appeal and error ⇐1015(5)

The trial court's conclusion, which was made on defendants' motion for new trial, with respect to whether defendants had been prejudiced by alleged misconduct of plaintiff's counsel would not be disturbed on defendants' appeal unless, under all circumstances, the conclusion was plainly wrong.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Charles E. Burch against the Levy Brothers Box Company and others for personal injuries. From a judgment for plaintiff, defendants appeal.

Affirmed.

George H. Moore and Hugh B. Rotchford, both of Los Angeles (Robert E. Ford, of Los Angeles, of counsel), for appellants.

Betts & Garrison and Wood, Crump & Rogers, all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Plaintiff, respondent herein, was injured while standing on the sidewalk opposite a forty-foot red zone marked on the curb, and about twenty inches back from the curb, in downtown Los Angeles, when he was struck by the right rear end of defendant's truck as it was backing up to the curb on an angle that brought the right

rear wheel in contact with the curb some distance ahead of the left wheel. The truck was equipped with a stake body loaded with tiers of wooden boxes which shut off all view through the rear window of the cab; there was a rear view mirror on the left door of the cab. The rear end of the bed of the truck extended about four feet ten inches back of the rear tires.

The driver of the truck, who was acting in the course of his employment by the other defendants, who owned the truck, sounded his horn twice as he started to back the truck; the horn made a "good loud noise". The inside muffler on the truck had been taken out and the exhaust was audible for about 75 feet. The truck was backed at a speed of about one mile per hour and the driver did not know that he had struck anyone.

From a judgment in plaintiff's favor defendants have appealed, urging that the court erred:

1. In refusing to strike testimony as to the amount of nursing expense in the absence of evidence of the reasonable value of such services; and,

2. In refusing to declare a mistrial for cited misconduct of plaintiff's attorney.

1. Prior to plaintiff's injury, his wife had suffered an injury resulting in the breaking of two shoulder blades, which limited the use of her arms, and which required her to have constant assistance. The plaintiff himself had rendered such assistance before his injury, and in his complaint he alleged special damages in the sum of $605, for his alleged employment of a practical nurse and housekeeper to take care of himself and wife. The judgment entered on the verdict of the jury was in the lump sum of $5,312.50.

Respondent employed his niece to take care of his wife and to do the housework when he was in the hospital; also, to perform the same work for himself and wife while he was confined to his bed at home.

It clearly appears from the evidence that the so-called "nursing" services were in fact the same services that plaintiff himself performed in caring for his wife and in keeping the house, before his injury, and that the same services were performed for both of them while plaintiff was incapacitated at home by reason of his injuries. The niece gave plaintiff his morning baths, cooked and served his meals, rendered him other non-professional assistance, and when he seemed to be in more pain than usual she would rub his legs with a stimulant to start circulation. Plaintiff agreed to pay his niece $17 per week, from the time he came home from the hospital, and also provided her board and lodging. She was on call 24 hours a day. The amount paid is not claimed to be excessive.

[1, 2] It appears that the services so rendered were in no sense expert services, but were services any lay person could render, and the jurors from their own experience could say whether or not the agreed pay was reasonable. We see no necessity for the proof, which, defendants claim, is lacking. The amount plaintiff agreed to pay was some evidence of reasonable value. Caulfield v. Market Street Ry. Co., 20 Cal. App.2d 220, 66 P.2d 752.

[3, 4] 2. During the cross-examination of defendant truck driver, plaintiff's attorney asked if he could have seen to the rear of the right hand side of the truck if there had been a mirror on the right hand door; if such a mirror had been installed subsequent to the accident, and if such defendant had requested his employer to install such a mirror prior to the accident. The court sustained objections to each of such questions and admonished the jury to disregard them. Such objections were properly sustained. It is common knowledge that if there had been such a mirror there, and defendant had looked in it, he could have seen to the rear of the truck. Whether or not he had requested his employers to install such a mirror before the accident was entirely incompetent and immaterial, as was the fact of whether or not such a mirror had been installed subsequent to the accident.

During the cross-examination of a private investigator called by plaintiff on rebuttal, plaintiff's attorney asked him to relate a conversation he had had with the defendant truck driver when he served some papers in the case on said driver after the suit was filed by plaintiff. The witness testified that during such conversation, observing that the truck had mirrors on both sides of the cab, he remarked to said defendant that he thought the driver would have seen the plaintiff as he backed toward the curb, to which the defendant driver replied, in effect, "If I had had both mirrors I would have seen him. I didn't have but one mirror at the time." Such witness also testified that the driver of the truck told

him that he had requested his employers to put on this other mirror but they had refused to do so, and that he put it on at his own expense. Defendants moved to strike all of such testimony and requested that the jury be instructed to disregard it. Defendants' counsel further cited counsel's conduct "as prejudicial" and asked for a mistrial. The motion to strike was granted and the jury was told to disregard such testimony. The court said, with regard to such request, "I am not going to declare a mistrial because I have confidence enough in the jury to believe they will act under the court's instructions, and not entertain any prejudice by reason of this improper testimony."

[5] We cannot commend counsel for plaintiff for acting as he did. None of such evidence was proper on rebuttal, nor can we conclude that any prejudice resulted therefrom. The defendant driver had already testified on cross-examination that except by looking through his left rear view mirror, he had "no view", and that such mirror did not aid him in seeing anything on the right hand side, so it clearly appeared to the jury that the truck was not equipped with a right rear view mirror.

[6, 7] Defendants made a motion for a new trial which was denied. One of the grounds was "irregularity in proceedings of the * * * adverse party, by which defendants were prevented from having a fair trial". Respondent states that the alleged misconduct of counsel was urged at the hearing of such motion, and this occurrence is not denied in appellants' reply brief. The trial court must be deemed to have concluded that no prejudice was suffered by defendants by reason of such claimed misconduct, and as such court was in a much better position than we are to determine whether the verdict rendered was in any part due to such alleged misconduct, "his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong." LaFargue v. United Railroads, 183 Cal. 720, 724, 192 P. 538, 540. In our opinion the circumstances shown here do not so indicate.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.

47 Cal.App.2d 1

PEOPLE v. MONTGOMERY et al.

Cr. 3420.

District Court of Appeal, Second District, Division 1, California.

Sept. 29, 1941.

Hearing Denied Oct. 27, 1941.

1. Indictment and Information ⇐71

An indictment charging defendants with conspiracy to commit pandering and with committing crime of pandering in that on certain date they willfully, unlawfully and feloniously procured a female inmate for a house of prostitution was not insufficient as failing to satisfy constitutional requirement as to notice of charges against defendants. Gen.Laws 1937, Act 1906.

2. Conspiracy ⇐48
Prostitution ⇐5

In prosecution for conspiracy to commit pandering, pandering and attempted pandering, defendant's guilt was for jury. Gen. Laws 1937, Act 1906.

3. Criminal law ⇐1173(2)

In pandering prosecution, failure to instruct that corroboration is not sufficient if it merely shows commission of offense or circumstances thereof was not prejudicial error where court instructed jury on corroborating evidence in general, and to effect that accomplices must be corroborated by evidence which, standing alone, tends to connect defendants with commission of the crime. Gen. Laws 1937, Act 1906; Pen.Code, § 1111.

4. Criminal law ⇐507(7)

A girl who was procured as inmate of house of prostitution by defendants charged with pandering, and who did not join with defendants in procuring any other girl was not an "accomplice" within statute requiring corroboration of accomplices' testimony. Gen.Laws 1937, Act 1906; Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

5. Criminal law ⇐761(6)

An instruction that if jury were satisfied that defendant "or any other conspirator" in furtherance of conspiracy to commit pandering did certain acts jury should find him guilty was not erroneous as assuming fact that defendant was a conspirator where

instruction as a whole clearly implied that if jury believed that defendant was a conspirator and in furtherance of conspiracy did certain acts they should find him guilty. Gen. Laws 1937, Act 1906.

6. Conspiracy ⇐24

A "conspiracy" need not be the result of an express agreement, but may result from actions of defendants in mutually carrying out a common purpose to achieve an unlawful end.

See Words and Phrases, Permanent Edition, for all other definitions of "Conspiracy".

7. Prostitution ⇐1

The word "procure" within statute providing that any person who shall procure a female inmate for a house of prostitution shall be guilty of pandering, necessarily implies the use of persuasion, solicitation, encouragement and assistance in achieving unlawful purpose, and hence if a defendant is charged with procuring a female as inmate of house of prostitution, he may be found guilty of such procurement if it is established that he either assisted, induced, persuaded or encouraged her to become an inmate. Gen. Laws 1937, Act 1906, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Procure".

8. Criminal law ⇐814(1)

Where indictment charged defendants with pandering and attempted pandering, instruction that it was unnecessary to prove that female was procured by means of force or fraud to become an inmate of house of prostitution and that if conduct of defendants assisted, induced, persuaded or encouraged female to become an inmate defendants were guilty of the offense of pandering was not erroneous as instructing to convict on a charge not made by the indictment. Gen. Laws 1937, Act 1906, § 1.

9. Prostitution ⇐1

Under pandering statute, it is immaterial whether female procured is an innocent girl or a hardened prostitute, nor whether procurement was at her request or upon defendant's own initiative, since in either case defendant has "procured" a female within meaning of statute and is guilty of "pandering". Gen.Laws 1937, Act 1906, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Pandering".

10. Prostitution ⇐5

In pandering prosecution, instruction that under statute if evidence disclosed that defendant acceded to importunities of a wanton woman and at her request found her a place in a house of prostitution, defendant was just as guilty of offense of "pandering" as though he had induced her to become such an inmate by means of threats, violence or fraud was proper. Gen.Laws 1937, Act 1906, § 1.

11. Criminal law ⇐44

To constitute an "attempt to commit crime", intervening circumstances which prevented actual commission must occur apart from and independent of the will of defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Attempt to Commit Crime".

12. Criminal law ⇐823(4)

In prosecution for attempt to commit pandering, defect in instruction in failing to state that to constitute an attempt to commit crime intervening circumstances which prevented actual commission must occur independent of the will of defendant was cured by instruction on specific attempt to procure certain females for a house of prostitution, wherein court instructed in effect that interruption must occur through intervention of circumstances "apart from and independent of the will of the persuader". Gen.Laws 1937, Act 1906, § 1.

13. Constitutional law ⇐209

Under equal protection provisions of State and Federal Constitutions, protection of the law will be extended to all persons equally in pursuit of their lawful occupations, but no person has right to demand protection of the law in the commission of a crime. Const.Cal. art. 1, §§ 11, 21; U.S.C.A. Const. Amend. 14.

14. Constitutional law ⇐250

In pandering prosecution, instruction that fact that other persons might also have violated the law and had not been arrested or prosecuted should not influence jury or affect their consideration of facts in case involved, and that such circumstances did not constitute a defense to the prosecution, was not erroneous as in violation of constitutional provisions guaranteeing equal protection of laws. Gen.Laws 1937, Act 1906; Const. Cal. art. 1, §§ 11, 21; U.S.C.A.Const. Amend. 14.

15. Criminal law ⇐772(6)

A defendant charged with pandering who did not attempt to defend on ground of discriminatory enforcement of the law could not complain of instruction that fact that other persons might also have violated the law and had not been arrested or prosecuted should not influence the jury or affect their consideration of facts in case and that such circumstances did not constitute a defense to prosecution. Gen.Laws 1937, Act 1906; Const.Cal. art. 1, §§ 11, 21; U.S.C.A. Const. Amend. 14.

16. Criminal law ⇐829(10)

A requested instruction that testimony of an accomplice cannot be corroborated by that of another accomplice was properly refused where jury were instructed that if conspiracy existed between defendants any testimony given by one defendant against the other must be corroborated by other competent testimony, which instruction in effect charged jury that testimony of an accomplice could not be corroborated by that of another accomplice. Pen.Code, § 1111.

17. Criminal law ⇐829(12)

A refusal to give instruction regarding evidence which merely excites suspicion was not prejudicial in view of instructions given as to type of evidence required for corroboration of accomplices, as to corroboration of witnesses generally, and on doctrine of reasonable doubt. Pen.Code, § 1111.

18. Criminal law ⇐829(10)

A refusal to give correct instruction as to how to test corroboration of accomplices' testimony was not prejudicial where court instructed jury that corroboration was sufficient "if such corroborative evidence standing alone tends to connect the defendant with the commission of the crime charged". Pen.Code, § 1111.

19. Criminal law ⇐814(15)

A requested instruction that a female can be an accomplice to crime of pandering was properly refused where court properly instructed that a girl procured by defendants as an inmate for a house of prostitution, who did not join with defendants in procuring any other girl, was not an "accomplice" and hence requested instruction could not apply to her testimony. Gen.Laws 1937, Act 1906; Pen.Code, § 1111.

20. Criminal law ⇐1173(2)

In absence of any specific showing of error in refusing to give instruction that a female can be an accomplice to crime of pandering, refusal to give such instruction did not constitute prejudicial error. Gen. Laws 1937, Act 1906; Pen.Code, § 1111.

21. Criminal law ⇐780(1)

In pandering prosecution, requested instruction that a female can be an accomplice to crime of pandering, which instruction could not have applied to testimony of inmate who was not an accomplice, was properly refused as against contention that jury were misled by failure to receive such instruction merely because some of witnesses in case were females. Gen.Laws 1937, Act 1906; Pen.Code, § 1111.

22. Prostitution ⇐1

The crime of "pandering" does not necessarily involve question of specific intent, since under statute the only intent required is that act be voluntarily done or performed by person charged with full knowledge of its nature, and any one who knowingly takes part in evil practice condemned is guilty of violation of the law regardless of state of his mind with relation to act involved. Gen. Laws 1937, Act 1906.

23. Criminal law ⇐814(17)

Where trial court instructed jury that there was no distinction between circumstantial evidence and direct evidence in degree of proof required for conviction, refusal to give further instructions on subject of circumstantial evidence on theory that prosecution relied solely upon circumstantial evidence for conviction was not error, it appearing that evidence adduced was largely direct, having been given by eyewitnesses and persons present at time of occurrence of events to which they testified. Gen.Laws 1937, Act 1906.

24. Prostitution ⇐5

Requested instructions on theory that to be found guilty of pandering it must be shown that defendants were acting for a house of prostitution in capacity of an agent therefor were properly refused, since under pandering statute agency for house of prostitution is not an essential element of "pandering". Gen.Laws 1937, Act 1906.

25. Prostitution ⇐1

The purpose of pandering statute is to combat the evil of prostitution through attacking the source of supply, and hence procuring an inmate for house of prostitution as denounced by statute cannot reasonably be limited to mean procuring an inmate as an

agent or representative of a house of prostitution. Gen.Laws 1937, Act 1906.

26. Criminal law ⇐673(1)

In pandering prosecution, requested instruction that evidence admitted as to one count of indictment was not to be considered as to other counts was properly refused where it did not appear that admission of any evidence was limited to any particular count, and if evidence was not so limited such instruction would be confusing and misleading. Gen.Laws 1937, Act 1906.

27. Prostitution ⇐5

In pandering prosecution, requested instructions relating to question of female involved voluntarily becoming an inmate or consenting to become one were properly refused, since consent or willingness of female is immaterial. Gen.Laws 1937, Act 1906.

28. Criminal law ⇐829(1)

Requested instructions on question of conspiracy and declarations of parties thereto were properly refused where substance of such instructions was covered by instruction given which applied to all defendants and correctly stated principle involved. Pen. Code, § 1111.

29. Witnesses ⇐366

In pandering prosecution, court improperly restricted cross-examination of a defendant called as a witness for prosecution by sustaining objections to questions to effect that such defendant knew that he would not be prosecuted which questions were calculated to bring out interest, bias or prejudice of the witness. Gen.Laws 1937, Act 1906.

30. Criminal law ⇐1170½(5)

In pandering prosecution, error in restricting cross-examination of a defendant called as a witness for prosecution, to effect that he knew that he would not be prosecuted, was not prejudicial where another defendant in testifying for prosecution was permitted to state that he expected to obtain leniency, and other evidence adduced was sufficient for conviction. Gen.Laws 1937, Act 1906.

31. Criminal law ⇐1170½(5½)

A somewhat extended examination of a witness by trial judge in pandering prosecution was not prejudicial to accused where court questioned the witness after examination by counsel, and questions were pertinent and did not show bias or prejudice as against accused. Gen.Laws 1937, Act 1906.

32. Criminal law ⇐1170½(5½)

A reversal may not be had upon a mere showing that trial court examined a witness at unusual length and without apparent necessity therefor.

33. Criminal law ⇐1170½(5½)

In pandering prosecution, wherein witness who was one of defendants had pleaded guilty to first count of indictment, accused was not prejudiced by trial judge's asking witness if he had pleaded guilty thereto because he believed he was guilty, which question did not indicate that court thought accused guilty because witness pleaded guilty. Gen.Laws 1937, Act 1906.

34. Witnesses ⇐269(1)

Objections to questions asked of witness on cross-examination were properly sustained where witness had not testified on direct examination to any matter pertinent to questions on cross-examination as to which objections were sustained.

35. Witnesses ⇐269(1)

Cross-examination, except for purposes of impeachment, should be confined to matters which have been elicited from the witness on direct examination.

36. Criminal law ⇐1170(1)

In pandering prosecution, sustaining of objection to question as to whether witness had conspired with other defendants was not prejudicial where question called for a categorical answer which could have been of little, if any, value to accused's case, even if statement of such a conclusion might properly have been elicited. Gen.Laws 1937, Act 1906.

37. Criminal law ⇐386

In pandering prosecution, a part of a telephone conversation heard by witness was properly admitted where part heard appeared intelligible and part testified to was carried on by accused. Gen.Laws 1937, Act 1906.

38. Criminal law ⇐1169(1)

A defendant convicted of pandering could not complain of acknowledged prostitute's testimony which was admitted only as to a codefendant. Gen.Laws 1937, Act 1906.

39. Prostitution ⇐4

In pandering prosecution, part of a conversation including salacious matter which formed an integral part of the conversation which witness, who was an acknowledged prostitute, had with owner of house of pros-

titution was properly admitted to show character of the house operated. Gen.Laws 1937, Act 1906.

40. Prostitution ⇐4

In pandering prosecution wherein an acknowledged prostitute's conversation with owner of house of prostitution was admissible to show character of house operated, prostitute was properly permitted to explain a more or less esoteric phrase used in the conversation, which phrase formed an integral part of the conversation, notwithstanding that related conversation contained references to a revolting and repulsive type of act. Gen.Laws 1937, Act 1906.

41. Prostitution ⇐4

The "corpus delicti" in pandering prosecution was established by evidence that accused with others transported certain girls to and from houses of prostitution pursuant to an organized plan to place the girls in houses of prostitution and that the girls were procured under such plan. Gen.Laws 1937, Act 1906.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

42. Criminal law ⇐633(1)

Accused could not complain because witness after giving testimony in pandering prosecution was permitted to leave jurisdiction where witness left only after she had testified and been cross-examined and no request was made that she be kept available for future testimony and no request was made to court for an order to that effect. Gen.Laws 1937, Act 1906.

43. Criminal law ⇐730(8)

Prosecutor's argument in pandering prosecution was not prejudicial where for the most part argument was based on evidence or prosecutor's interpretation of the evidence, and in the one or two instances of misstatements of evidence court either instructed jury to disregard such statements or prosecutor withdrew his remarks. Gen.Laws 1937, Act 1906.

44. Witnesses ⇐409

The failure of a defendant to testify before grand jury may be introduced in evidence at trial, but only for limited purpose of impeachment.

45. Criminal law ⇐673(3)

Where from all that appeared in record defendant's refusal to testify before grand jury was admitted in evidence on general issue of guilt or innocence, failure to limit purpose of such evidence for impeachment only was error.

46. Criminal law ⇐720(1)

Where in pandering prosecution a defendant was compelled to admit that she had refused to testify before grand jury and it did not appear that such testimony was limited to purpose of impeachment, prosecutor's argument on such evidence as pertaining to general issue of guilt or innocence was improper. Gen.Laws 1937, Act 1906.

47. Criminal law ⇐1163(1)

Every invasion of even a constitutional right does not necessarily require a reversal of a conviction.

48. Criminal law ⇐1168(2), 1171(3)

In pandering prosecution, error in failing to limit testimony of a defendant that she had refused to testify before grand jury for purpose of impeachment only, and misconduct of prosecutor in commenting on such evidence were not prejudicial in light of entire record.

49. Criminal law ⇐1168(2), 1171(3)

In pandering prosecution, error in failing to limit testimony of codefendant that she had refused to testify before grand jury and misconduct of counsel in commenting upon such testimony were not prejudicial to defendant where such testimony did not in any way pertain to defendant. Gen.Laws 1937, Act 1906.

50. Prostitution ⇐4

Evidence that accused knowingly permitted a girl to work for accused as a prostitute in accused's houses of prostitution showed that accused was guilty of "pandering" for having "procured" such female as an inmate of house of prostitution. Gen. Laws 1937, Act 1906.

51. Prostitution ⇐1

The pandering statute is broad enough to include within scope of its provisions activities of operators of houses of prostitution in obtaining inmates for their houses. Gen.Laws 1937, Act 1906.

52. Criminal law ⇐878(3)

Accused was not improperly convicted of pandering because she was acquitted of charge of conspiracy to commit pandering where charge of conspiracy was based upon 17 separate overt acts with many of which accused had no connection and in receiving

girl to accused's house of prostitution accused might not have had any connection with conspiracy by means of which such girl was brought to accused's attention. Gen. Laws 1937, Act 1906.

53. Prostitution ⇐1

Each alternative act described in pandering statute and included in definition of pandering therein is a separate offense and commission of a single enumerated act will constitute the offense. Gen.Laws 1937, Act 1906.

54. Prostitution ⇐1

A person may "procure" a female inmate for a house of prostitution by means of promises, threats, violence or any scheme or device by which female is caused, induced, persuaded or encouraged to become such an inmate, and likewise any one who has procured for a female a place as inmate in a house of prostitution has necessarily "procured" a female inmate for a house of prostitution, and the two situations are synonymous as far as purpose of pandering statute is concerned. Gen.Laws 1937, Act 1906.

55. Prostitution ⇐3

In pandering prosecution, it is not necessary to plead or prove the means by which female was procured since the means of procuring is immaterial. Gen.Laws 1937, Act 1906.

56. Criminal law ⇐881(3)

Verdicts of guilt in pandering prosecution were not void for uncertainty because of instruction that jury might find accused guilty if accused had procured a place for a girl as an inmate of a house of prostitution, or if accused acted for a house of prostitution and procured the girl as an inmate, since the two are not distinct offenses under pandering statute. Gen.Laws 1937, Act 1906.

57. Criminal law ⇐1170½(1)

Limiting the examination of a witness in pandering prosecution was not prejudicial to defendant convicted of pandering where matter which trial court ruled out had to do with conspiracy charge of which defendant was exonerated. Gen.Laws 1937, Act 1906.

58. Criminal law ⇐1170½(1)

In pandering prosecution, alleged error in limiting examination of a witness for defense was not prejudicial where evidence on counts of which defendant was convicted was sufficient to convict her even if testimony of witness had been entirely eliminated. Gen.Laws 1937, Act 1906.

59. Criminal law ⇐1172(2)

A defendant who was convicted of pandering and exonerated of charge of conspiracy to commit pandering could not complain of ruling directing jury to consider all of evidence against defendant and in informing jury that prima facie case of conspiracy had been made out against all defendants. Gen.Laws 1937, Act 1906.

60. Prostitution ⇐5

In prosecution for conspiracy to commit pandering, pandering and attempted pandering, refusal to direct a verdict in defendant's favor on all counts was not error where evidence was sufficient to support verdict of guilty on count charging pandering. Gen. Laws 1937, Act 1906.

61. Criminal law ⇐29

The commission of any one of acts enumerated in pandering statute constitutes by itself the offense of "pandering" but it does not follow that a defendant may not be guilty of having committed more than one of enumerated acts in a single transaction, or that the description of one enumerated act may not in a proper instance be applied to another. Gen.Laws 1937, Act 1906.

62. Criminal law ⇐1163(1)

Where errors in pandering prosecution did not affect outcome of trial, and prejudice requiring reversal was not a natural or likely consequence thereof, there was no miscarriage of justice and convictions were affirmed. Gen.Laws 1937, Act 1906.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Charles W. Montgomery was convicted of conspiracy to commit pandering, pandering, and attempted pandering, and Ann Forrester was convicted of pandering, and they appeal.

Affirmed.

Morris Lavine and F. Paul Hornaday, both of Los Angeles, for appellant Montgomery.

George Stahlman, of Los Angeles, for appellant Forrester.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Both appellants herein, together with others named, were charged by an indictment with one count of conspiracy to commit pandering, a felony (Stats.1911, p. 9, Act 1906, p. 970, Deering's General Laws), with four counts of pandering and two counts of attempted pandering. Appellant Montgomery was convicted on all counts and appellant Forrester was convicted on three counts of pandering. Each appellant prosecutes a separate appeal from the respective judgments of conviction and from the orders denying appellants' motions for a new trial. The evidence adduced at the trial establishes that appellant Montgomery, in conjunction with defendants Barrett and Tullis, at various times and upon different occasions transported certain girls to and from houses of prostitution in and about the city of Los Angeles and other parts of the state. There was ample evidence from which the jury might infer that this was done pursuant to an organized plan or scheme on the part of all three to place the girls in various houses of prostitution; and there was sufficient evidence to establish that the girls named as victims in the counts of the indictment were procured under this organized plan, either through the services of Barrett in enticing them from dance halls or similar places of amusement, or otherwise. It was also sufficiently established that appellant Ann Forrester operated several of the houses of prostitution in Los Angeles in which one of the said females was placed. Appended to appellant Forrester's brief there is a summary of all the evidence adduced at the trial and the reading of this summary alone clearly reveals the sufficiency of the evidence. The record itself is some 2150 pages in length. The points raised by each appellant will be separately considered.

Appeal of Charles W. Montgomery

[1] Appellant Montgomery attacks the sufficiency of the indictment, contending that it fails to specify the form of pandering which appellant was accused of having committed. Demurrer to the indictment was overruled in the trial court. Count I of the indictment charges defendants with a conspiracy to commit a crime through violation of section 1, Act 1906, Statutes of 1911, page 9, General Laws of the state of California, to-wit, pandering, a felony, and sets forth 17 separate overt acts in support of the charge. Four of the other counts accuse defendants of committing the crime of pandering, in that, on a certain date they wilfully, unlawfully and feloniously procured a female inmate (naming her) for a house of prostitution. The two remaining counts charged defendants in the same form with attempted pandering. People v. Wright, 26 Cal.App.2d 197, 79 P.2d 102, 105, furnishes a complete answer to appellant's contention. There an information, worded like the indictment in the instant case, was held to state a good cause of action. The information there charged that the defendant did "wilfully, unlawfully and feloniously procure for a female person, to-wit: one Esther Stephens Blanas, a place as an inmate of a house of prostitution". The fact that the indictment in the instant case accused defendants of "procuring a female inmate for a house of prostitution" does not render the charge less sufficient. As to the elements of the offense of pandering under the California statute, see People v. Cimar, 127 Cal.App. 9, 15 P.2d 166, 16 P.2d 139. It cannot be successfully contended that the indictment fails to satisfy the constitutional requirements as to notice of the charges against appellant.

[2] Appellant attacks the sufficiency of the evidence. As already pointed out, there can be no merit to any such contention. The evidence was sufficient to submit the question of appellant's guilt to the jury on each count of the indictment. The testimony of appellant's accomplices, Barrett and Tullis, produced as witnesses for the prosecution after dismissal of certain of the charges against them, was amply corroborated. Appellant does not question the corroboration. However, he contends that the evidence as to the counts other than that of conspiracy fails to show that appellant acted as an agent for a house of prostitution. As will hereinafter more fully appear, agency for a house of prostitution is not an essential element of the crime of pandering.

Appellant complains of numerous errors in the instructions given by the court to the jury, and of failure of the court to give other instructions requested.

[3] On the question of the corroboration of testimony of accomplices the court did not instruct the jury strictly in the language of section 1111 of the Penal Code,

which provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." The court in instructing the jury omitted the clause beginning "and the corroboration is not sufficient," etc. In People v. Cowan, 38 Cal.App.2d 231, at 243, 244, 101 P.2d 125, such a failure or omission in an instruction on corroboration of accomplices was conceded to be error (on authority of People v. Swoape, 75 Cal.App. 404, 242 P. 1067, and People v. Brown, 25 Cal. App.2d 513, 77 P.2d 880). But the court in the Cowan case did, in effect, instruct the jury at least twice that there must be evidence, independent and apart from that of the accomplices, that in and of itself tended to connect the defendant with the crime charged, and the jury was also given another instruction on the subject of corroboration generally; and as a result, it was held in the Cowan case that the failure to incorporate the omitted sentence was not prejudicial. The jury in the instant case was instructed to the same effect as was the jury in the Cowan case. Moreover, in the Swoape case, supra, the stress was there laid upon the refusal of the court to instruct that "by corroborative evidence is meant additional evidence of a different character to the same point" [75 Cal.App. 404, 242 P. 1072], which language was characterized as of extreme importance. It appears that the error in failing to give the instruction requested in the Swoape case was based more upon the exclusion of the latter language than upon the omission of the clause contained in section 1111 of the Penal Code. See People v. Swoape, supra, 75 Cal.App. at page 415 et seq., 242 P. 1067. People v. Brown, supra, merely concerns failure to instruct that certain witnesses were accomplices where the facts were admitted. It would appear, in view of the court's instruction on corroborating evidence in general, and of the instruction given to the effect that accomplices must be corroborated by evidence which standing alone tends to connect the defendants with the commission of the crime, that here, as in People v. Cowan, supra, the error in failing to include the clause in question was not prejudicial.

[4] The court instructed the jury that Brenda Allen Burns, one of the girls procured by defendants, who testified for the prosecution, was not an accomplice. Appellant contends that the evidence showed this girl to be an accomplice. It does not appear that the Burns girl joined with defendants in procuring any other girl and the contention appears to be based solely on the ground that she willingly complied in her own procurement. Appellant's contention is completely answered by People v. Brown, 61 Cal.App. 748, 216 P. 58, 60, cited by respondent. Appellant's attempt to distinguish between "persuading" and "procuring" is without substance. If a person could not "persuade" himself or herself, by the same token he could not "procure" himself. In the Brown case it was held that the person "induced, persuaded and encouraged" to become an inmate of a house of prostitution could not be held an accomplice in the act of pandering based upon such inducement.

[5] Appellant's contention that the court in instructing the jury assumed the fact that appellant was a conspirator by stating in an instruction, "if you are satisfied * * * that the defendant Montgomery or any other conspirator in furtherance of the conspiracy", etc., is absolutely without merit. The meaning of the instruction, read as a whole, would be perfectly clear to a person of common understanding, namely, that if the jury believed that Montgomery was a conspirator, and in furtherance of the conspiracy did certain acts they should find him guilty.

[6] Appellant complains of an instruction by the court to the effect that a conspiracy need not be the result of an express agreement, but may result from the actions of the defendants in mutually carrying out a common purpose to achieve an unlawful end. The instruction correctly stated the law. People v. Yeager, 194 Cal. 452, 484, 229 P. 40.

[7, 8] Appellant complains of the following instruction, contending that by it the jury was instructed to convict on a charge not made by the indictment. The instruction reads as follows: "Counts II to V, inclusive, charge the defendants with the offenses of pandering; Counts VI and VII charge the defendants with the offenses of attempted pandering. Under those charges it is unnecessary to prove that the female was procured by means of

force or fraud to become an inmate of the house of prostitution. It is not even necessary to prove that she became an inmate of the house of prostitution against her will. If you are satisfied beyond a reasonable doubt that the conduct of the defendant assisted, induced, persuaded or encouraged the female to become an inmate of the house of ill-fame for the purpose of practicing prostitution, such defendant is guilty of the offense of pandering. In other words, under those circumstances such defendant is deemed to have procured said female to become an inmate of a house of prostitution." The specific charge in each of the counts in question was that defendants procured a female inmate for a house of prostitution, which is the offense named in the first clause of section 1 of the act in relation to pandering, supra. Section 1 of that act recites a number of alternative situations under any one or more of which a person is to be deemed guilty of pandering. The alternatives recited in the statute are plainly not all mutually exclusive of each other. For example, the second clause provides in effect that any person who "by promises, threats, violence, or by any device or scheme, shall cause, induce, persuade or encourage" a female person to become an inmate of a house of prostitution, is guilty of pandering. But the term "procure" as used in the first clause of section 1 of the statute necessarily implies the use of persuasion, solicitation, encouragement and assistance in achieving the unlawful purpose, and it follows that if a defendant is charged with "procuring" a female as an inmate for a house of prostitution, he may be found guilty of such procurement if it is properly established that he either assisted, induced, persuaded or encouraged her to become an inmate. It is the offense of pandering that is condemned by the statute rather than the particular means by which the crime is committed. See People v. Cimar, supra, 127 Cal.App. at page 14, 15 P.2d 166, 16 P.2d 139; People v. Wright, supra. The jury could not have been misled to the prejudice of appellant by the instruction given. People v. Marino, 5 Cal. App.2d 550, 553, 42 P.2d 713.

[9, 10] Appellant also takes exception to the trial court's instruction to the effect that under the provisions of the pandering statute, if the evidence discloses that defendant acceded to the importunities of a wanton woman and at her request found her a place in a house of prostitution, the defendant is just as guilty of the offense of pandering as though he had induced her to become such an inmate by means of threats, violence or fraud. In this regard, appellant in his contentions misconstrues the meaning and application of the term "procure" as used in the statute, and in fact misconstrues the entire purpose of the statute. It is immaterial whether the female "procured" is an innocent girl or a hardened prostitute of long experience; nor is it material that the procurement was either at her request or upon the defendant's own initiative. In either case the defendant has "procured" a female within the meaning of the act and is guilty of pandering. The instruction to which appellant here excepts correctly construed the pandering statute. People v. Cimar, supra, 127 Cal.App. at page 15, 15 P.2d 166, 16 P.2d 139.

[11, 12] Exception is taken to an instruction of the court on the question of attempt to commit a crime, on the ground that the trial court in its instruction omitted an essential element of an attempted crime, namely, that to constitute an attempt to commit crime, the intervening circumstances which prevented the actual commission must occur apart from and independent of the will of the defendant. In other words, if a person voluntarily abandons his proposed plan of crime before actual commission of the crime, he cannot be held guilty of an attempt. The proposition contended for by appellant is correct and the particular instruction in question did omit that essential element of an attempted crime, but the defect therein was adequately remedied by the instruction immediately following on the specific attempt in question, namely, to procure certain females for a house of prostitution, wherein the court instructed the jury in effect that the interruption must occur through the intervention of circumstances "apart from and independent of the will of the persuader".

[13-15] The court instructed the jury in effect that the fact that other persons might also have violated the law and had not been arrested or prosecuted should not influence the jury or affect their consideration of the facts in the instant case; and that such circumstances did not constitute a defense to the prosecution in question. Appellant contends that this instruction violates the provisions of the fourteenth amendment of the United States Constitution, and article I, sections 11 and 21 of

the Constitution of California, on the authority of Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, a case concerning discrimination in the licensing of laundries under an ordinance of the city and county of San Francisco. Appellant argues that the Yick Wo case and others upholding the fourteenth amendment to the Constitution of the United States are to the effect that no person shall be denied the equal protection of the laws, stating: "Thus, where officials discriminate and prosecute one and not the other for the same act, there is a denial of protection of the laws under the fourteenth amendment, and the prosecution is therefore void." Appellant misconstrues the purport of such decisions as that of the United States Supreme Court in the Yick Wo case. It should be borne in mind that in the Yick Wo case the equal protection of the law was extended to persons of a particular race to enable them to engage in a lawful business on a basis of equality with all other persons. Appellant now in effect argues from this that equal protection should also be extended to any person to enable him to commit a crime on a basis of equality with all other persons. While all persons accused of crime are to be treated on a basis of equality before the law, it does not follow that they are to be protected in the commission of crime. It would be unconscionable, for instance, to excuse a defendant guilty of murder because others have murdered with impunity. The remedy for unequal enforcement of the law in such instances does not lie in the exoneration of the guilty at the expense of society. Applying the rule to the instant case, there is an obvious distinction between extending protection to persons of the Chinese race in pursuit of the harmless and somewhat necessary business of laundering and the extension of a like protection to those engaged in the vicious social evil of pandering. Protection of the law will be extended to all persons equally in the pursuit of their lawful occupations, but no person has the right to demand protection of the law in the commission of a crime. In civil matters the distinction is illustrated by the rule that the law will not enforce an illegal contract. If the law will not enforce an illegal contract, neither will it protect a criminal in the commission of his crime. The instruction in question correctly stated the principles involved therein. In this connection, it should be stated that the only possible application of the doctrine of the Yick Wo case to a criminal prosecution would appear to be in an instance where a person was under prosecution for the commission of some otherwise harmless act which ordinarily had not theretofore been treated as a crime. Furthermore, in the instant case it does not appear that appellant attempted to defend on the ground of discriminatory enforcement of the law, even if such a defense were available to him.

[16] Appellant also takes exception to the refusal of the trial court to give numerous instructions requested. One of the requested instructions was to the effect that the testimony of an accomplice cannot be corroborated by that of another accomplice. The court instructed the jury that defendants Barrett and Tullis were accomplices, an undisputed fact. There was no evidence to show that any of the other witnesses were accomplices. The jury was instructed that if they found that a conspiracy existed between the defendants charged in the indictment, any testimony given by one defendant against the other, must be corroborated by other competent testimony. Applied to the facts of this particular case, the instruction given by the court charged the jury in effect that testimony of an accomplice could not be corroborated by that of another accomplice and rendered further instruction on the point unnecessary.

[17] While defendants requested an instruction regarding evidence which merely excites suspicion, which proposed instruction appears to have correctly stated the rule involved, in view of the instructions given as to the type of evidence required for corroboration of accomplices, as to corroboration of witnesses generally, and on the doctrine of reasonable doubt, it does not appear that appellant could have been prejudiced by a refusal to give the requested instruction.

[18] An instruction requested as to how to test the corroboration of accomplices' testimony correctly stated the rule and amplified it; but as the court instructed the jury that the corroboration was sufficient "if such corroborative evidence *standing alone* tends to connect the defendant with the commission of the crime charged", the appellant could not be held to have been prejudiced merely by the refusal to give a further instruction amplifying the rule. The instruction given on the point was sufficiently clear to a per-

son of common understanding and that requested was therefore not necessary.

[19-21] Defendants requested an instruction to the effect that a female can be an accomplice to the crime of pandering. It has already been pointed out that the court did not err in instructing the jury that the witness Brenda Allen Burns was not an accomplice; hence the requested instruction could not have applied to her testimony. Appellant intimates that it might have applied to the testimony of other female witnesses, but does not refer to any applicable portion of the record in support of his contention. In the absence of any specific showing of error in refusing to give such an instruction, it cannot be said that such refusal constituted prejudicial error. Nor can it be said that the jury were misled or confused by the failure to receive such an instruction merely because some of the witnesses in the case were females.

[22] Appellant takes exception to the court's instructions with respect to the subject of intent, contending that the crime of pandering requires a specific intent. The crime of pandering does not necessarily involve the question of specific intent. Under the statute, all that is required to render a person guilty of pandering is the commission of any one of the acts set forth in section 1 thereof, and the only intent required is that the act be voluntarily done or performed by the person charged, with full knowledge of its nature. In other words, by way of example, if a person places a female in a house of prostitution, knowing it to be such and intending the female to commit acts of prostitution therein, he is guilty of pandering, regardless of whether he did such act with intent to violate the law, or with malice, or feloniously, or otherwise. As already indicated herein, the statute condemns the vicious practice of supplying and maintaining the supply of females for houses of prostitution. Any one who knowingly takes a part in the evil practice condemned is guilty of a violation of the law regardless of the state of his mind with relation to the act in question. Appellant cites People v. Snyder, 15 Cal.2d 706, 710, 104 P.2d 639, as embodying the same error as appellant contends was committed in the instant case. People v. Snyder concerned a prosecution for attempted murder, a crime requiring a specific intent, and is not applicable here. There was no error in the instructions of the court as to the intent of defendants in the instant case.

[23] The trial court instructed the jury to the effect that there is no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction. Appellant cites as error the refusal of the court to give further instructions requested by defendants on the subject of circumstantial evidence, contending that the prosecution relied solely upon circumstantial evidence for conviction. The record reveals appellant's contention in this respect to be incorrect. The evidence adduced appears to have been largely direct and not circumstantial, having been given by eyewitnesses and persons present at the time of the occurrence of the events to which they testified. In the absence of any specific showing to the contrary, it cannot be said that any further instruction was required on the question of circumstantial evidence.

[24, 25] Requests for instructions based upon a theory that to be found guilty of the charges against defendants it must be shown that defendants were acting for a house of prostitution in the capacity of an agent therefor, were properly refused. As already mentioned, there is nothing in the pandering statute requiring a person charged to have been acting for a house of prostitution. Such a construction would defeat the apparent purpose of the act, to combat the evil of prostitution through attacking the source of supply. In the light of the obvious purpose for which the statute in question was enacted, procuring an inmate for a house of prostitution could not reasonably be interpreted to mean procuring an inmate as an agent or representative of a house of prostitution.

[26] Appellant takes exception to the refusal of the trial court to give an instruction to the effect that evidence admitted as to one count of the indictment was not to be considered as to the other counts, but fails to point out where, if at all, any evidence was admitted solely as to one particular count and not as to the others. It does not appear that the admission of any evidence was so limited by the court, and if evidence was not so limited such an instruction as that requested would clearly be confusing and misleading to the jury.

[27] Requested instructions having to do with the question of the female involved

voluntarily becoming an inmate or consenting to become one were, of course, properly refused. It has already been shown that the consent or willingness of the female is immaterial.

[28] The substance of proffered instructions on the question of conspiracy and declarations of the parties thereto was covered by an instruction requested by one of the defendants and given as modified by the court. As so modified, the instruction given applied to all defendants and correctly stated the principle involved.

[29, 30] Appellant complains of the court's having restricted the cross-examination of defendant Barrett, called as a witness for the prosecution, by sustaining objections to questions such as the following: "You knew you wouldn't be prosecuted on those six counts the others are being tried on in this court?" "You believe in your heart you will not be tried on those counts?" "Well, you expect to get probation, don't you?" and other similar questions calculated to bring out the interest, bias or prejudice of the witness in giving evidence for the people. While it was error to sustain objections to questions of this type, it appears that appellant's other alleged accomplice, Tullis, in testifying for the prosecution, was permitted to state that he expected to obtain leniency. It also appears from the record that even if the jury had chosen to discredit the entire testimony given by Barrett, other evidence adduced was sufficient on which to find the appellant guilty as charged. The error thus complained of could not be held prejudicial. People v. Bennett, 79 Cal.App. 76, 95, 249 P. 20.

[31-33] Appellant complains of the somewhat extended examination of a witness by the trial judge. From a reading of the record it does not appear that the court committed any misconduct in such examination. The court questioned the witness after examination by counsel. The questions were pertinent and did not show bias or prejudice as against appellant and there was nothing in the form of the questions suggesting any prejudice on the part of the trial judge. See People v. Mintz, 106 Cal. App. 725, 290 P. 93. A reversal may not be had upon a mere showing that the trial court examined a witness at unusual length and without apparent necessity therefor. People v. Keys, 82 Cal.App. 602, 255 P. 897. Moreover, from all that appears here, the questions of the trial court served to clarify the record of the witness' testimony. The witness, one of the defendants, had pleaded guilty to the first count of the indictment. There could be no prejudice to appellant in the court's having asked the witness if he had pleaded guilty thereto because he believed he was guilty. The question did not indicate that the court thought appellant guilty because the witness pleaded guilty.

[34-36] There was no error in the sustaining of objections to certain questions asked of defendant Tullis on cross-examination. Appellant fails to point out where the witness had testified on direct examination to any matter pertinent to the questions on cross-examination as to which the objections were sustained. Cross-examination, except for purposes of impeachment, should be confined to matters which have been elicited from the witness on direct examination. 27 Cal.Jur. 98, sec. 77. Moreover, the sustaining of the objection to the question as to whether Tullis had conspired with the other defendants, could hardly have been prejudicial since the question called for a categorical answer which could have been of little, if any, value to appellant's case, even assuming that a statement of such a conclusion might properly have been elicited.

[37] There was no error in the admission of part of a telephone conversation heard by a witness. The part heard by the witness appears intelligible and the witness was properly allowed to testify to the part he heard, namely, that part carried on by appellant. See People v. Suter, 43 Cal.App.2d 444, 111 P.2d 23; People v. Luis, 158 Cal. 185, 194, 110 P. 580.

[38-40] Appellant may not properly complain of the testimony of the witness Pauline Skevenski, an acknowledged prostitute. Her testimony was admitted only as to appellant Forrester. The basis of appellant's complaint in this regard is certain salacious matter given by the witness as part of a conversation the witness stated she had with appellant Forrester. Appellant contends in effect that the nature of this testimony was so revolting as to create bias and prejudice in the minds of the jury as to all defendants. But the conversation so related was proper to show the character of the house operated by appellant Forrester and the matter complained of formed an integral part of the conversation. The court permitted the prosecution

to elicit from the witness an explanation of a more or less esoteric phrase used in the conversation, to which line of questioning objection was interposed. Under the circumstances there was no error in allowing such an explanation; since the phrase formed an integral part of an admissible conversation it was only proper to permit a definition thereof for the enlightenment of the uninitiated. The fact that the related conversation contained references to a revolting and repulsive type of act could not render the relation of the conversation inadmissible if otherwise pertinent.

[41] Appellant's contention that the corpus delicti was not established is without any merit whatsoever. What has already been said heretofore serves to refute such a contention. See People v. Cimar, supra, 127 Cal.App. at page 16, 15 P.2d 166, 16 P.2d 139; People v. Wright, supra.

[42] It appears that before the end of the trial the witness Brenda Allen Burns was permitted to leave the jurisdiction. However, this was after she had testified and been submitted to cross-examination. Respondent properly points out, and the record indicates, that at the time she left the witness stand, after testifying, no request was made that she be kept available for future testimony and no request was made to the court for an order to that effect. Under such circumstances there is no basis for a complaint that after giving her testimony the witness was permitted to leave the jurisdiction.

[43] Appellant's numerous exceptions as to the conduct of the prosecutor in argument to the jury are for the most part without merit, dealing as they do largely with what, in the light of the record, was either proper argument based on the evidence, or the prosecutor's interpretation of the evidence. There appear to have been only one or two instances of misstatements of evidence by the prosecutor in his argument, and in every such instance the court either instructed the jury to disregard such statements or the prosecutor withdrew his remarks. Under the circumstances here presented and in the light of the record, the effect of any such misconduct by the prosecutor must be held to have been cured; though it is extremely doubtful that the effect thereof could be held in any event to have been prejudicial to appellant.

[44-49] One point, however, in this regard might bear discussion. Over objection, appellant Ann Forrester was compelled to admit, while a witness on the stand, that she had refused to testify before the grand jury. In his argument, the prosecutor stated, in part: "I don't intend to convey the impression that you should determine the guilt or innocence of the defendant Ann Forrester or any other defendant merely by reason of the fact that the Grand Jury returned this indictment, or that any indictment was returned by the Grand Jury. But we do know from the testimony of Ann Forrester herself on this witness stand on two occasions * * * she did go before the very same Grand Jury that returned this indictment—and did she tell those Grand Jurors anything at all about her relationship with these so-called higher ups, McAfee, Buckwald and Taylor? The answer to that question is right here in the record—". To which remarks defense counsel immediately took exception and asked the court to instruct the jury to disregard them. It does not appear from the record that the testimony as to failure to testify before the grand jury was limited to the purpose of impeachment. Failure of a defendant to testify before the grand jury may be introduced in evidence at the trial, but only for the limited purpose of impeachment. People v. Kynette, 15 Cal.2d 731, at pages 749 to 751, 104 P.2d 794. From all that appears here, Ann Forrester's refusal to testify before the grand jury was admitted in evidence, and commented upon in argument by the prosecution, as pertaining to the general issue of guilt or innocence. There was error on the part of the court in failing to limit the purpose of such evidence, and the comments as made in argument by the prosecution thereon were improper. However it does not follow that every invasion of even a constitutional right necessarily requires a reversal, and in a case involving a far more flagrant infraction in this respect, such error was held not to have been prejudicial in the light of the entire record. See People v. O'Bryan, 165 Cal. 55, 60, 130 P. 1042 et seq. Similarly, in the light of the entire record here presented the error of the court and misconduct of the prosecution was necessarily so slight as to preclude the possibility of prejudice resulting therefrom. The effect thereof is a matter of pure speculation and conjecture. Moreover, it is difficult to perceive how this matter could in any way have prejudiced appellant Montgomery's defense as it did not in any way pertain to him.

Appeal of Ann Forrester

Appellant Forrester contends that the evidence was insufficient to warrant a conviction upon the charges of which she was found guilty; that the verdicts are void for uncertainty; that the court committed prejudicial error in sustaining objections to certain evidence, in improperly limiting the cross-examintaion of a certain witness, in ruling and directing the jury to consider all of the evidence in the case against appellant, and in informing the jury that a prima facie case of conspiracy had been made out against all of the accused, in denying appellant's motion for a directed verdict of acquittal in her favor, and in giving certain instructions and refusing to give others requested. Appellant also contends that she was not accorded a fair trial. Appellant lays principal stress upon her contentions as to the insufficiency of the evidence.

[50, 51] The charges in the indictment, of which appellant was found guilty, accused appellant, together with the other named defendants, and each of them, of having wilfully, unlawfully and feloniously procured a female inmate, Brenda Allen Burns, for a house of prostitution. This constitutes the offense of pandering mentioned in the first alternative set forth in the Pandering Act, supra. Each of the said counts had to do with such procurement on a different date. As already pointed out, the evidence sufficiently established that appellant Forrester was the owner or operator of the houses of prostitution in which the said Brenda Burns was placed as the result of the conspiracy, plan or scheme of the defendants Montgomery, Tullis and Barrett. It also appears from the evidence that appellant Forrester saw the Burns girl, interviewed her and approved her as an inmate for appellant's houses of prostitution. Appellant concedes that "all appellant did was to permit Brenda Burns to work as a prostitute in houses of appellant". This admission of appellant effectively disposes of all of her contentions as to the sufficiency of the evidence, for if appellant knowingly permitted Brenda Burns to work for appellant as a prostitute in appellant's houses of prostitution, appellant was guilty of having procured the said female person as an inmate for a house of prostitution within the meaning of the first alternative description of pandering contained in section 1 of the Pandering Act. Appellant contends that the pandering statute does not make the operation of a house of ill-fame an offense of pandering. But what does the operator of a house of ill-fame do if not "procure" inmates for the purpose of practicing prostitution in the house? Every time such an operator receives a female as ar inmate of the house the operator thereof is guilty of pandering within the meaning of the pandering statute. The language of the act is clearly broad enough to include within the scope of its provisions the activities of operators of houses of prostitution in obtaining inmates for their houses. It was the apparent purpose of the legislature in enacting the statute in question to attack just such an evil.

Appellant's contention that to prove a defendant guilty of a charge of pandering, as described in the first alternative clause of the act, it must be established that the defendant acted as the agent of the house of prostitution, is without merit. Her contention and argument in support thereof in this regard is substantially the same as that made by appellant Montgomery. Neither appellant has cited any authority which even remotely supports such a contention. As far as appellant Forrester is concerned, it has already been established that the operator of a house of prostitution may be convicted of pandering under the circumstances shown to exist in the instant case. People v. Torres, 193 Cal. 730, 227 P. 177; People v. Wright, 26 Cal.App.2d 197, 79 P.2d 102.

[52] Appellant contends that because she was acquitted of the charge of conspiracy she could not have been found guilty of procuring Brenda Burns for a house of prostitution. It should be noted that the charge of conspiracy was based upon seventeen separate overt acts, with many of which appellant Forrester had no connection. Her connection with the charge of procuring Brenda Allen Burns has already been pointed out. It is at once clear that appellant could have received Brenda Burns as an inmate of her house without having had any connection whatsoever with the plan or conspiracy by means of which Brenda Burns was brought to appellant's attention.

[53] Many of appellant's contentions, and much of her argument in support thereof, are based upon the premise that it is settled law that the Pandering Act is made up of a series of offenses, each

separate and distinct from the others. It has been held that each alternative act, described in section 1 of the pandering statute and included in the definition of pandering therein, is a separate offense (People v. Cimar, supra; People v. Burns, 75 Cal.App. 84, 241 P. 935); and the commission of a single enumerated act will constitute the offense. People v. Lawlor, 21 Cal.App. 63, 131 P. 63. From this, appellant concludes that the language used to describe one of the enumerated acts cannot be applied to any other of the acts included in the definition of pandering contained in section 1 of the act in question. Much the same contention has been made by appellant Montgomery and one phase of the matter has already been discussed herein in the consideration of his appeal. It is upon such an assumption that appellant Forrester argues that to "procure a female person as an inmate for a house of prostitution", the first act denounced in section 1 of the Pandering Act, is an entirely different and distinct crime from that set forth as the third alternative act, namely, to "procure for a female person a place as inmate in a house of prostitution"; and that the same person cannot be guilty of both acts in the same transaction. Appellant argues that in the first instance the procurer acts as the agent of the house and in the second he acts as the agent of the female. But in either instance he is guilty of the same offense, pandering, and the social consequences are the same. The consequences are what the legislature clearly intended to remedy by the Pandering Act. In setting forth the alternatives enumerated in section 1 of the act the legislature was undoubtedly endeavoring to cover all the various ramifications of the social evil of pandering and include them all in the definition of the crime, with a view of effectively combatting the evil sought to be condemned.

[54] While it is true that each enumerated alternative constitutes a separate offense, in the sense that commission of only one alternative act is sufficient to constitute the offense of pandering, it does not necessarily follow that each alternative enumerated is exclusive of the others. It has already been demonstrated that a person may procure a female inmate for a house of prostitution by means of promises, threats, violence, or any scheme or device by which the female is caused, induced, persuaded or encouraged to become such an inmate. Likewise, any one who has procured for a female person a place as inmate in a house of prostitution has necessarily procured a female inmate for a house of prostitution. The two alternative situations are in fact synonymous as far as the purpose of the Pandering Act is concerned. To argue otherwise is to give the act form without substance. In re Roberts, 157 Cal. 472, 108 P. 315, cited by appellant and dealing with section 337a of the Penal Code, a statute making an offense of certain forms of betting, is not properly applicable here. There the several offenses described were plainly distinct and independent of each other. In fact, it is to be noted that section 337a now sets out the offenses there condemned in six separately numbered subsections.

In this connection, appellant relies upon People v. Lawlor and People v. Burns, both supra, and criticizes People v. Cimar and People v. Wright, both supra. It may be well, therefore, to review here the decisions in question. In People v. Lawlor the defendant was charged with procuring "for a female person a place as [an] inmate in a house of prostitution". [21 Cal.App. 63, 131 P. 64.] Defendant demurred and contended on appeal, in effect, that to state an offense he must have been charged with all the acts and conduct set forth in the Pandering Act. His contention was held without merit. The case stands for the proposition that under the Pandering Act the commission of a single enumerated act will constitute the offense. From this, however, it does not follow that a defendant may not have been guilty of having committed in the same transaction more than one of the acts enumerated.

In People v. Burns, supra [75 Cal.App. 84, 241 P. 936], an information charged in one count that defendant did "cause, induce, persuade, and encourage" a female to become an inmate of a house of prostitution, and in a second count charged in like manner that the female was induced by defendant to remain in such a house. Defendant contended the information did not state an offense. It was held that the statute provides in such instances that the defendant must "by promises", etc., cause, induce, persuade, etc., and that under the language of the statute it was necessary to plead and prove that the female was caused, induced, etc., *by means* of promises, devices, etc., and failure to so plead constituted total failure to charge one of the essentials of the offense. But in the in-

stant case the charge was in the language of the first alternative enumerated in the statute, and the reasoning applied in the Burns case is necessarily limited to the alternatives there concerned and can have no application here. Incidentally, the Burns case was disapproved by the Supreme Court in so far as it is in conflict with People v. Cimar, as hereinafter noted.

[55] In People v. Cimar, supra, the defendant was charged with procuring "for a female person * * * a place as an inmate of a house of prostitution". It was contended that the verdict was not supported by the evidence because the female was not procured against her will but voluntarily entered and remained in the house. It was also asserted that the trial court erred in the admission of certain testimony and in instructions to the jury. The evidence showed that defendant had seduced a 17-year-old girl and then placed her in a house of prostitution. It was there held that according to the provisions of that portion of the statute under which defendant was charged it was unnecessary to prove that the female was procured by means of promises, threats, devices, etc., or that she became an inmate against her will. In denying a petition for a hearing in the Cimar case the Supreme Court expressly disapproved anything in the opinion of People v. Burns contrary to the decision in the Cimar case. People v. Cimar is applicable to the instant case in that the alternative act under the statute which defendant was charged there with committing is of the same type as that here charged, and that here, as in People v. Cimar, it is not necessary to plead or prove the means by which the female was procured. The means of procuring is immaterial.

In People v. Wright, supra, defendant was charged with procuring for a female a place as an inmate of a house of prostitution. The defendant in the Wright case was an operator of a house of prostitution and at the request of a third party, a man, consented to the girl in question becoming an inmate of her house. The evidence in that case, as set forth in the opinion, reveals a situation closely resembling that in the instant case. In fact, with only a few minor exceptions the situation of appellant here and that of the defendant in the Wright case are identical. In the Wright case the court held the evidence sufficient to warrant finding the defendant guilty of procuring the girl "to become" an inmate of her house of prostitution. As already pointed out, procuring "for a female a place as [an] inmate in a house of prostitution" is necessarily synonymous with procuring "a female inmate for a house of prostitution", in so far as the Pandering Act is concerned; and it is immaterial which language is employed in the charge, both amount to the same thing.

[56] Appellant's contention that the verdicts are void for uncertainty is based upon the argument that procuring a female inmate for a house of prostitution is a separate and distinct offense from procuring for a female person a place as inmate; and that, since the court instructed the jury in effect that if they believed the appellant had procured a place for Brenda Burns as an inmate they might find her guilty and that they might also find appellant guilty if they were satisfied that appellant acted for a house of prostitution and procured Brenda Burns as an inmate thereof, it cannot be known which of these legally irreconcilable beliefs the jury entertained. It has already been shown that appellant's contention in this respect is wholly without merit.

[57, 58] Appellant complains that the trial court erred in limiting the examination of one Donna Stewart, a witness for the defense. According to appellant, the matter which the trial court ruled out had to do with the conspiracy charge, of which appellant was exonerated. Moreover, the evidence against appellant on the counts of which she was found guilty was sufficient to convict her thereon even if the testimony of Donna Stewart had been entirely eliminated. No prejudice to appellant could be held to have resulted, therefore, even if the ruling of the court on the question was erroneous.

[59] Appellant also contends that the court erred in ruling and directing the jury to consider all of the evidence in the case against appellant, and in informing the jury that a prima facie case of conspiracy had been made out against all of the accused. Having been exonerated by the jury of the charge of conspiracy, appellant cannot complain of the court's ruling and action in the matter. Obviously, no prejudice resulted therefrom.

[60] Since it appears from the record that the evidence against appellant was sufficient to support the verdicts of guilty re-

turned by the jury in her case, there was obviously no error in the court's refusal to direct a verdict in her favor on all counts.

Other contentions of appellant have already been answered by what has been said before herein, either in consideration of appellant's appeal or that of appellant Montgomery.

[61] In conclusion appellant reiterates her contention that the alternative descriptions of the offense of pandering enumerated in section 1 of the Pandering Act constitute separate offenses and that the respective descriptions of these offenses do not apply to the other offenses in the series. As already demonstrated, the latter portion of appellant's contention is untenable. While previous decisions have held that the act creates a series of separate offenses, none of these decisions may be taken as authority for the proposition that the description of each enumerated offense of pandering is necessarily exclusive of the description of other enumerated acts. It is true that the commission of any one of the enumerated acts constitutes by itself the offense of pandering, but, as already seen, it does not follow that a defendant may not be guilty of having committed more than one of the enumerated acts in a single transaction, or that the description of one enumerated act may not in a proper instance be applied to another.

[62] It does not appear that the above-mentioned errors could have affected the outcome of the trial and that prejudice, requiring a reversal, was a natural or likely consequence thereof. There was no miscarriage of justice.

For the foregoing reasons the judgments and orders are affirmed.

YORK, P. J., and WHITE, J., concurred.

KLEIBER v. CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 16487.

Supreme Court of California.

Oct. 8, 1941.

Rehearing Denied Nov. 6, 1941.

1. Municipal corporations ⇐108

The power of referendum does not apply to acts of city council which are not legislative in character, and executive and administrative acts, whether initiated by resolution or ordinance, are not subject to that reserved power.

2. Municipal corporations ⇐108

If action of city be designed merely to carry into effect law already enacted, it is "administrative" rather than "legislative" action, so as not to be subject to power of referendum.

See Words and Phrases, Permanent Edition, for all other definitions of "Administrative" and "Legislative".

3. Municipal corporations ⇐85

Adoption by the city and county of San Francisco of a housing program, and authorization of housing and slum clearance contracts, was "administrative" rather than "legislative" action, and hence could be accomplished by resolution without necessity of enacting ordinance. United States Housing Act 1937, 42 U.S.C.A. § 1401 et seq.; St. 1938, Ex.Sess., pp. 1, 2 and p. 9, § 4.

4. Health ⇐32

The declared purpose and policy of legislature in enacting Housing Authorities Law is slum clearance and substitution of low-rent, safe and sanitary dwellings. United States Housing Act 1937, 42 U.S.C.A. § 1401 et seq.; St.1938, Ex.Sess., pp. 1, 2 and p. 9, § 4.

5. Courts ⇐90(3)

In action for injunction against performance of municipal contracts made in conformity with Housing Authorities Law, propriety of the procedure was concluded by prior decision holding such law constitutional, though plaintiff in the instant case was not attacking constitutionality of the law. United States Housing Act 1937, 42 U.S.C.A. § 1401 et seq.; St.1938, Ex.Sess., pp. 1, 2, and p. 9, § 4.

6. Health ⇐21

The purposes and provisions of Housing Authorities Law, giving city power to dedicate property for the purpose, which is made tax exempt, and to furnish municipal services without compensation unless the housing authority elects to pay the cost, are constitutional. St.1938, Ex.Sess., p. 1, § 2.

7. Constitutional law ⇐63(2)

Matters relating to contracts between housing authority and city under Housing Authorities Law are "administrative" only for purpose of giving state-wide effect to legislative policy, and are therefore acts which the legislature may delegate as provided by statute. St.1938, Ex.Sess., p. 1, § 2.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Action by Antonia Kleiber against the City and County of San Francisco and others, for injunction against performance of contracts entered into pursuant to the Housing Authorities Law, and to have such contracts declared void. From a judgment for defendants, plaintiff appeals.

Affirmed.

Charles A. Christin and T. J. Keegan, both of San Francisco, for appellant.

John J. O'Toole, City Atty., Walter A. Dold, Chief Deputy City Atty., and William A. O'Brien, Deputy City Atty., all of San Francisco, for respondents.

Stephen Wyckoff, of Santa Cruz, Amicus Curiae for respondents.

SHENK, Justice.

The plaintiff, a taxpayer of the city and county of San Francisco, sought an injunction against the city, its board of supervisors, the housing authority of the city and its members to prevent the performance of the provisions of certain contracts entered into pursuant to the Housing Authorities Law, and to have such contracts declared void. The court found for the defendants and entered judgment accordingly. The plaintiff appealed.

In support of the appeal it is contended that the trial court erroneously found and concluded that the contracts were in accordance with law and therefore valid. The basis of the plaintiff's contention is the provision of the charter of the city and county of San Francisco, hereinafter called the city, that every legislative act must be by ordinance. The contracts were author-

ized by resolution of the board of supervisors.

In order to take advantage of the federal loans provided by the United States Housing Authority Act of 1937, 42 U.S.C.A. §§ 1401–1430, the California legislature adopted the Housing Authorities Law, Stats.1938, Ex.Sess., p. 9, and related acts. Stats.Ex. Sess.1938, p. 2; Stats.Ex.Sess.1938, p. 1. This law was upheld as constitutional in Housing Authority of County of Los Angeles v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794.

Section 4 of the Housing Authorities Law provides that there is created in each city, county, and city and county of the state a public body corporate and politic to be known as the "housing authority"; but that such authority shall not function until or unless the governing body of the city or county, or city and county, by proper resolution shall declare that there is need for an authority to function. The section also provides that the governing body may adopt a resolution declaring that there is need for a housing authority if it shall find that insanitary or unsafe inhabited dwelling accommodations exist or that there is a shortage of safe or sanitary dwelling accommodations available to persons of low income at rentals they can afford. It is also provided that in any action involving the validity or enforcement of any contract of the authority, the authority shall be conclusively deemed to have become established and authorized to transact business and exercise its powers upon proof of the adoption of a resolution by the governing body declaring the need for the authority.

At the same session of the legislature the Housing Cooperation Law was enacted. Stats.1938, Ex.Sess., p. 2. That act provides the powers which may be exercised by a city or county, or city and county, which has declared the necessity for the housing authority to function, and the contracts which may be entered into between it and such housing authority. Section 7 provides that the exercise of the powers granted may be authorized by resolution of the governing body of the city or county, or city and county, which resolution shall take effect immediately and need not be laid over or published or posted.

Still another act, Stats.1938, Ex.Sess., p. 1, provides that all property of a housing authority shall be exempt from any and all taxes and special assessments. It contains a proviso that in lieu of taxes and special assessments a housing authority may agree to make payments to the city for services, improvements or facilities furnished by the city for the benefit of a housing project owned by the housing authority, such payment not to exceed the estimated cost of such services, improvements or facilities.

After the effective date of the foregoing legislation and on March 28, 1938, the board of supervisors of the city and county of San Francisco adopted a resolution, duly approved by the mayor, finding and declaring that there is need of the housing authority in the city; that insanitary and unsafe inhabited dwelling accommodations exist therein; and that there is a shortage of safe and sanitary dwelling accommodations therein available to persons of low income at rentals which they can afford. On the same day the mayor appointed the commissioners of the housing authority of the city and county of San Francisco.

On July 20, 1938, the city and the housing authority entered into an equivalent elimination agreement respecting the execution of a slum clearance and construction of a low-rent housing project in the Holly Park-Potrero district. The authority made application to the United States Government for a loan which has been approved by the federal authority.

On January 25, 1939, the board of supervisors of the city adopted a resolution authorizing the city to enter into a municipal cooperation agreement with the housing authority whereby the city should agree not to levy or impose any taxes or special assessments against the project or the authority, and that it would furnish to the project without cost municipal services and facilities, including fire, police and health protection, street maintenance and lighting, sewer maintenance, and repairs to municipal facilities. The furnishing of such free services was limited to the period of the physical usefulness of the project for the purpose of providing dwelling accommodations, and in no event less than the number of years during which any bonds issued in financing the development of such projects should remain outstanding. Such an agreement was executed by the parties on January 27, 1939.

Section 13 of the charter of the city and county of San Francisco provides that action by the board of supervisors shall be by ordinance or resolution and that "every legislative act shall be by ordinance".

The trial court specifically found and concluded that the foregoing resolutions were adopted by the board of supervisors in accordance with the provisions of the charter and in conformity with law and that the contracts entered into pursuant thereto were valid. Its judgment was based on that finding and conclusion.

[1] The plaintiff contends that the action of the board of supervisors represented by the various resolutions was legislative in character as distinguished from administrative or executive; that the board could therefore validly authorize the contracts referred to only by ordinance, as distinguished from action by resolution. The plaintiff relies on Hopping v. Council of City of Richmond, 170 Cal. 605, 150 P. 977, wherein this court held that action of the city council providing for the acquisition of land and the construction of a city hall and offices was legislative rather than administrative in character, and was therefore subject to a referendum. That decision recognized, however, that the power of referendum does not apply to acts which are not legislative in character, and that executive and administrative acts, whether initiated by resolution or ordinance, are not subject to that reserved power. See, also, Brazell v. Zeigler, 26 Okl. 826, 110 P. 1052.

It is not here questioned that if the action of the board of supervisors in adopting the foregoing resolutions was not legislative, but was executive or administrative in character, then the argument and the decisions relied on by the plaintiff are unavailing.

[2] In the Hopping case it was said that the action by the city council involved a determination that the public interest of the city required that it should have a city hall, which should be located on land offered for the purpose, that a building should be constructed thereon and a suitable appropriation made for the purpose. "This constituted a declaration of a public purpose and a provision for ways and means of its accomplishment. * * * It was to that extent a thing which the legislative power alone may declare and determine. The council could consider the questions of public good, public interests and public policy involved solely by virtue of and in the exercise of its legislative powers, and its action thereon was clearly an act in the exercise of that power." [170 Cal. 605, 150 P. 980.] The court there distinguished cases in which a contrary conclusion had been reached by pointing out that in such cases the measures held to constitute merely executive or administrative action were not such as declared a public purpose or policy, but were designed merely as detail to carry out a previously declared legislative purpose and policy. Therefore, if the action be designed merely to carry into effect law already enacted it may be said to be administrative rather than legislative action.

[3, 4] The distinction pointed out in that case must be deemed determinative of the question presented here. The public purpose here involved was declared and made law by the legislature of this state when it enacted the housing authorities law and related acts. That law applies to and affects the entire citizenry of the state as a body, whether the details incident thereto be executed in one or another, in several or in all of the political subdivisions authorized to act thereunder. The declared purpose and policy of the legislature is slum clearance and substitution of low-rent, safe and saniary dwellings. Housing Authority of Los Angeles County v. Dockweiler, supra, 14 Cal.2d at page 441, 94 P.2d 794. In Adler v. Deegan, 251 N.Y. 467, 476, 167 N.E. 705, 711, which upheld a slum clearance act of the New York legislature directed to conditions in New York City, Mr. Chief Justice Cardozo summed up the statewide concern of the law by saying: "It seeks to bring about conditions whereby healthy children shall be born, and healthy men and women reared, in the dwellings of the great metropolis. To have such men and women is not a city concern merely. It is the concern of the whole state. Here is to be bred the citizenry with which the state must do its work in the years that are to come. The end to be achieved is more than the avoidance of pestilence or contagion. The end to be achieved is the quality of men and women. * * * If the moral and physical fiber of its manhood and its womanhood is not a state concern, the question is, what is? Till now the voice of the courts has not faltered for an answer. * * *" After pointing out what local measures may be considered strictly city affairs he continued: "If any one thing, however, has been settled in this realm of thought by unison of opinion, it is the state-wide extension of the interest in the maintenance of life and health. The advancement of that interest, like the advancement of education, is a function of the state at large."

Similarly in Humphrey v. City of Phoenix, 55 Ariz. 374, 102 P.2d 82, 88, it was said, citing the case of Adler v. Deegan, supra: "While slum clearance in cities and towns only is provided for by the municipal housing law, the necessity that such subdivisions of the state be kept in sanitary and safe condition is essential to the health, morals and general welfare of the whole state."

In People v. Newton, 106 Colo. 61, 101 P.2d 21, 23, the court, in upholding the constitutionality of similar legislation, stated: "If the constitutional basis for the enactment of the National Housing Act was the general welfare of the nation, it would seem reasonable to assume that the enactment here in question is a valid exercise of the state's legislative power in promoting the general welfare of the state."

[5] The plaintiff urges that the foregoing cited cases are not in point here because she is not attacking the constitutionality of the Housing Authorities Law. Nevertheless, the issues raised by the plaintiff's appeal, although not directly involved therein, should be deemed to be concluded by the decision in the case of Housing Authority of Los Angeles County v. Dockweiler, supra. In that proceeding, this court, in determining that the Housing Authorities Law was constitutional, necessarily established that its public purpose and policy was to be effective throughout the state. The act created a housing authority as a separate public body corporate and politic in each city, county, and city and county of the state. It provided that that body was to function upon the specified finding of necessity therefor by resolution of the governing body of the city, county, or city and county. The act also prescribed the powers, duties and obligations of the authority and of the city in carrying out its salutary purposes. Every necessary legislative act was completed by the legislature. There was nothing left to do except to administer the law. Governing bodies of cities, counties, or cities and counties perform both legislative and executive or administrative acts. The former is ordinarily performed by ordinance; the latter may be done by resolution. The steps to be taken by the city to gain the advantages afforded by the law are in the ascertainment of facts, and are administrative in character. To gain those advantages the city must proceed in the manner specified in the act. Furthermore, since the statute is the only authority under which the city may act in the premises, and the subject matter of the action is of more than local concern, the city is bound to proceed in accordance therewith.

[6, 7] The plaintiff asserts that in the cases deciding the constitutional question the propriety of the procedure was not involved. There was no such question raised in the Dockweiler case, a mandamus proceeding, for the apparent reason that, as in the present case, the steps were taken in accordance with the statute. Since the act has been declared constitutional and the proceedings here involved have been taken in accordance therewith, there would seem to be no question of illegality open to the plaintiff in this case. Pursuant to the act the housing authority and the city may contract to put into effect the purposes and aims of the law. The city is given the power to dedicate property for the purpose, which is made tax exempt, and to furnish municipal services without compensation unless the housing authority elects to pay the cost thereof. Sec. 2, Stats.1938, Ex.Sess., p. 1. These purposes and provisions are constitutional, and the contracts between the housing authority and the city are in conformity therewith. It is clear that all of these matters are administrative only for the purpose of giving state-wide effect to the declared legislative policy, and are therefore acts which the legislature may delegate as provided by the statute. Housing Authority of Los Angeles County v. Dockweiler, supra, 14 Cal.2d at page 462, 94 P.2d 794.

The foregoing discussion requires an affirmance of the judgment without the necessity of considering other contentions made by the parties.

The judgment is affirmed.

GIBSON, C. J., CARTER, and TRAYNOR, JJ., and MOORE and PULLEN, JJ. pro tem., concurred.

FAGEOL TRUCK & COACH CO. v. PACIFIC INDEMNITY CO. et al.

S. F. 16600.

Supreme Court of California.

Oct. 10, 1941.

Rehearing Denied Nov. 6, 1941.

1. Insurance ⇐582

Buyer of truck under conditional sales contract could contract for insurance against not only his own loss but that of conditional seller as well.

2. Insurance ⇐150

Special loss payable indorsement on truck collision policy in favor of conditional seller prevailed over any contrary provision of body of policy, and, since rider made loss payable to seller, rider controlled and seller became the assured.

3. Insurance ⇐328(2)

Where insurer issued collision insurance to buyer covering truck and had knowledge of conditional sale evidenced by warranty in policy declaring truck was purchased under conditional sale contract and attached loss payable clause in seller's favor, insurer assumed risk of title passing from insured to conditional seller after loss might occur.

4. Insurance ⇐582

Where collision policy issued to buyer, covering truck and indorsement made it payable to conditional seller in case of loss, seller's rights were fixed at time of loss.

5. Insurance ⇐581, 582

That collision insurance contract is designed primarily to indemnify titular owner in case of a mortgage or the vendee under a conditional sales agreement against loss of insured property arising from contingent event does not defeat rights of beneficiary named in rider at request of assured.

6. Insurance ⇐579

Where loss payable clause is annexed to collision policy, indemnitee named in indorsement is as much entitled to indemnification for loss as is person named as insured, and by no adjustment made between insured and insurer can indemnitee be defeated of his indemnity.

7. Insurance ⇐130(2)

Acceptance by conditional seller of collision policy taken by conditional buyer of truck and containing clause making loss payable to conditional seller was unnecessary where neither policy nor indorsement required acceptance by either beneficiary and no statute required such acceptance.

8. Insurance ⇐130(3)

Where conditional buyer took out collision policy covering truck containing loss payable clause in favor of conditional seller and after collision occurred conditional seller took steps toward enforcement of its rights under policy, seller's acceptance of policy was established.

9. Insurance ⇐130(6)

Where collision policy was ordered by brokers acting for conditional buyer of truck, and policy was promptly forwarded and the same brokers remitted payment for premium, that completed contract, which by virtue of indorsement, at once made insurer contingently liable for loss to conditional seller.

10. Insurance ⇐245

That conditional seller of truck, who took policy from P. company covering excess insurance, declined to cancel such policy when requested to do so after being advised of issuance of another policy to buyer with loss payable clause in seller's favor, did not constitute repudiation by seller of policy issued to buyer.

11. Insurance ⇐582

After conditional seller accepted collision policy with loss payable clause in his favor taken out by conditional buyer of truck covering collision, rights of conditional seller could not be impaired by any agreement between buyer and insurer.

12. Insurance ⇐246

Where loss under collision policy issued to truck buyer containing loss payable clause in favor of conditional seller occurred January 18, 1933, agreement made on July 14, 1933, by buyer and insurer to cancel policy, did not impair rights of seller thereunder.

13. Insurance ⇐582

By insurer's contract as contained in collision policy covering truck and indorsement making loss payable to conditional seller, insurer contemplated that buyer might fail to make good under his agreement of purchase, that truck might be destroyed, and that successor in interest to buyer would be entitled to insurance fund.

14. Insurance ⇐115(6)

Seller under conditional sales contract had an "insurable interest" in truck sold by such contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurable Interest".

15. Insurance ⇐115(6)

Under conditional sales agreement, buyer has an "insurable interest", and this is true even beyond amount actually paid on purchase price.

16. Sales ⇐467

Under law in both Washington and California, title remains in vendor under conditional sales contract until stipulated conditions have been fulfilled.

17. Insurance ⇐582

Where, by reason of breach of conditions, buyer's rights under conditional sales contract covering truck were terminated after loss insured against under collision policy containing loss payable clause in favor of seller, the seller could recover against the insurer to extent of damage to truck.

18. Insurance ⇐582

Repossession of truck by conditional seller and termination of buyer's interest under contract after loss covered by collision policy containing loss payable clause in favor of seller did not effect release of insurer from obligation to pay seller amount of loss suffered, since insurance was to stand in lieu of property lost by virtue of collision.

19. Insurance ⇐582

Indorsement on fire and theft policy, issued to conditional seller of truck, protecting seller against accidental collision occurring while automobile was in possession of buyer, in which event, if buyer defaulted in payments and insured repossessed automobile, the loss insured should thereupon be payable, construed under rule of strict construction, meant that, if collision occurred while truck was in buyer's possession and if he defaulted in payments, and seller had repossessed automobile, insurer was thereupon obligated to pay vendor the loss insured.

20. Insurance ⇐336(1)

Where fire and theft policy issued to conditional seller of truck contained indorsement against accidental collision occurring after insured had repossessed truck, and policy provided that such insurance was excess insurance where any specific insurance existed for benefit of insured, such policy was not "other insurance" which would prevent recovery on collision policy issued to buyer and containing loss payable clause in favor of seller where, at time of collision, seller had not repossessed truck and because when seller later repossessed truck, insurance taken by seller became "excess" or "secondary" insurance.

See Words and Phrases, Permanent Edition, for all other definitions of "Excess Insurance", "Other Insurance", and "Secondary Insurance".

21. Insurance ⇐146(3)

If there was any ambiguity in collision policy covering truck, policy must be resolved against insurer, and if there was any ambiguity in clause precluding recovery in case of any other insurance, and if to give such clause the meaning contended for would release insurer from liability, policy must be construed to permit recovery, where policy was susceptible of such construction.

22. Insurance ⇐146(3)

Where two interpretations of automobile collision policy equally fair may be made, that which affords greatest measure of protection to insured will prevail.

In Bank.

Appeal from Superior Court, Alameda County; Peter J. Crosby, Judge.

Action by Fageol Truck & Coach Company against Pacific Indemnity Company and Detroit Fire & Marine Insurance Company, on insurance policies covering loss from collision. From a judgment for plaintiff against defendants on their two separate policies for loss resulting from damage to truck which had been sold by plaintiff under a conditional sales contract, defendant Detroit Fire & Marine Insurance Company appeals.

Affirmed.

For prior opinion, see 110 P.2d 1085.

See, also, 117 P.2d 669.

White, Wakefield, Leighton & White, Dunn, White & Aiken, and Carlos G. White, all of Oakland, for appellant Detroit Fire & Marine Ins. Co.

Bronson, Bronson & McKinnon, Kirke LaShelle, and Harold R. McKinnon, all of San Francisco, for defendant Pacific Indemnity Co.

Fitzgerald, Abbott & Beardsley and Edward B. Kelly, all of Oakland, for respondent.

MOORE, Justice pro tem.

This action was brought to recover a loss suffered by plaintiff by reason of damage to a ten-ton truck, which it had sold under a conditional sales contract to one Thomas on November 28, 1932. From a judgment against both defendants on their two separate policies, both defendants appealed on separate records.

At all times herein mentioned plaintiff will be referred to as Fageol; defendant Pacific Indemnity Company will be referred to as Pacific; and the defendant Detroit Fire and Marine Insurance Company will be referred to as Detroit or appellant.

The vendee had paid only the sum of $2,000 on the purchase price of the truck, leaving a balance of $7,871.76. At the time of the purchase the Pacific issued its fire and theft policy of automobile insurance naming Thomas as the insured. Attached to the policy was a rider designated as "vendors single interest coverage" or "V.S.I." endorsement. By its terms Pacific insured Fageol's interest in the truck against the peril of accidental collision or upset occurring while the truck "is in the possession of the purchaser, the purchaser has defaulted in payment thereon and the assured has re-possessed the automobile". One of the terms of the policy provided "This insurance shall be considered as excess insurance where any specific insurance exists in the name of or for the benefit of the assured on any of the property hereby insured and this insurance shall not apply nor contribute to the payment of any loss until any such specific insurance shall have been exhausted."

Thereafter, on December 20, 1932, with the consent of plaintiff, Thomas requested Detroit to issue to him a policy of insurance upon his truck in an amount not exceeding the cash value of the car at the time of loss which was to be payable as interest may appear to assured and the beneficiaries to be named in the endorsements. Pursuant to such request, a policy was issued. The risks covered by the policy included "Collision or upset" but it contained a "deductible" clause whereby the loss was to be only that in excess of $250. By one rider attached to the policy, loss was made payable to Fageol for damage to the chassis; by another rider loss was to be payable to Isaacson Iron Works on account of loss to the trailer or its body or to the truck body. One clause provided: "No recovery shall be had under this policy if at the time a loss occurs there be any other insurance, whether such other insurance be valid and/or collectible or not, covering such loss, which would attach if this insurance had not been effected." Thomas accepted the policy at the time of its issuance but deferred payment of the premium in the sum of $243.10.

On the 18th day of January, while Thomas was driving on a highway in the state of Washington, he collided with a guard rail whereby the truck was damaged in many parts. Its condition necessitated its removal for a long distance to the shop of Fageol in the city of Seattle.

Forty-seven days after the accident, with plaintiff's consent, Pacific paid the Detroit premium and at that time plaintiff, at Pacific's request, acquiesced in the issuance of the Detroit policy and the endorsement thereon on condition that it should not thereby be understood to release Pacific from liability under its "Single Interest Collision Coverage Endorsement". At the same time, however, Pacific agreed that, in event of loss and of Detroit's fixed liability, Pacific would pay plaintiff the $250 deductible under the Detroit policy and its rider. Failing in its efforts to collect the balance of the purchase price on the 20th day of February, 1933, plaintiff terminated Thomas' interest in the contract of purchase.

On the 19th day of January, 1933, oral notice of the loss was given to Detroit and a written estimate of the cost of repairs and the amount of the loss was, at its request, delivered to Detroit's agent January 25, 1933.

On March 16, within sixty days after the collision, verified proof of loss was served on Detroit. By such proof no fact with reference to the Pacific insurance was concealed from Detroit. Both policies contained a provision that in event of loss or damage, plaintiff should protect the property from further loss or damage and that any act done in furtherance of that end should be considered as done without prejudice and for the benefit of all concerned and that all reasonable expense thereby incurred should constitute a claim under the insurance. It was to protect the truck from further loss or damage and to preserve it that it was removed from the scene of the wreck to Seattle at an expense of $281.50. This expense in moving the truck from the highway to plaintiff's branch factory in Seattle, was expressly authorized

and directed in advance by Detroit. Upon removal of the truck to Seattle, repairs were begun. The repairs were completed April 10, 1933. Detroit induced plaintiff to reduce the charges for making the repairs from a larger sum to $2,865.31, and approved that sum as the cost of the repairs and of hauling and towing the truck from the scene of the collision to Seattle.

After this action had been commenced Detroit paid Isaacson Iron Works its total loss in excess of $250.

Appellant has made much of its contention that Fageol never accepted the insurance. But the court properly found that Detroit never suggested the necessity for such acceptance; that it was not concerned with the acceptance of the policy by the assured or by the beneficiaries; that no restriction or condition was imposed by Detroit as to its acceptance; that Detroit was ignorant of the negotiations of Thomas for its policy; that it had no knowledge of the payment of the premium with moneys of Pacific until after this action was filed; but that no knowledge with reference to either fact had been concealed; that on the day of the collision, the broker at Seattle, who had on behalf of Thomas procured the Detroit policy, advised plaintiff of the loss; that the Detroit policy and its endorsement constituted and was at all times specific insurance, existing in the name and for the benefit of plaintiff; that the Pacific policy was excess insurance as to plaintiff and as to the Detroit policy; that by its terms the Pacific policy was not to apply or contribute to plaintiff's loss until the specific insurance of Detroit had been exhausted by plaintiff. Upon such findings the court adjudged that plaintiff was entitled to recover from both defendants the sum of $3,146.81 with interest at 7 per cent per annum from April 28, 1933; but that Pacific should pay only such part of the judgment as might remain unpaid by Detroit and only in the event that plaintiff first exhaust the Detroit insurance without full satisfaction of the judgment.

At the outset, it will be understood that the determination of this case will be governed by the laws of Washington. The truck was sold to a citizen of Washington to be used there. By the contract of purchase, the venue of any legal proceedings brought by the vendor might be laid in any county of that state. The truck was not to be removed therefrom without Fageol's consent. The Detroit policy was executed in Washington whose law by its terms should control. (32 C.J. 979, 980, 981, sec. 10; 55 C.J. 1208-1209, sec. 1192.)

Fageol Was Insured Under the Detroit Policy.

[1-3] Detroit assigns as error the insufficiency of the evidence to support the decision that Detroit insured Fageol as well as Thomas. This claim is without merit. Thomas, as purchaser of the truck and as debtor to Fageol, was free to contract for insurance against not only his own loss but that of his secured creditor as well. This was done by Detroit's attaching a special rider to the policy, as follows: "This endorsement applies to Fageol chassis only. Loss, if any, subject to all terms and conditions of this policy is payable to Fageol Truck and Coach Company." Such special endorsement prevails over any contrary provision of the body of the policy. Since the rider made the loss payable to Fageol, the rider controls and Fageol became the "assured" (Aetna Ins. Co. v. Sacramento Stockton S. S. Co., 9 Cir., 273 F. 55, 58; 32 C.J. 1160), and Thomas' protection did not commence until Fageol should be wholly indemnified. Moreover, the contract of purchase provided that loss resulting from collision should be paid to Fageol to the extent of its unpaid balance. Detroit had knowledge of such provision as evidenced by warranty 6 of the policy, which declares the truck to have been purchased on a "Conditional Sales Contract". That instrument contained clauses that Fageol might repossess the truck and hold it free of all claims of buyer upon his default; that buyer must insure the truck for an amount not less than the unpaid balance; that Fageol should, as Thomas' agent, collect any insurance for collision. By such provisions Detroit assumed the risk of the title's passing from Thomas to Fageol after a loss might occur. Brown v. Northwestern Mut. Fire Ass'n, 176 Wash. 693, 30 P.2d 640, at page 643.

[4, 5] *Inasmuch as the policy and its endorsement made it payable to Fageol in case of loss, the latter's rights were fixed at the time of the loss.* Harrington v. Fitchburg Insurance Co., 124 Mass. 126, 131. The fact that an insurance contract is designed primarily to indemnify the titular owner in the case of a mortgage or the vendee under a conditional sales agreement against the loss of the insured property arising from a contingent or unknown

event (Insurance Code, sec. 22, St.1935, p. 498) does not defeat the rights of a beneficiary named in the rider at the request of the assured.

[6] We are directed to no Washington statute that precludes the insured from contracting for an indemnity against loss to his creditor who is secured by the property covered. Inasmuch as Fageol was specified in the Detroit endorsement as one intended to be insured, the coverage must be applied to its interest. It is a circumstance of daily occurrence that a mortgagee requires his debtor to procure insurance upon the mortgaged property payable to the mortgagee to the extent of his loss. It is equally as common that a mortgage indebtedness is secured by the debtor's contract with the insurer to cover the interest of the creditor by a proper endorsement on the policy. "Insurance policies are contracts to indemnify against contingent losses" (Nash v. New York Life Ins. Co., 272 Mich. 680, 262 N.W. 441, 442) and once procured by the titular owner of the property, the mortgagee's indemnity cannot be defeated by any act of the insured after loss has occurred. 38 A.L.R. 379 and 383. Where a loss payable clause is annexed to a policy, the indemnitee named in the endorsement is as much entitled to indemnification for his loss as is the person named as the insured. By no adjustment made between the mortgagor and the insurer can the mortgagee be defeated of his indemnity under the policy. When, upon the happening of the loss, the mortgagee's rights have become fixed, he can suffer no loss or diminution of his rights because of his debtor's subsequent actions. Georgia Home Ins. Co. v. Stein, 72 Miss. 943, 18 So. 414, 415.

Acceptance of Insurance by Fageol.

[7, 8] It is next contended that Fageol never accepted the Detroit insurance. Acceptance was wholly unnecessary. Neither the policy nor its endorsement required acceptance by either beneficiary. No statute required such acceptance. Under the custom and practice of insurance companies, as found by the court, when, following Thomas' application for a policy, it was issued to him, it became a binding contract for the benefit of the assured and his beneficiaries, for the term specified. It was found by the court that the plaintiff neither rejected the Detroit insurance nor concealed the fact of the repossession of the truck; that it was never falsely represented to Detroit that at the time of the accident there was no other insurance covering the truck or that plaintiff had not repossessed nor intended to repossess the truck or that after its repossession it was and continued to be in the possession of Thomas; that the payment of the Detroit premium was not made with intent to deceive appellant or to prevent it from discovering facts which would constitute a defense to this action or with the intent of aiding anyone in concealing material facts from Detroit. When the fact of the Detroit policy became known to Fageol, it made itself a party thereto in adopting the policy by acting upon it. De Cicco v. Schweizer, 221 N.Y. 431, 117 N.E. 807, L.R.A.1918E, 1004, Ann. Cas.1918C, 816. So long as Fageol's conduct discloses that it had knowledge of the existence of the Detroit policy and that it took steps toward the enforcement of its rights thereunder, its acceptance was established. Such acceptance was properly inferable from the authorization to Fageol by Detroit to make the repairs and by the latter's promise to pay the bill. Blake v. Atlantic Nat. Bank, 33 R.I. 464, 82 A. 225, 39 L.R.A.,N.S., 874; Farrell v. Anderson-Dulin-Varnell Co., 211 Ala. 238, 100 So. 205, 206. The fact that more positive action by Fageol might have been taken immediately following the loss does not defeat Fageol's acceptance as established by the finding.

[9] But the ingenious argument of appellant that Fageol never accepted the policy is beside the point. While we have demonstrated above that plaintiff's acceptance was, under the authorities, wholly unnecessary, at the same time there was nothing for Fageol to accept. The only "acceptance" which appears to have been appropriate or to have been actually indicated was that of Detroit at the time of Thomas' application for a policy. There were no extended negotiations; neither was there any counter-offer by Detroit to Thomas following his request for a policy on his truck, such as would require an acceptance by Thomas or by either beneficiary named in the endorsement. 32 C.J. 1107, sec. 196. The policy was ordered by brokers acting for Thomas on December 20, 1932. The policy was promptly forwarded. The same brokers remitted payment for the premium. That completed the contract which by virtue of the endorsement at once made Detroit contingently liable for loss to Fageol.

Under the custom of insurance agents, Thomas had sixty days within which to pay the premium. It was paid and the whole thereof was never returned by Detroit to Thomas. He still held the policy on the day of the collision and for six months thereafter. From these facts the conclusion is inescapable that, following the collision of the truck, Fageol became vested with the absolute right to recover from Detroit the amount of its loss.

[10, 11] Appellant makes much of the fact that Fageol declined to cancel its policy with Pacific when requested to do so after being advised of the issuance of the Detroit policy. Such request, however, was a gratuitous query of the brokers, not of Detroit. There was nothing in such refusal that would constitute a repudiation of the Detroit policy. Fageol had good reason to decline the substitution of the Detroit policy. Its premium was unpaid and it carried a clause whereby it could deduct $250 from any loss that it might be called upon to pay on account of damage to the truck resulting from a collision. To surrender the Pacific policy and accept in lieu thereof the policy of Detroit at a cost of $493 more than the cost of the Pacific insurance would have been justified on no sound business principle and, besides, Fageol would have lost that portion of the Pacific premium already earned. The only basis for Detroit's claim of Fageol's rejection of the Detroit policy was Fageol's refusal to take the Detroit policy "in lieu of the policy now in force". Fageol originally acquired the Pacific policy and insisted upon keeping it in force because plaintiff was thereby indemnified against total collision loss. It maintained such position, as a result of which Pacific paid the Detroit premium on behalf of Thomas. We conclude, therefore, that the policy was accepted by Fageol—if acceptance has any virtue—and that after reliance had once been placed thereon, the rights of Fageol thereunder could not be impaired by any agreement of Thomas and Detroit. 13 C.J. 602, sec. 625, 17 C.J.S., Contracts, § 390.

Rescission of Detroit Policy.

[12] An agreement made on July 14, 1933, by Thomas and Detroit to cancel the policy did not impair the rights of Fageol thereunder. Such rights were permanently vested at the moment of the loss. The policy, free from fraud, was issued on December 20, 1932. The truck was damaged the following January 18th. Verified proof of loss was served upon Detroit March 16th. The repairs, under the authorization of appellant, were completed April 10th, and on the 17th of the same month Detroit induced plaintiff to reduce its charges and finally promised to pay the repair bill in the sum of $2,865.31 as well as the cost of towing. With knowledge of the loss, and having approved the bill for repairs, Detroit accepted the premium on the 23rd day of May, practically four months after the truck's collision. Appellant conceives the attempted cancellation to be in the same category as that where two parties to a contract rescind it before the beneficiaries commence to enforce it. But such is far from the situation here. The premium having been paid on the policy on May 23rd, it was not until the 14th day of July following that Thomas, with the consent of Pacific, requested Detroit to cancel the policy. The request was granted and the unearned portion of the premium was, without the knowledge of plaintiff, returned to Thomas. At the time of the attempted cancellation the policy and its rider were in full force as they had been at the time of the loss. While the cancellation voided all future liability of Detroit (Duncan v. New York Mut. Ins. Co., 138 N.Y. 88, 33 N.E. 730, 20 L.R.A. 386) at the same time Thomas was powerless to effect a cancellation of Fageol's insurance under the endorsement after the loss had occurred. Such cancellation could not retroact to the date of issuance, as might have resulted by virtue of the rescission of a voidable agreement. The act of Thomas was nothing more than the exchange of Detroit's future liability for the unused portion of the premium. At the time of the so-called cancellation Thomas as the "insured" vendee was powerless to make any contract that might release Detroit from its obligation incurred prior to his surrender of the policy. Nash v. New York Life Ins. Co., 272 Mich. 680, 262 N. W. 441. By virtue of the loss Detroit's obligation had been transmuted from a contingent liability to a certain obligation.

Detroit's absolute debt to Fageol could not have been extinguished by Detroit's acquiring manual possession of the policy subsequent to the loss. Indeed, it is not even suggested that any attempt was made by Thomas to absolve appellant from any obligation already incurred. Therefore, not

only by the principle announced in the Nash case, supra, is Fageol entitled to recover under the Detroit policy and its endorsement but its rights are unimpaired by the very failure of Thomas to antedate his surrender even if he had possessed the power to do so. Although the charge is veiled, nevertheless it is clear from the argument of appellant that it conceives itself to have been aggrieved by the suppression of facts, the knowledge of which in good faith it should have received at some time prior to the close of events which culminated with Detroit's acceptance of the proof of loss and its approval of the bill for repairs. But if this be an accusation, it is not justified. At the time of the issuance of its policy, Detroit had notice that Thomas had purchased the truck under a conditional sales agreement. Of the contents of such agreement Detroit had knowledge or easy access thereto. In the proof of loss filed March 16, 1933, Thomas stated that he was the owner of the truck as a conditional sales purchaser. The proof of loss contained nothing to indicate that there was no other insurance on the truck. Neither did the claimant conceal from Detroit the actual purchase price nor misrepresent any material fact. It may be fairly inferred that if such had occurred Detroit would have offered to rescind the policy and to restore a part of the premium or to do some other act consistent with an offer to do equity. Appellant having duly performed all conditions on its part to be performed, it stands now in a position to reap the benefits of a contract made for its benefit.

Repossession.

It is the contention of appellant that the repossession of the truck and the termination of Thomas' interest under his contract of purchase, after the insurance loss effected the release of Detroit from the obligation to pay either Thomas or Fageol the amount of loss suffered.

In Brown v. Northwestern Mutual Fire Ass'n, 176 Wash. 693, 30 P.2d 640, 643, this identical question was determined. Pursuant to the terms of a conditional sales contract, the purchasers of real property, Dorothy Barger and husband procured a policy from the insurance association whereby the insurance was to be payable first to the bank mortgagee in the amount of the unpaid portion of the first mortgage; secondly, to the sellers to the extent of the unpaid part of the purchase price of their equity; thirdly, to the purchaser. For breach of the contract the sellers, Brown and Bolton, terminated the Barger contract November 22, 1932, and filed suit to enforce the forfeiture of the Barger interest. While that action was pending the house burned to the ground. The insurer paid the mortgage and took an assignment. In its action to foreclose the mortgage the insurer contended that the termination of the purchasers' rights after the fire had effected a release of the insurer from liability to Mrs. Barger. But the Bargers, as vendees under a conditional sales contract, did not lose their interest in the property until some time after the fire. The association by contract had insured their interest and had undertaken the risk of the title's passing from the Bargers to Brown, the other insured. The purchasers had an insurable interest in the premises as did also Brown and Bolton, the vendors, who, as owners of the legal and equitable title, had "the undoubted right to step into the shoes of the Bargers" and they "should be as fully protected as the bank as mortgagee".

[13-15] The truck, while in Thomas' possession, having suffered impairments to the extent recited, the insurance money stood in lieu of the property destroyed. By its contract, as contained in the policy and its endorsement, Detroit contemplated that Thomas might fail to make good under his agreement of purchase; that the truck might be destroyed; and that the successor in interest to Thomas would be entitled to the insurance fund. If such was not intended by Detroit, the act of affixing the endorsement insuring Fageol's interest was an idle ceremony. That the vendor under a conditional sales contract has an insurable interest in the chattel sold by such contract is emphatically established. Brown v. Northwestern Mut. Fire Ass'n, supra. Under the law of California (Kleiber Motor Truck Co. v. International Indemnity Co., 106 Cal.App. 709, 289 P. 865, 866) the seller of a truck may recover the insurance procured by the assignee of the original purchaser notwithstanding that the vendor is ignorant of the fact that the loss was payable to him. He had an insurable interest, covered by the policy "payable * * * as their interests appeared". Also, under a conditional sales agreement the purchaser has an insurable interest. Dunne v. Phoenix Ins. Co., 113 Cal.App. 256, 260, 298 P. 49. And this is true even beyond the amount actually paid on the purchase

price. Vigliotti v. Home Insur. Co., 206 App.Div. 398, 201 N.Y.S. 407, 408.

[16, 17] Appellant's efforts to apply the holding of certain authorities have led it into error. The case of Reynolds v. London, etc., Ins. Co., 128 Cal. 16, 60 P. 467, 79 Am.St.Rep. 17, is cited in support of their claim that Fageol's protection under the policy was defeated by the forfeiture of Thomas' rights under the purchase agreement. But the Reynolds case merely determined that the mortgagee named as such in the mortgagor's insurance policy forfeited his interest therein upon becoming purchaser at his foreclosure sale. But in both Washington and California the relationship between the buyer and seller under a conditional sales contract is not that of debtor and creditor. Under such contracts the title remains in the vendor until the stipulated conditions have been fulfilled. Barbour v. Hodge, 99 Wash. 578, 170 P. 115, 119. If by reason of a breach of conditions the vendee's rights are terminated after the loss insured against, the vendor may recover to the extent of the damage to the chattel against the insurer. Brown v. Northwestern Mut. Fire Ass'n, supra.

Appellant's authorities (James v. Allen, 23 Cal.App.2d 205, 72 P.2d 570; Martin Music Co. v. Robb, 115 Cal.App. 414, 1 P.2d 1000; Murphy v. Hellman Commercial, etc., Bank, 43 Cal.App. 579, 185 P. 485; Covington v. Lewis, 83 Cal.App. 8, 256 P. 277; Frankel v. Rosenfield, 95 Cal.App. 647, 273 P. 122; Smith v. Miller, 5 Cal.App.2d 564, 569, 43 P.2d 347) are not in point. Those cases merely hold that when the vendor of a chattel under a conditional sales contract elects to disaffirm the contract and repossess the property and enforce the agreement he is bound by his election. That principle is not in conflict with the holding of the Brown case under which Fageol was not only an assured but also became owner of Thomas' interest in the truck, upon the latter's forfeiture of that interest and was entitled to payment by Detroit for damage to the truck out of Thomas' indemnity under the Detroit policy.

[18] Under our view of the language of the conditional sales contract, the Detroit insurance was to stand in lieu of the property lost by virtue of the collision and, therefore, Fageol's repossession of the truck did not defeat its right to be indemnified for the damage to the property.

"Other Insurance".

[19, 20] The Detroit policy provided that no recovery should be had thereunder if other insurance covered the loss. The trial court found that such clause did not apply to the excess insurance provided by the Vendor's Single Interest Coverage endorsement annexed to the Pacific policy. This ruling was correct. The clause relied upon by the appellant to defeat its liability follows: "No recovery shall be had under this policy if at the time a loss occurs there be any other insurance, whether such other insurance be valid and/or collectible or not, covering such loss, which would attach if this insurance had not been effected."

Detroit contends that by virtue of the quoted clause it was released from liability because the "Vendors Single Interest" endorsement on the Pacific policy insuring Fageol against loss by collision was such "other insurance". However, that endorsement does not protect plaintiff against all collision losses but only in the case of "accidental collision * * * occurring while the automobile is in possession of the purchaser [in which event if] the purchaser has defaulted in his payments and the assured has repossessed the automobile [the loss insured shall thereupon be payable]". Considering the last quoted clause as found in the V. S. I. endorsement, it is self-stultifying. Without interpolating the language enclosed within the brackets, it apparently requires that the possession be in the purchaser and at the same time "repossession" must have been accomplished by the vendor. That which was evidently intended, however, and which under the rule of strict construction it must be held to mean, is that if a collision occurs while the truck is in the possession of the purchaser and if he has defaulted in his payments, and if the vendor has repossessed the automobile, the insurer is thereupon obligated to pay the vendor the loss insured. This is clearly evidenced by other clauses of the V. S. I. endorsement whereby it is provided that the assured, Fageol, after having "repossessed the automobile but has failed to collect overdue balances * * * assured shall give immediate notice of loss to this company"; that the date of the receipt of notice of loss shall be construed as the date of the loss; that the V. S. I. endorsement is specified to be "excess" insurance where specific insurance exists and "shall not apply nor contribute to the pay-

ment of any loss until all such *specific* insurance shall have been exhausted".

The Detroit policy was such specific insurance. It must be exhausted before the Pacific's "excess insurance" could be forced to contribute to the loss. (1) At the time of the collision of the truck, the Pacific insurance and its V. S. I. endorsement was not in force and could not be until the car was repossessed, which did not occur until February 20, 1933. If the Pacific insurance did not attach on the day of the collision it could not have been such insurance as would relieve Detroit from its liability under its policy. Before the V. S. I. endorsement could cover Fageol's interest in the truck, it was necessary that the car be not only repossessed but also that Fageol first have vainly attempted to collect from Thomas the balance of the purchase price. Had there been no repossession or had Thomas paid his debt to Fageol there could have been no claim under the Pacific policy even in the absence of the Detroit policy. In the absence of repossession and attempts to collect from Thomas, the claim of loss could not successfully have been made against Pacific. However, both incidents having occurred, the Pacific coverage became "excess" or "secondary" insurance. (2) Since it was such "excess" the trial court correctly determined that it was not the other insurance intended by the quoted provision of the Detroit policy.

[21, 22] But if there be any ambiguity in the Detroit policy, it must be resolved against the insurer. (32 C.J. 1152, sec. 265.) If to give the quoted clause the meaning contended for would release Detroit from liability, then it must be construed so as to permit recovery since it is "susceptible of such construction". Where two interpretations equally fair may be made, that which affords the greatest measure of protection to the assured will prevail. 32 C.J. 1155, sec. 265; Hartford Steam Boiler, etc., Co. v. Cochran Oil Mill, etc., Co., 26 Ga.App. 288, 105 S.E. 856, 859.

The "excess" insurance of the Pacific policy could not have been contemplated by the "other insurance" clause of the Detroit policy for the reason that the liability of the former could not be established where a primary policy was in effect at the time of loss. This principle is exemplified in the case of St. Paul Fire & Marine Ins. Co. v. Garza County Warehouse & Marketing Ass'n, 5 Cir., 93 F.2d 590, 591. The warehouse had obtained a policy from the St. Paul Fire and Marine Insurance Company covering cotton while held in storage for its patrons. A clause in that policy provided that it did not cover any cotton on which the owner had other insurance "except on the value, if any, in excess of such insurance". The owners of certain cotton took out a policy with the Insurance Company of North America which also provided that the policy should be void to the extent of any other insurance, directly or indirectly covering the same property and that, since it was to be void in the event of "other insurance" it could not itself be "other insurance" within the meaning of the clause. The circuit court held that St. Paul Fire & Marine policy did not cover as to the cotton except as excess insurance and that as to the North America policy's covering the cotton, defendant's (St. Paul Fire etc.) policy was simply "excess insurance" not "other insurance".

Upon a consideration of the foregoing, we are impelled to hold that the Pacific policy was excess insurance and that it was not the "other insurance" alluded to in the Detroit policy.

Judgment is affirmed.

GIBSON, C. J., CARTER and TRAYNOR, JJ., and PULLEN, Justice pro tem., concurred.



18 Cal.2d 748

FAGEOL TRUCK & COACH CO. v. PACIFIC INDEMNITY CO. et al.

S. F. 16604.

Supreme Court of California.

Oct. 10, 1941.

1. Appeal and error ⇐173(2)

Contention relating to construction and enforcement of a conditional judgment came too late when first made on appeal.

2. Insurance ⇐504

Indorsement covering collision insurance providing that such insurance should not apply to payment of any loss until all specific insurance should have been exhausted must be given such construction as, if fairly war-

ranted, would best carry out object of contract, namely, that of securing indemnity to insured for losses.

3. Insurance ⇐504

Purpose of indorsement on policy issued to conditional seller of truck, covering collision insurance that such insurance should not apply to payment of any loss until all specific insurance should have been exhausted, was to make indemnitee whole in event of insolvency of primary obligor, as against contention that excess insurance never became effective because face of another policy exceeded amount of loss.

4. Insurance ⇐504

Where conditional seller of truck took policy with indorsement insuring against collision and providing that such insurance should not apply unless all specific insurance should have been exhausted, and subsequently conditional buyer took policy in another company having loss payable clause in favor of seller, insurer issuing policy to seller was required to pay loss if the other company should prove to be insolvent.

5. Insurance ⇐622(2)

Covenant in automobile liability policy shortening period of limitation is valid if limitation is not so unreasonable as to show imposition or undue advantage.

6. Insurance ⇐622(2)

Provision of automobile collision policy requiring action to be commenced within 12 months after loss did not provide for unfair period of limitation.

7. Insurance ⇐612(1)

Where indorsement covering collision insurance attached to fire and theft policy covering truck provided that such insurance should not apply until all specific insurance had been exhausted, and policy required action to be commenced within 12 months after happening of loss, it was never intended that the specific insurance should be exhausted before action could be instituted on excess policy.

8. Action ⇐50(5)
Judgment ⇐204

Insurer which issued excess collision insurance to conditional seller and insurer which subsequently issued another policy to buyer with loss payable clause in favor of seller could be sued in same action and judgment entered in such form as to protect the rights of all parties to the action. Code Civ. Proc. § 383.

9. Judgment ⇐229

Where excess insurer was by judgment in action against two collision insurers fully protected against any requirement to pay anything so long as the other insurer was able to pay judgment, excess insurer could suffer no detriment by provision of judgment making it contingently liable therefor upon failure of the other insurer to respond to judgment.

10. Action ⇐50(5)

Excess insurer issuing collision insurance to conditional seller of truck and another insurer subsequently issuing policy to buyer containing loss payable clause in favor of seller could under statute be properly joined in same action, since they insured with respect to the "same subject and interest" within statute permitting action against two or more insurers who insure in respect to the same subject and interest. Code Civ.Proc. § 383.

See Words and Phrases, Permanent Edition, for all other definitions of "Same Subject and Interest".

11. Contracts ⇐108(2)

Parties to conditional sales contract covering truck were bound by covenant that time was of essence of every part thereof, that neither acceptance of any overdue payment nor waiver of any breach of any term or condition should operate as waiver of any other prior or subsequent breach, and that upon default repossession might be gained without previous demand of performance, since such provisions did not violate statute or "public policy".

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

12. Sales ⇐477(6)

Where conditional sales contract provides that acceptance of installment payments after due shall not operate as waiver of forfeiture provision, acceptance of past-due payments does not "waive" strict performance as to any other payments or conditions stipulated in contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

13. Sales ⇐477(6)

Where insured conditional seller of truck extended payment due under sales contract December 21, 1932, to January 21, 1933, but on default in such payment and the payment

due January 10, 1933, seller gave notice of termination on February 20, and repossessed truck, seller's repossession, which was prerequisite to seller's right to recover on collision policy, was lawful and default was not "waived", in view of provision that waiver of breach should not operate as waiver of any prior or subsequent breach.

In Bank.

Appeal from Superior Court, Alameda County; Peter J. Crosby, Judge.

Action by Fageol Truck & Coach Company against Pacific Indemnity Company and others to recover collision loss claimed to be due under two policies of insurance issued respectively by the named defendant and another insurance company and covering a truck sold by plaintiff under conditional sales contract. From a judgment for plaintiff, defendant named appeals.

Affirmed.

For prior opinion, see 110 P.2d 1090.

Bronson, Bronson & McKinnon and Kirke LaShelle, all of San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley and Edward B. Kelly, all of Oakland, for respondent.

MOORE, Justice pro tem.

This appeal by Pacific Indemnity Company is from the same judgment as that affirmed by our decision this day filed, 117 P.2d 661. Other points, however, raised by this appeal require separate consideration.

[1] 1. It is contended that the conditional judgment transforms appellant's excess insurance to a suretyship for Detroit's financial responsibility. Pacific argues that if it should be forced to satisfy the judgment and attempted, as subrogee, to enforce its judgment against Detroit, it would upon Detroit's application be restrained from such enforcement "upon the ground that it never requested Pacific to act as its surety". If such a contention ever had any merit, it comes too late to avail appellant. It was not mentioned in Detroit's appeal.

[2-4] The V S I endorsement of Pacific provides that "this insurance shall not apply nor contribute to the payment of any loss until all such specific insurance shall have been exhausted." Notwithstanding this language, Pacific contends that its excess insurance never became effective because the face of Detroit's policy exceeded the amount of the loss. But the clause quoted has the ring of intelligible English. It must be given "such a construction * * * as, if fairly warranted, will best carry out the object for which the contract was entered into, namely, that of securing indemnity to the insured for the losses to which the insurance relates". Cutting v. Atlas Mutual Ins. Co., 199 Mass. 380, 85 N.E. 174, 175; Fageol Truck & Coach Co. v. Pacific Indemnity Co. et al., supra. It was held in the Cutting case that specific insurance is exhausted "when all that is collectible in respect to any given loss has been paid * * * when all that can be collected has been collected for a loss arising from any of the risks so insured against". The very purpose of an agreement for indemnity is to make the indemnitee whole in event of the insolvency of the primary obligor. We can perceive no other intention to have been contemplated by the provision of the V S I endorsement. When that rider was affixed to the Pacific policy there was no other insurance on the truck. Had the second policy never been issued the rider would surely have applied without a question. Since the legal effect of the Detroit policy was that it became primarily liable for the damage to the truck, we can conceive of no valid reason why Pacific should not still pay the loss if Detroit should prove to be insolvent.

Properly to distinguish the authorities cited by appellant (Fairchild et al. v. Liverpool Ins. Co., 51 N.Y. 65; Klotz Tailoring Co. v. Eastern Fire Ins. Co., 116 App. Div. 723, 102 N.Y.S. 82; Hartford Steam Boiler Inspection & Ins. Co. v. Cochran Oil Mill & Ginnery Co., 26 Ga.App. 288, 105 S.E. 856) would unduly extend this opinion. They deal with a "floating policy", a policy covering proportionate liability, or a policy not represented on the appeal. They do not aid in interpreting the meaning of the V S I endorsement which provides that it shall "not contribute to the payment of any loss until after specific insurance shall have been exhausted".

[5-7] Also, the clause contains no requirement that even suggests that action against Pacific be delayed until Detroit's insolvency be demonstrated. If such had been intended by Pacific in composing the rider, it has demonstrated by its technical

contentions on this appeal that it would have inserted such provision into the instrument by which it contracted to insure Fageol's interest in the truck. It was just that cautions in delaying Fageol's right of recovery or of filing a claim "unless and until the assured shall have made reasonable effort * * * to collect overdue balances and repossess the automobile". Since appellant inserted only such condition precedent to Fageol's right to recover the excess insurance while wholly omitting reference to the necessity of first proving the primary insurer insolvent, no other inference can be drawn than that such reference was not intended. Our conclusion appears even more reasonable in the light of the V S I provision that after the automobile has been repossessed and *Fageol has failed to collect overdue balances* "the assured shall give immediate notice of loss to this company", etc. It would have been impossible to give such immediate notice of loss had Fageol been required first to exhaust the primary insurance. Judging by the time this litigation has consumed (over seven years) appellant itself might have become insolvent before such exhaustion.

Moreover, if plaintiff had waited for such proof of insolvency of Detroit to be made, it would have breached another provision of the Pacific policy which required action to be "commenced within twelve months after the happening of the loss". Such a covenant shortening the period of limitations is a valid provision of an insurance contract and cannot be ignored with impunity as long as the limitation is not so unreasonable as to show imposition or undue advantage. One year was not an unfair period of limitation. Tebbets v. Fidelity & Casualty Co., 155 Cal. 137, 99 P. 501; Beeson v. Schloss, 183 Cal. 618, 192 P. 292. Since the right of recovery accrued upon giving notice and continued for only twelve months it is clear to us that the Pacific never intended that the specific insurance should be exhausted before action could be instituted. The author of the policy must have known of the unlikelihood that a final judgment against the primary insurer could be entered and executed within one year. For this reason it was necessary that plaintiff seek an alternative judgment against Pacific while attempting to enforce payment primarily by Detroit.

[8-10] 2. The contention that the judgment is premature because it is based upon an unaccrued right is not supported either by authority or in reason. The V S I endorsement is such a contract as to require an unusual judgment and its provisions control the form of the judgment. The judgment follows closely the logic of the endorsement which was intended to be of some value to the plaintiff. Inasmuch as the policy itself does not expressly require that the specific insurance be exhausted before suit be instituted or judgment rendered against Pacific, there is no reason why both companies should not have been sued in the same action and judgment entered in such form as to protect the rights of all parties to the action. Leese v. Sherwood, 21 Cal. 151. In view of the fact that appellant is fully protected against any requirement to pay anything to plaintiff so long as Detroit is able to pay the judgment, Pacific can suffer no detriment by that provision of the judgment making it contingently liable therefor upon the failure of Detroit to respond to the judgment. Ward v. Blair, 231 Ky. 96, 21 S.W.2d 123; Fidelity & Deposit Co. v. Bankers' Trust Co., Tex.Civ.App., 161 S.W. 45. In the latter case it was adjudged that execution should not issue against the excess insurer in the first instance.

The trends of judicial decisions and legislative enactments for many years have been to avoid a multiplicity of suits and a plurality of judgments. One of the statutory provisions, with this end in view, is contained in section 383 of the Code of Civil Procedure, which provides: "* * * where the same person is insured by two or more insurers separately in respect to the same subject and interest, such person, or the payee under the policies, or the assignee of the cause of action, or other successor in interest of such assured or payee, may join all or any of such insurers in a single action for the recovery of a loss under the several policies, and in case of judgment a several judgment must be rendered against each of such insurers *according as his liability shall appear.*" The language of that section emphatically disposes of the contention that both insurers could not have been properly joined in the same action, inasmuch as they insured with respect to the "same subject and interest".

The judgment in question "was rendered against each of such insurers according as his liability shall appear". The wisdom of the quoted code section is justified by the facts of the case at bar. Here the Detroit policy exempted that insurer from liability if there was other insurance. The Pacific policy provided that this appellant should not contribute to the loss until all specific insurance be exhausted. Having to determine whether the V S I endorsement was "other insurance" or whether it was "excess insurance" could be more satisfactorily adjudicated with both insurers before the court at the same time. The facts of this case have demonstrated that one judge might have held that the Pacific policy was "other insurance" while another judge might have held it to be "excess". As a consequence, the quoted code section was designed to avoid such anomalous situations. By the application of that section, practical protection of the rights of the insured will not be so readily defeated where all of the insurers are before the same court in a single action. The wisdom of such a procedure was justified by the joinder of both insurers here by the very fact that it disposed of the questions of exhausting (1) the primary insurance, (2) the denials that there had been a collision or damage to the truck, and (3) the inability of plaintiff to collect the overdue balances from the purchaser.

[11-13] 3. Pacific finally contends that Fageol's repossession of the truck was unlawful and that since lawful repossession was a prerequisite to plaintiff's right to recover against appellant, the judgment must be reversed. The logic of such contention is (1) that Fageol extended the $500 payment on the truck for 30 days; (2) that it negotiated with Thomas after his default as to the $410 payment due January 10, 1933; (3) that after the wreck, it negotiated with Thomas to the end that he would again take the truck after repairs under a new contract; (4) that during such negotiations the truck was in Fageol's possession for repairs; (5) that by force of the four events last enumerated, Fageol waived the strict provision of, and so modified, the contract as to render necessary a reasonable notice to Thomas of plaintiff's intention to enforce the contract strictly. Neither the details of the actual transaction nor the authorities cited by the appellant supported its contention. No money was ever paid by Thomas other than the down payment of $2,000. At the vendee's request on December 27, the date of the payment of the $500 installment due on December 21, 1932, was extended to January 21, 1933. The repeated demands upon Thomas for the $410 due January 10 were answered by repeated statements of his inability to pay and of his counter-proposals that Fageol accept partial payments of the sums past due. He continued his appeals until the day arrived for the payment of the $500. In the meantime the truck was wrecked on January 18. Nothing but demands for both payments continued after January 21, without avail. There was no acceptance of any delayed payment. The only "negotiations" between the buyer and the seller were demands for the defaulted payments on the one hand and the answer of inability to pay on the other. Neither conduct nor declaration by Fageol was calculated to lull Thomas into the belief that he might accept a notice of intention to terminate his contract on a designated future date. Moreover, the record is devoid of any proof that Thomas believed himself secure against momentary forfeiture of the truck.

The case of Beardslee v. North Pacific Finance Corp., 161 Wash. 86, 296 P. 155, 158, does not support appellant's contention. The non-waiver provision of the conditional sales contract in that case was that no waiver of strict compliance with the contract should be deemed "a waiver of any *subsequent* failure of strict compliance", etc. The defendant was assignee of the original conditional sales contract. On June 22, 1929, after Beardslee had defaulted in paying two installments, defendant granted an extension. Just four days later defendant demanded payment of the two installments and threatened *replevin* of the property if payment should not be made immediately. The letter containing such threat was received by Beardslee on June 29, after the automobile had been repossessed. On the 1st of July he offered the delinquent installments when he was met with the demand for the full balance of the purchase price. He thereupon tendered the full amount which was rejected. In that case, the claim of the right of repossession was based upon payments already in default at the time leniency was granted by the payee. *After indulgence had been granted, there was no subsequent breach* but only the continued existence of the prior breaches.

And finally the contract contained no provision that an extension of leniency should operate as a waiver of a *prior* breach.

In the light of the foregoing observations we turn now to a consideration of the terms of the Fageol contract and of the conduct of the parties prior to repossession. In the Fageol contract the non-waiver provision was as to any *prior or subsequent* breach. Fageol's notice of termination of the contract on February 20 stated that the repossession was on account of the default in payment of $410 due January 10. No payment had been accepted by Fageol after the latter date nor was any extension waiver or delay promised to Thomas after the due date of the $410. After the $500 became due on January 21 no promise was made Thomas that he might have further time within which to make this payment. The default in the payment of the $410 on January 10 occurred *subsequent* to the only extension granted, to wit, that of the $500 payment due December 21. The contract provides that time is the essence of every part thereof; that neither acceptance of any overdue payment nor the waiver of any breach of any term or condition shall "operate as a waiver of any other *prior or subsequent breach*"; and that upon default repossession may be gained without previous demand of performance. Having so provided, the parties were bound by such covenants to the same extent as they were bound by any other article of their agreement. By such provisions they neither violated a statute nor contravened public policy. Where a contract expressly provides that acceptance of installment payments after they become due shall not operate as a waiver of its forfeiture provision, the acceptance of past due payments does not waive strict performance as to any other payments or conditions stipulated in the contract. Pacific Finance, etc., Co. v. Pierce, 48 Cal.App. 600, 191 P. 1115; Lundberg v. Switzer, 146 Wash. 416, 263 P. 178, 59 A.L.R. 131. It having been established that Thomas was in default as to the payment due January 10 and that such default was never waived, plaintiff's repossession of the truck was its absolute right.

The judgment is affirmed.

GIBSON, C. J., CARTER and TRAYNOR, JJ., and PULLEN, Justice pro tem, concurred.

18 Cal.2d 726

BARTHOLOMAE OIL CORPORATION v. SUPERIOR COURT OF SAN FRANCISCO.

L. A. 17895.

Supreme Court of California.

Oct. 10, 1941.

1. Judges ⇐32

A party is entitled to have a trial upon all the facts before a judge hearing all the evidence in the case.

2. Judges ⇐32

There are many acts which a successor judge may perform where the trial judge leaves the bench.

3. Judges ⇐32

In action to establish trust interest in certain mining properties and for an accounting, where trial judge entered an interlocutory decree determining interest of plaintiff and plaintiffs in intervention, ordering an accounting, and directing that upon rendition of the account a final decree should be entered fixing the interest of plaintiff and plaintiffs in intervention in accordance with the interlocutory decree, upon the rendition of account a judge other than the trial judge, without necessity for an examination of the evidence, could perform the more or less perfunctory act of entering the final decree. Code Civ.Proc. § 184.

4. Judges ⇐31

Where term of trial judge, who entered interlocutory decree fixing interest of plaintiff and plaintiffs in intervention in mining properties, ordered an accounting and directed that upon rendition of account a final decree should be entered fixing interest of parties in accordance with the interlocutory decree, expired before referee had rendered account, but such judge was returned to bench by governor's appointment and case had been re-assigned to such judge, he had jurisdiction to proceed with the case, and, therefore, mandamus would not be granted to compel the granting of a trial de novo.

5. Mandamus ⇐7

The issuance of a writ of mandamus is not a matter of right but involves a consideration of its effect in promoting justice.

6. Mandamus ⇐7

The issuance or refusal of a writ of mandamus to a considerable extent lies within the sound discretion of the court.

7. Mandamus ⇐7

A court should not arbitrarily grant or refuse a writ of mandamus, but in the exercise of a wise discretion it may refuse the relief where the applicant's substantial rights are otherwise amply protected.

In Bank.

Mandamus proceeding by the Bartholomae Oil Corporation against the Superior Court of San Francisco to compel the respondent Superior Court to vacate a decree and to grant a trial de novo.

Alternative writ discharged and proceeding dismissed.

Earl D. Killion, of Los Angeles, for petitioner.

Vincent W. Hallinan, Carey Van Fleet, and Emmett R. Burns, all of San Francisco, for respondent.

GIBSON, Chief Justice.

By this proceeding in mandamus petitioner seeks to compel the respondent Superior Court to vacate a decree and to grant a trial de novo.

In May, 1937, one Lucientes instituted an action in the respondent Superior Court against the Bartholomae Oil Corporation, petitioner here, to establish a trust interest in certain mining properties and for an accounting. Complaints in intervention were filed by Root and Dalziel, two other claimants to an interest in the trust. The cause was tried before Honorable Everett C. McKeage over a period of sixteen days. On November 14, 1940, Judge McKeage rendered an interlocutory decree which adjudged that plaintiff Lucientes and the plaintiffs in intervention, Root and Dalziel, had a 10% interest in the subject matter of the action, Lucientes and Root each having an undivided 40% and Dalziel an undivided 20% of said interest. The decree also ordered an accounting for the years 1935 to 1940, and further provided that "upon the rendition of said account * * * a final decree shall be entered fixing the interest of the plaintiff * * * and plaintiffs in intervention * * * *in accordance with this interlocutory decree* * * *". On the following day a referee was appointed to conduct the accounting.

In the interim an election had been held at which Judge McKeage was not returned to office. As a result, his term expired on January 6, 1941, at which time the accounting had been commenced before the referee, but not finished. On January 8, 1941, the defendant oil corporation gave notice that it would move to vacate the interlocutory decree and appointment of referee and for a trial de novo on the ground that no final judgment had been rendered in the cause before the trial judge left the bench and that no other judge might appropriately enter such final judgment. The motion to vacate came on for hearing before another judge of the respondent Superior Court who, on March 3, 1941, denied it on the ground that the interlocutory decree decided all issues save the accounting, which could as well proceed before a different judge of the same court. This proceeding in mandamus was thereupon instituted to compel the respondent court to vacate the interlocutory decree and the order appointing the referee and to grant a trial de novo.

[1, 2] We are satisfied that petitioner is not entitled to the relief here sought. Petitioner relies upon the cases of Gunder v. Gunder, 208 Cal. 559, 282 P. 794; Di Blasi v. Di Blasi, 209 Cal. 753, 290 P. 7, and Middleton v. Finney, 214 Cal. 523, 6 P.2d 938, which held that where a decree determines the rights of the parties but refers the case to a referee for an accounting, upon which a further decree is to be entered, the first or interlocutory decree is not a "final" decree for *purposes of appeal.* Those cases present clearly distinguishable factual situations and are not determinative of our present problem. Nor do we question the principle relied on by petitioner in the respondent court, and here, that a party "is entitled to have a trial upon all of the facts before a judge hearing all the evidence in the case", citing McAllen v. Souza, 24 Cal.App.2d 247, 74 P.2d 853; De Mund v. Superior Court, 213 Cal. 502, 503, 2 P.2d 985, and Hughes v. De Mund, 96 Cal.App. 365, 274 P. 405. But, it is equally true that there are many acts which a successor judge may perform where the trial judge leaves the bench. A discussion of the subject and a collection of cases dealing therewith may be found in 30 Am.Jur. 750, section 38; 33 C.J. 972, section 103; 54 A.L.R. 952; 58 A.L.R. 848; 114 A.L.R. 435. See, also, Crim v. Kessing, 89 Cal. 478, 489, 26 P. 1074, 23 Am.St.Rep. 491, and Cocke v. MacLeod, 85 Cal.App. 63, 65–68, 258 P. 980.

In the last cited case the trial judge retired from the bench after entering an interlocutory decree declaring that plaintiff was the owner of a half interest in property, and appointing a referee to conduct an accounting. Prohibition was sought to restrain the referee from proceeding on the ground that "such court is without jurisdiction to render a final judgment founded upon the interlocutory judgment, and consequently that the referee appointed by the court is also without jurisdiction in the premises". In rejecting this contention, Mr. Justice Houser, then a member of the District Court of Appeal, stated that "It is clear that the order is not one merely personal to the judicial officer of the court, but is an order by the court itself and as such unaffected by the retirement of the judge who made it. Were it otherwise, no judge, other than the one making the appointment of a receiver or a referee, even in a condemnation proceeding, would be authorized to receive and act upon the report of such appointee; and a similar situation might result in an action, arising from the death or retirement of a judge who theretofore had made an order appointing a notary public or commissioner to take a deposition. * * * Section 184 of the Code of Civil Procedure is as follows: 'No proceeding in any court of justice, in an action or special proceeding pending therein, shall be affected by a vacancy in the office of all or any of the judges thereof.' Aside from lack of authority to the effect that, because of the retirement of the judge who made the order of appointment of the referee in the instant case, the powers of such referee ceased, the statutory authority to which reference has been had is broad enough in its scope to cover the situation here presented".

[3, 4] However, because of developments subsequent to the filing of the present petition, we do not find it necessary to rest our decision herein solely upon the proposition that upon rendition of the account a judge other than the trial judge, without any necessity for an examination of the evidence, might well perform the more or less perfunctory act, under the circumstances here present, of entering the final decree "fixing the interest of the plaintiff * * * and plaintiffs in intervention * * * in accordance with this interlocutory decree * * *". It now appears that Judge McKeage has been returned to the bench by appointment of the Governor and is a member of the respondent court. Petitioner has refused to stipulate that Judge McKeage may proceed in the cause. It appears, however, from correspondence now in the file of this proceeding that the cause has been reassigned by the presiding judge of the respondent court to the department presided over by Judge McKeage. We are satisfied that he may properly proceed therein. Citation of authority is unnecessary to establish that if Judge McKeage had been re-elected at the expiration of his term of office, he would have had undoubted jurisdiction to proceed with the consideration and determination of matters partially tried by him during his prior term. The circumstance that his second or succeeding term was the result of appointment rather than re-election, even though preceded by a short interval of non-judicial activity, does not suggest a different result under the facts here present.

Petitioner's refusal to stipulate that Judge McKeage may proceed in the cause materially detracts from, if it does not totally destroy, the contention that it "is entitled to a decision upon the facts of [its] case by the judge who hears the evidence * * *". Such refusal indicates a desire to secure a second trial of the merits rather than full participation by the judge who heard the evidence and entered the interlocutory decree.

[5-7] In conclusion, it may be stated that the issuance of a writ of mandamus is not a matter of right but involves a consideration of its effect in promoting justice. Wiedwald v. Dodson, 95 Cal. 450, 30 P. 580. Its issuance or refusal to a considerable extent lies within the sound discretion of the court. Rogers v. Board of Directors, 218 Cal. 221, 22 P.2d 509; Clough v. Baber, 38 Cal.App.2d 50, 100 P.2d 519. As stated in the Rogers case [218 Cal. 221, 22 P.2d 510], quoting from High on Extraordinary Legal Remedies, "cases may therefore arise where the applicant for relief has an undoubted legal right, for which mandamus is the appropriate remedy, but where the court may, in the exercise of a wise discretion, still refuse the relief * * *". In other words, while a court should not arbitrarily grant or refuse the writ, in the exercise of a wise discretion it may refuse the relief where the applicant's substantial rights are otherwise amply protected. 16 Cal.Jur. 768, sec. 7, and authorities there cited. In the instant proceeding it is apparent that

the petitioner may and will procure a complete disposition of the action pending in the respondent court by the judge who has heard the evidence and entered the interlocutory decree. The writ here sought is not indispensable to that purpose. Our conclusion serves to expedite the litigation by obviating the necessity for a new trial, thus saving expense to the litigants while conserving the time of the courts. Petitioner's highly technical position tends to defeat rather than subserve the ends of justice.

For the foregoing reasons, the alternative writ is discharged and the proceeding is dismissed.

CARTER and TRAYNOR, JJ., and MOORE and PULLEN, Justices pro tem., concurred.



47 Cal.App.2d 156

WISWELL v. SHINNERS et al.

Civ. 12580.

District Court of Appeal, Second District, Division 1, California.

Oct. 3, 1941.

Rehearing Denied Oct. 29, 1941.

Hearing Denied Dec. 2, 1941.

1. Appeal and error ⇐989

In determining whether proof contained evidence of sufficient stability to support a verdict for plaintiff, appellate court must disregard the fact that there is conflict in evidence and give full credit only to that portion of evidence which tends to support the allegations contained in plaintiff's complaint.

2. Trial ⇐178

In determining motion for directed verdict, trial court cannot weigh evidence nor determine credibility of witnesses.

3. Appeal and error ⇐989

On appeal from order granting defendant's motion for directed verdict, appellate court cannot weigh evidence or determine credibility of witnesses.

4. Death ⇐58(1)

In death action, plaintiff was entitled to invoke aid of presumptions that every person obeys the law, that every person takes ordinary care of his own concerns, and that a person is innocent of crime or wrongdoing. Code Civ.Proc. § 1963, subds. 1, 4, 33.

5. Automobiles ⇐242(8)

In action for death of pedestrian struck by automobile, presumptions existed that pedestrian, while crossing intersection, was at all times exercising the requisite degree and amount of care for his own safety by looking in the direction from which danger could be anticipated and that he was obedient to the statute regarding crossing of street at point other than within marked or unmarked crosswalk. Code Civ.Proc. § 1963, subds. 1, 4, 33; Vehicle Code, § 562(a), St.1935, p. 188.

6. Evidence ⇐89

Where facts, admitted or established by proof, are irreconcilable with a presumption, the presumption loses its evidentiary value.

7. Evidence ⇐85

A "presumption" is a species of indirect evidence and will prevail in and control the deliberations of a jury unless it is overcome by satisfactory evidence. Code Civ.Proc. § 1957.

See Words and Phrases, Permanent Edition, for all other definitions of "Presumption".

8. Automobiles ⇐242(8)

In action for death of pedestrian struck by automobile while crossing intersection, where direct evidence of eyewitness was introduced to establish as a fact conduct of pedestrian at variance with and contrary to presumptions that he was exercising requisite degree of care for his own safety and that he was obedient to statute regarding crossing of streets at a point other than within marked or unmarked crosswalk, the disputed facts remained to be considered and determined upon all the evidence including the presumptions. Code Civ.Proc. § 1957; § 1963, subds. 1, 4, 33; § 2061, subd. 2; Vehicle Code, § 562(a), St.1935, p. 188.

9. Trial ⇐178

Evidence introduced by defendants favorable to their cause must be eliminated from consideration by court for purpose of ruling on a motion of defendants for directed verdict.

10. Automobiles ⇐245(72)

In action for death of pedestrian struck by automobile while crossing intersection,

whether presumptions that pedestrian was exercising requisite degree of care for his own safety, and that he was obedient to statute regarding crossing of street at point other than within a marked or unmarked crosswalk, had been overcome by evidence offered in contradiction thereof, was for jury. Code Civ.Proc. § 1957; § 1963, subds. 1, 4, 33; § 2061, subd. 2; Vehicle Code, § 562(a), St.1935, p. 188.

11. Automobiles ⇐160(4)

If pedestrian was crossing intersection outside of a marked or unmarked crosswalk, he was required to yield right of way to all vehicles on roadway, but driver of automobile was not absolved from the obligation to exercise due care. Vehicle Code, § 562 (a, b), St.1935, p. 188.

12. Automobiles ⇐160(1)

The driver of a motor vehicle which strikes a pedestrian is not guilty of negligence if driver did those things which a reasonably prudent person would have done under similar circumstances. Vehicle Code, § 562(b), St.1935, p. 188.

13. Automobiles ⇐217(2)

Pedestrian struck by automobile while crossing intersection was not guilty of contributory negligence if, seeing what he saw and knowing what he knew, his behavior and conduct was the equal of that of an ordinarily and reasonably prudent person. Vehicle Code, § 562(a, b), St.1935, p. 188.

14. Automobiles ⇐150

A driver must always maintain a vigilant watch for other persons and vehicles using the highway.

15. Automobiles ⇐245(6, 55)

In action for death of pedestrian struck by automobile while crossing intersection, evidence that accident occurred in broad daylight with weather clear, that view of driver was unobstructed from time he passed through intersection east of one at which the fatality occurred, that driver failed to sound his horn or give other warning, that one skid mark was 48 feet long and another 52 feet long, presented question for jury regarding whether driver was guilty of negligence which proximately caused the fatal injuries.

16. Automobiles ⇐245(72)

In action for death of pedestrian struck by automobile while crossing intersection, whether conduct of pedestrian who either did not see the approaching automobile or saw it and misjudged either its speed or distance constituted contributory negligence was for jury. Vehicle Code, § 562(a, b), St. 1935, p. 188.

17. Negligence ⇐65, 136(26)

The question of contributory negligence is always one of fact for the jury to decide under proper instructions except in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons must conform in which case a failure to adhere to that common standard is as a matter of law "contributory negligence".

See Words and Phrases, Permanent Edition, for all other definitions of "Contributory Negligence".

18. Appeal and error ⇐927(7)

On appeal from judgment following a directed verdict or nonsuit, evidence and presumptions as a species of evidence must be taken by the appellate tribunal in the light most favorable to the losing party in the court below.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Death action by Winifred K. Wiswell against Marvin P. Shinners and others. From an adverse judgment, plaintiff appeals.

Reversed and remanded for a new trial.

James V. Brewer, of Los Angeles, for appellant.

Betts & Garrison, of Los Angeles, for respondent Harold E. Shugart.

Charles Peckham, of Los Angeles, for respondent Marvin P. Shinners.

WHITE, Justice.

This appeal is taken from a judgment for defendants upon a directed verdict returned by the jury in an action brought by the widow of Wilkens W. Wiswell to recover damages for the death of said decedent, who was killed when struck by an automobile driven by defendant Marvin P. Shinners, who at the time was acting as the agent and employee of defendant Harold E. Shugart Company.

Upon completion of the testimony offered by both sides the defendants moved the court to direct the jury to return a verdict in favor of such defendants. Said motion

was grounded on the claim that "the evidence at this time fails to establish a prima facie case to go to the jury, in that the evidence fails to establish a prima facie case of negligence against the defendant, Mr. Shinners, and fails to establish that any negligence on his part was the proximate cause or a proximate cause of the accident in question; and in that the uncontradicted evidence in this case establishes that the deceased, Mr. Wiswell, was himself negligent, and that such negligence contributed proximately to the happening of the accident". The court granted this motion, and it is the correctness of such ruling that is here challenged.

For a proper understanding of the questions involved on this appeal, the facts of the case may be thus epitomized: At about 1:45 o'clock on the afternoon of October 21, 1938, the day being clear and the street dry, defendant Shinners was driving his automobile west on Sixth street in the city of Los Angeles at a rate of speed estimated by all witnesses as not exceeding 25 to 30 miles per hour. The automobile was traveling along the west-bound street car tracks, with the left wheels between the rails of the east and west-bound tracks. There were but two eye-witnesses to the accident who testified. One was the defendant driver of the automobile, who stated at the trial that he drove west on Sixth street and approached the intersection of Grand View street where the accident occurred; that there was nothing to obstruct his view of the street ahead of him and that he was at all times looking straight ahead; but when asked whether or not he saw the deceased at any time prior to the impact, the driver testified, "It is blank to me. I don't recall. The only thing I recall is the impact." In answer to an interrogatory as to what happened to the deceased when the automobile came in contact with him, the defendant driver stated: "Well, I have a recollection of his body going against my windshield. I don't know exactly what happened it all happened so quickly, but I do remember seeing the body come up to the car and off." In explanation of his lapse of memory concerning the incidents leading up to the happening of the fatality, the defendant driver testified that the accident completely unnerved him; that he suffered profound shock, inability to sleep and loss of memory, all of which explanation may be summarized by his answers given to the following queries:

"Q. By the Court: In what way did that shock manifest itself? There are many kinds of shock. In what manner did it manifest itself to you? A. I couldn't remember regarding the accident. All I could remember was the impact and a few incidentals like pulling on the brake.

"Q. By Mr. Betts (Attorney for defendant employer): What was the last time before your memory goes more or less blank? A. I remember putting on the brakes. That is about all.

"Q. Well, about that, do you remember traveling westerly after you passed Alvarado? (The second street east of Grand View Street.) A. No, sir.

"Q. So that that blank goes back in your mind? A. Yes."

That the defendant driver was in a very upset condition nervously immediately following the accident was testified to by a police officer who investigated at the scene thereof.

The only other eye-witness of the accident, John E. Smith, called by the defendants, testified that he was sitting with his grandchild at the southwest corner of the intersection of Sixth and Grand View streets. This witness testified that he saw the deceased from the time the latter stepped off the sidewalk into Sixth street; that the decedent walked cater-corner across the street and was not within any marked or unmarked crosswalk at the time he was struck. When asked by the court to indicate the decedent's course of travel, Mr. Smith testified: "As I say, an angle of forty-five degrees, coming across here toward this point here" (indicating). Suffice it to say that this witness testified unequivocally that the deceased was crossing the intersection of Sixth and Grand View streets at an angle and not within any kind of crosswalk. The point of impact as fixed by this witness was slightly in excess of 20 feet west of the prolongation of the easterly side of Grand View street, well without and west of any pedestrian crosswalk. Skidmarks were found running east and west on the north side of Sixth street. One of these marks was 48 feet long, and the other 52 feet long.

[1-3] We deem it unnecessary to here set forth in detail the rule governing the power of a trial court to direct a verdict, as the same has been before the courts of this state on many occasions and is firmly

established by Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768, and Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579. In analyzing the proof to determine whether it contains evidence of sufficient substantiality to support a verdict for plaintiff if such verdict were returned, we must disregard the fact that there is a conflict in such evidence and give full credit only to that portion of the evidence which tends to support the allegations contained in plaintiff's complaint. We cannot, nor was the trial court authorized, in determining the motion for a directed verdict, to weigh the evidence or judge of the credibility of witnesses.

[4, 5] Where, as in the instant case, death has ensued as a result of the accident, thereby sealing the lips of the injured party, the surviving spouse as plaintiff in the action for the alleged wrongful death, was entitled to invoke the aid of certain presumptions indulged in by law. The presumption is that every person obeys the law; that every person takes ordinary care of his own concerns, and that a person is innocent of crime or wrong. Code Civ.Proc., sec. 1963, subds. 1, 4 and 33. There was therefore present in this case the presumption that decedent, while crossing through the intersection, was at all times exercising the requisite degree and amount of care for his own safety by looking in the direction from which danger could be anticipated, and also that he was obedient to the provisions of subdivision (a) of section 562 of the Vehicle Code, St.1935, p. 188, if he was crossing the street at a point other than within a marked or unmarked crosswalk. Hatzakarzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027; Hollowell v. Cameron, 186 Cal. 530, 199 P. 803; Crabbe v. Mammoth Channel G. Min. Co., 168 Cal. 500, 506, 143 P. 714; Drouillard v. Southern Pacific Co., 36 Cal.App. 447, 172 P. 405; Ross v. San Francisco-Oakland Terminal Railways Co., 47 Cal. App. 753, 761, 191 P. 703; Little v. Yanagisawa, 70 Cal.App. 303, 306, 233 P. 357; Broun v. Blair, 26 Cal.App.2d 613, 80 P.2d 95.

[6-8] True, where facts are admitted or established by proof which are irreconcilable with the presumption, the latter loses its evidentiary value. Nevertheless the presumption is a species of indirect evidence (Code Civ.Proc. sec. 1957), and will prevail in and control the deliberations of the jury unless it is overcome by satisfactory evidence. When, as in the case at bar, direct evidence of an eye-witness was introduced to establish as a fact conduct and behavior on the part of the decedent at variance with and contrary to the presumption, the disputed fact nevertheless remains to be considered and determined upon all the evidence, including the presumption. Indeed, section 2061, subdivision 2, of the Code of Civil Procedure admonishes the trial judge upon all proper occasions to instruct the jury "that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against * * * a presumption * * *".

[9, 10] In urging that the direct evidence furnished by an eye-witness in this case dissipated the presumptions established by law, respondents fail to appreciate the limitations upon the power of the trial court when directing a verdict as such limitations are laid down in Estate of Flood and Estate of Lances, supra. Under the familiar rules there enunciated, when there is a showing on behalf of the plaintiff of certain facts—as in the instant case, certain physical facts, such as skid marks and their relation to the point of collision and the point at which the driver first applied his brakes; the speed of the automobile; the failure of the driver to sound his horn or otherwise give warning; the unobstructed view of deceased on the part of the driver for some considerable distance; the clearness of the weather and the dryness of the street—together with the presumptions relied upon; and when on the other hand, evidence both direct and circumstantial, favorable to their cause, is introduced by defendants, the latter evidence must be eliminated from consideration by the court for the purpose of ruling upon a motion for a directed verdict. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529. We therefore conclude that appellant was entitled to the benefit of the presumptions here claimed until dispelled by evidence opposed to them, and that it was for the jury to determine whether the presumptions had been overcome by evidence offered in contradiction thereof, and which last-named evidence the court was not permitted to consider in ruling upon the motion for a directed verdict.

Cases cited by respondents in support of their claim that the presumption is destroyed by evidence in contradiction thereof are all cases where appeals were taken

from final judgments, in the rendition of which the court or jury was entitled to pass upon the weight of all the evidence submitted and to judge of the credibility of witnesses. Such power is not within the province of a court in ruling upon motions for nonsuit or directed verdict.

[11-15] Respondent argues that by the provisions of section 562(a) of the Vehicle Code, the decedent was required to yield the right of way to all vehicles on the roadway. Without doubt, if the decedent was crossing the intersection outside of a marked or unmarked crosswalk, he was so required, but by the provisions of subdivision (b) of the same section the defendant driver was not absolved from the obligation to exercise due care. Watkins v. Nutting, 17 Cal.2d 490, 110 P.2d 384; Quinn v. Rosenfeld, 15 Cal.2d 486, 491, 102 P.2d 317. The evidence in the case before us points unerringly to the fact that the accident occurred in broad daylight with the weather clear and the view of the driver unobstructed from the time he passed through the intersection east of the one at which the fatality occurred. The aforesaid duty imposed upon the defendant by the provisions of the Vehicle Code would be breached if under the circumstances he failed to see, when an ordinarily prudent person, situated as he was and using due care, would have seen. The driver of a vehicle is not guilty of negligence under the circumstances here shown if he did those things which a reasonably prudent person would have done under similar circumstances. Neither was the decedent guilty of contributory negligence if, seeing what he saw and knowing what he knew, his behavior and conduct was the equal of that of an ordinarily and reasonably prudent person. And, it must be remembered that the law requires that a driver shall always maintain a vigilant watch for other persons and vehicles using the highway. Under the facts disclosed in the instant case, the jury might have concluded that the driver of the automobile failed to perform his requisite duty and that such failure was the proximate cause of the fatal injuries sustained by the decedent.

[16, 17] We are unable to say that before crossing the street the deceased should have waited for a vehicle to pass which was approaching at a speed not in excess of thirty miles per hour, practically in the middle of the street, with unimpaired opportunity on the part of the driver to see the pedestrian at a distance within which he could have either stopped his automobile or turned the same to the right and thereby avoided the accident. On the record presented to us herein, we feel that the question whether decedent's behavior and conduct, that is to say, whether he looked, either did not see the approaching automobile, or saw it and misjudged either its speed or distance, constituted contributory negligence under the particular circumstances then existing, was one of fact, as was also the question of whether decedent's conduct measured up to the requirements of that of a reasonable man in complying with the aforesaid Vehicle Code provision. The question of contributory negligence is always one of fact for the jury to decide under proper instructions, except in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform. It is only in these last-named cases that failure to adhere to that common standard is as a matter of law contributory negligence. Where different conclusions may reasonably be drawn by different minds from the same evidence, the decision must be left to the triers of fact. Therefore, under the facts and circumstances here present, the questions of the negligence of the defendant and the contributory negligence of the deceased, as well as the important question of proximate cause, were all for the jury to determine in the light of all the facts, circumstances and presumptions presented by the evidence.

[18] It should be understood that throughout this opinion we have followed the rule applicable to cases where the appeal is taken from a judgment following a directed verdict or nonsuit, which rule requires that evidence, and presumptions as a species of evidence, shall be taken by the appellate tribunal in the light most favorable to the losing party in the court below. We are therefore expressing no opinion as to the weight of the evidence or its truth or falsity.

For the foregoing reasons, the judgment is reversed and the cause remanded for a new trial.

DORAN, J., concurred.

YORK, P. J., concurred in the conclusion reached.

47 Cal.App.2d 211

HAYWARD LUMBER & INVESTMENT CO. v. COAST FEDERAL SAVINGS & LOAN ASS'N OF LOS ANGELES.

Civ. 13292.

District Court of Appeal, Second District, Division 2, California.

Oct. 7, 1941.

Hearing Denied Dec. 2, 1941.

1. Liens ⇐7

Where property was sold under trust deed securing notes given to obtain loan for construction of building, an unexpended part of loan fund remaining in hands of loan association was subject to pro rata distribution among those persons having legally and satisfactorily established their lien claims against the property involved.

2. Mechanics' liens ⇐1

A mechanic's lien is a statutory lien. Code Civ.Proc. § 1183 et seq.

3. Liens ⇐7

An action for judgment establishing and prorating among certain lien claimants the unexpended part of a building loan remaining in hands of loan association after foreclosure of trust deed securing notes given to obtain the loan was an "equitable action" to enforce an "equitable lien" of the claimants against a fund which the owner and lender were estopped to withhold. Code Civ.Proc. §§ 1183 et seq., 1190.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Action" and "Equitable Lien".

4. Liens ⇐7

Where property was sold under trust deed securing notes given to obtain loan for construction of building, unexpended portion of loan fund remaining in hands of loan association was required to be distributed pro rata among all holders of mechanic's liens regardless of whether they had previously filed suit to enforce the liens. Code Civ.Proc. §§ 1183 et seq., 1190.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by the Hayward Lumber & Investment Company against the Coast Federal Savings & Loan Association of Los Angeles, to enforce an equitable lien against residue of a building fund. From a judgment establishing and prorating the residue of the fund among certain lien claimants, plaintiff appeals.

Affirmed.

Philip T. Lyons, of Los Angeles, for appellant.

Crail, Crail & Crail, of Los Angeles, for respondent Coast Federal Savings & Loan Ass'n.

George W. Burch, Jr., of Los Angeles, for respondents Robertson and Hazen.

Jerome Giss, of Los Angeles, for respondent Osipow Electric Supply Co. and another.

Alfred R. Meyers, of Los Angeles, for respondent Commercial Carpet Co. and another.

SCOTT, Justice pro tem.

This is an appeal by plaintiff from a judgment establishing and prorating the residue of a building loan among certain lien claimants.

The owners of certain real property obtained a loan to construct buildings thereon and gave their notes and two first trust deeds to secure them. The property was later sold under the trust deeds. An unexpended portion of the loan fund amounting to $4,650.53 remained in the hands of defendant Coast Federal Savings & Loan Association of Los Angeles, which announced that it was ready and willing to pay the fund into court for distribution or to distribute pro rata among defendants and plaintiff in accordance with the court's order. Certain lien claimants, including plaintiff and six defendants, Patten-Blinn Lumber Co., Dunns, Inc., Peterson & Golt, F. L. Jordon S. & D. Co., Monarch Screen & Mfg. Co. and Story & Sons, had filed their claims for mechanic's liens and had filed suit to enforce them as provided in section 1190 of the Code of Civil Procedure. Five other defendants, Osipow Electric Supply Co. and Philip M. Haddox, Commercial Carpet Co., Enscoe, Hazen and Robertson, had filed mechanic's liens but had not filed suit to enforce them. The trial court gave judgment dividing the balance of the loan fund pro rata among plaintiff and the eleven defendants named other than the Coast Federal.

Plaintiff on appeal urges that the lien claimants who had not pursued their claims by filing suit under section 1190 of the Code of Civil Procedure were not entitled

to participate in such a division, and that the trial court should have divided the sum pro rata only among those who not only had filed a mechanic's lien claim but also had brought suit to enforce it.

[1] The Supreme Court of this state, in the case of Smith v. Anglo-California Trust Company, 205 Cal. 496, 271 P. 898, 902, has held that such a fund is subject to pro rata distribution "among those persons having legally and satisfactorily established their lien claims" against the real property involved. That case "was decided upon the dual grounds that the owner and the lender were estopped by their conduct to withhold the fund, and that the claimants had an equitable lien thereon. The essential basis of the opinion is the justifiable reliance upon the fund by the lien claimants." Pacific Ready Cut Homes v. Title Insurance & Trust Co., 216 Cal. 447, 450, 14 P.2d 510, 511.

In this case it is not denied that all parties asserting claims had furnished the labor and material for which they sought compensation. It is solely a question of whether to successfully assert a claim to a share in the funds available it was an essential prerequisite that the claimant not only should have filed his claim for mechanic's lien but also must have filed a suit in court to enforce it. Plaintiff contends that the words above quoted, "legally and satisfactorily established", can tolerate no lesser construction, but nowhere urges that the claimant must have gone beyond the act of filing the suit in order to thus establish his right to share in the funds. It does not appear that the mere filing of such a suit to enforce a mechanic's lien, which is but a statutory step, would lend a weight or dignity to the claim or more "legally and satisfactorily" establish it than has been done in this case by the submission of it to the trial court and the determination of its validity by that tribunal.

Plaintiff's position if upheld would construe the case of Smith v. Anglo-California Trust Company, supra, to mean that in such a case as this, where a suit is to be brought by certain claimants to secure payment out of a special fund, although they know they are about to bring such an equitable action to determine their right to a pro rata distribution of the fund, each claimant must preface his filing or joining in such action by filing a separate suit to enforce his individual mechanic's lien even though he has no intention of ever bringing it to trial.

[2, 3] A mechanic's lien is a statutory lien (Spinney v. Griffith, 98 Cal. 149, 32 P. 974), and the provisions for enforcing it are set out in title IV, chapter 2, Code of Civil Procedure, § 1183 et seq. The language of our Supreme Court above quoted expressly negatives the suggestion that equity will deny equal consideration to all those who can establish the justice of their claims and their right to compensation out of the fund. It nowhere indicates that it considers an action such as the instant case as being in effect one to enforce a mechanic's lien—a statutory suit to enforce a statutory lien. The case now before us is an equitable action to enforce an equitable lien of the claimants against a fund which owner and lender are estopped to withhold. Pacific Ready Cut Homes v. Title Insurance & Trust Co., supra.

[4] We conclude that plaintiff and the eleven defendants who are claimants in this action are entitled to share pro rata in the distribution of the funds as provided in the judgment of the trial court.

Judgment affirmed.

MOORE, P. J., and WOOD, J., concurred.



47 Cal.App.2d 214

PEOPLE v. PEYTON et al.

Cr. 1767.

District Court of Appeal, Third District, California.

Oct. 7, 1941.

1. Robbery ⇐24(3)

Evidence regarding accused's identity was sufficient to sustain conviction of robbery by means of force and fear. Pen.Code, § 211.

2. Criminal law ⇐339, 345

In robbery prosecution, testimony of employee at factory where codefendant was employed, that employee was acquainted with both defendants and that codefendant

left his work at factory on morning of day of robbery and returned to factory and went to second floor of building where sack of money and revolver were found in the afternoon of same day was properly admitted to show identity of codefendant's associate in commission of crime and that defendants had previously planned to perpetrate the robbery on that day. Pen.Code, § 211.

3. Criminal law ⇐345

In robbery prosecution, evidence that defendant had told superintendent of plant where defendant was employed the night before day of robbery that defendant was not going to work on that day because he had to take a treatment from a doctor, that he did not go to work on that day, that defendant and his associate were seen at tavern where robbery occurred on morning of day of the robbery, that they appeared together after commission of robbery at a garage and that associate was absent from work was properly admitted to show that defendant and his associate previously planned to commit the robbery. Pen.Code, § 211.

4. Criminal law ⇐424(1)

In robbery prosecution, evidence of discovery of bag of money taken in robbery and of revolver which were hidden in pile of shook at factory where codefendant was employed was properly admitted to show defendant's guilt, notwithstanding that codefendant alone probably hid the money and revolver, since if defendant was identified as codefendant's associate at robbery, defendant was an "accomplice" and therefore guilty as a principal. Pen.Code, §§ 31, 211.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

5. Criminal law ⇐404(4)

In robbery prosecution, a shotgun and rifle which were borrowed by defendant on day of robbery were properly admitted where they were procured by officer from lender and fully identified as the weapons which were borrowed by defendant. Pen.Code, § 211.

6. Criminal law ⇐338(3)

In robbery prosecution, an officer was properly permitted to testify that he found in defendant's automobile cartridges which fitted shotgun and rifle which defendant borrowed from a person on day of robbery, since it was a circumstance tending to show that defendant was connected with the robbery, and defendant's automobile was positively identified as the one which was used by robbers. Pen.Code, § 211.

7. Criminal law ⇐939(1)

In robbery prosecution, denial of motion for new trial on ground of "newly discovered evidence" was not an abuse of discretion where by exercise of reasonable diligence defendant evidently could have adduced alleged new evidence at the trial. Pen.Code, §§ 211, 1181, subd. 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Newly Discovered Evidence".

8. Criminal law ⇐958(1)

The affidavits in support of motion for new trial on ground of newly discovered evidence must show by proper allegations that defendant had no knowledge at time of trial of facts relied upon. Pen.Code, § 1181, subd. 7.

9. Criminal law ⇐938(3)

That defendant convicted of robbery believed his accomplice to be unfriendly or that he would not tell the truth furnished no excuse for failure to call him as a witness so as to require grant of new trial on ground of newly discovered evidence. Pen. Code, §§ 211, 1181, subd. 7.

10. Criminal law ⇐939(2)

Where in robbery prosecution against two defendants before completion of evidence codefendant pleaded guilty and was present in court room and could have been called to the stand, defendant's failure to do so was proof of lack of diligence, and hence defendant was not entitled to new trial on ground of newly discovered evidence to show that defendant did not participate in robbery. Pen.Code, §§ 211, 1181, subd. 7.

11. Criminal law ⇐958(6)

A denial of motion for new trial in robbery prosecution on ground of newly discovered evidence was not an abuse of discretion where affidavits presented sufficient conflict regarding contention that a third party and not defendant participated in perpetrating robbery to warrant denial of the motion. Pen.Code, §§ 211, 1181, subd. 7.

12. Criminal law ⇐958(6)

The denial of motion for new trial in robbery prosecution on ground of newly discovered evidence was not an abuse of discretion where court was warranted in disbelieving affidavit of a convict who had nothing to lose by confession that it was he and not

the defendant who participated in robbery. Pen.Code, §§ 211, 1181, subd. 7.

13. Criminal law ⇐938(1)

The courts will not grant new trials in criminal prosecutions except upon clear and satisfactory showings that alleged "newly discovered evidence" is material, not cumulative, previously unknown to defendant and that he is not guilty of lack of diligence in failing to produce it at the trial, and it must also appear that evidence relied upon would have been likely to have caused jury to reach a different conclusion regarding guilt of defendant. Pen.Code, § 1181, subd. 7.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Wayne Peyton and Leslie Stinson were convicted of robbery accomplished by means of force and fear, and Leslie Stinson appeals.

Affirmed.

S. Luke Howe, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The appellant was jointly charged with Wayne Peyton, under section 211 of the Penal Code, with the crime of robbery accomplished by means of force and fear. Both defendants pleaded not guilty. In the progress of the trial, after much incriminating evidence had been adduced, Peyton withdrew his plea of not guilty and entered a plea of guilty of the offense charged. Neither defendant became a witness at the trial. The appellant was convicted. A motion on his part for new trial was denied. He was thereupon sentenced to imprisonment in state prison for the term prescribed by law. From the order denying his motion for new trial and from the judgment of conviction Leslie Stinson has appealed.

It is contended the verdict and judgment are not supported by the evidence, chiefly for lack of proof positively identifying the appellant as the individual who participated with Wayne Peyton in perpetrating the hold-up. It is asserted the motion for new trial on the ground of newly-discovered evidence should have been granted. A reversal of the judgment is also sought on account of alleged errors committed in the admission of testimony over the objections of the appellant during the course of the trial.

The robbery consisted of a hold-up at the tavern of Louis M. Lasell at number 2317 Broadway, Sacramento, at about half-past two o'clock on the afternoon of February 7, 1941, by two masked and armed men. They stole a sack of coin and greenbacks containing $1,200. Mr. Lasell, the proprietor of the tavern, was in the habit of cashing pay-checks for the defendants and other persons which were usually presented to him on Friday. Both defendants frequented his place of business and knew he usually provided himself with cash on that particular day for the purpose of accommodating his customers. On the afternoon of Friday, the 7th day of February, Mr. Lasell withdrew from the bank several hundred dollars which he brought to his place of business about 2 o'clock. It was contained in a canvas sack which he placed on a desk in his office in the tavern. He locked the door of that room and proceeded to wait on customers at the bar. There were about three customers present at that time.

Wayne Peyton worked at the Capital Box Company's factory at Sacramento. On the second floor of that building a large quantity of shook was stored. The appellant, Leslie Stinson, worked at a sheet metal factory in Sacramento. The defendants were friends and associates. The appellant owned a new, green De Soto sedan automobile. Neither of the defendants worked on February 7th. Peyton was seen at the box factory at 10 o'clock in the morning, but left at that time. He was again seen to enter the plant after the robbery about 4 o'clock in the afternoon and went to the second floor of the factory where the shook was stored, after which he again left the premises. The appellant Stinson, on the evening of February 6th, told Mr. McLaughlin, the superintendent of the sheet metal works, where he was employed, that he would not work the following day because he had to take treatment for an ailment at a doctor's office. Mrs. Cook, who lived with her family in the neighborhood of the tavern, testified that Stinson, who frequently visited in their home, drove his new sedan car to their residence about 2 o'clock on the afternoon of February 7th, and asked her to loan him a rifle, saying that he was going to hunt for jackrabbits. She told him to go to the closet and help himself. He took a .32 caliber rifle and a

shotgun and immediately drove away. At 11 o'clock that same day, a neighbor by the name of Grace Radovich saw two men carefully inspecting the alley adjacent to the tavern. They drove up in a new car. She described one as a tall man and the other as a short man. The driver of the car got out and went down the alley. After a few moments they drove away. It appears that Peyton is a tall man and that Stinson is comparatively short in stature. Both defendants entered the tavern during the forenoon of that day and drank at the bar.

At about 2:30 o'clock in the afternoon of February 7th the defendant Peyton suddenly entered the tavern through a side door, armed with a revolver in each hand. He had a mask of white fabric over the lower portion of his face and he wore dark glasses. At the same time, a short, small man, similarly masked and carrying a shotgun covered with burlap, entered the front door and, taking a position behind a table at the side of the room, removed the burlap from the gun and pointed toward the men at the bar. Peyton commanded the proprietor, Louis Lasell, and the customers who were present, to throw up their hands and to get into an adjacent lavatory "lively if they didn't want to get hurt". They did so. He then entered the back room and ushered Mrs. Lasell into the same lavatory at the point of a revolver, telling her it was a "hold-up". Finding the door of the office locked, he opened the lavatory door and demanded the keys from Mr. Lasell. Because Lasell did not comply with his demand speedily enough to suit him, he violently struck him in the face with his revolver and seriously injured him. He then unlocked the door to the office and seized the canvas sack of money. The two robbers hurriedly left and drove away in Stinson's car, which contained a license plate numbered 82-B-844. During the hold-up the car was parked in or near the alley where soft mud had accumulated from recent rains.

At fifteen minutes past 3 o'clock on that day both defendants drove together in Stinson's car into a Sacramento garage and asked the mechanic, Louis Savio, to hastily change the 1940 license plates on appellant's car for new 1941 plates which were in their possession. The old plates, which were then on his car, were numbered 82-B-844. Mrs. Lola McIntyre, a lady who lived adjacent to the tavern in question, was in the alley and saw the armed robbers rush from the saloon and drive away in that machine. The haste with which they departed and the fact that she saw one of them carrying a gun, led her to become suspicious of them, and she therefore took pains to observe the number of their license plate, which number she at once reported to Mr. Lasell and which information was promptly furnished to the officers, who subsequently identified the car from that number and apprehended the defendants on the same day the robbery was committed. When the defendants appeared at the garage they were in great haste. The mechanic testified that Stinson said "he was in an awful hurry to go down and get his check", and that he wanted "one of my mechanics to help me change the plates so he could get them off that much sooner". The mechanic also testified that Peyton then said "it took an awful long time to change the plates". Evidently they were very impatient and anxious to change the plates and to speedily get away from the garage.

Mr. C. A. Conry, who was working at the Cook residence that day, from which Stinson borrowed the guns, testified that the appellant returned both the rifle and the shotgun the same day at about 3 or 3:15 o'clock that afternoon, and saw him extract the shells from both guns and replace the guns in the closet. He then asked Stinson what luck he had in hunting. Stinson told him that he got one "jack". That statement was evidently false. He had the guns in his possession only about an hour and a half, and he had no time to go hunting for jackrabbits in that brief period of time. Evidently he did not go hunting. The guns were procured and received in evidence at the trial. They were identified as the same ones he borrowed from Mrs. Cook.

When the defendants were arrested and the car was searched on the evening of February 7th, the officers discovered in it a piece of cheesecloth which a witness identified as similar to the material from which the masks of the robbers were evidently made. The officers also found in the car both rifle and shotgun shells which fitted the guns that were borrowed from Mrs. Cook.

A few days after the robbery a workman discovered the canvas sack containing some of the money which was stolen at the tavern, together with a revolver, hidden in a stack of shook on the second floor of the box factory. Evidently Peyton concealed

them in that place at 4 o'clock on the day of the robbery, when he was seen to enter the factory where he was accustomed to work, and to go to the second floor of the building.

One other incident tends to connect the appellant with the robbery. It appears that the car was parked during the hold-up in or adjacent to the alley where the ground was composed of soft mud. Two witnesses testified that when the defendants were arrested late that afternoon there was clearly visible on Stinson's shoes some mud which was not yet dry. The appellant was also impeached by several contradictory statements regarding material facts. He made a statement to the officers, positively denying that he had been in the company of Peyton on the day of the robbery. He denied that he knew anything about the mask material or the cartridges which were found in his machine, and he asserted that no one but himself had ever driven his car. Yet the proof is positive and undisputed that his machine was used in perpetrating the robbery and that Peyton drove the car. Peyton was positively identified by eyewitnesses when his mask fell from his face in the course of the hold-up. Stinson was recognized as corresponding in size, weight and height to the other "short man" who participated in the robbery.

[1] The record contains an abundance of evidence identifying the appellant as the man who participated with Peyton in perpetrating the robbery of which he was convicted. There can be no reasonable doubt he was the person who assisted in carrying out the hold-up. The verdict and judgment are adequately supported in that regard.

[2, 3] The court did not err in overruling appellant's objection to the testimony of Youngblood, an employee at the box factory where Peyton was employed, that he was acquainted with both defendants and that Peyton left his work at the factory at 10 o'clock on the day of the robbery and returned to the factory and went up to the second floor of the building where the shook was stored and where the sack of money and revolver were found at 4 o'clock that same day.

The evidence was competent as tending to show the identity of Peyton's associate in the commission of the crime and that the defendants had previously planned to perpetrate the robbery on that day. Stinson had told the superintendent at his sheet-iron plant the night previous to the robbery that he was not going to work on that day because he had to take treatment from a doctor. It also appears he did not go to work on February 7th. The evidence shows that both of the defendants were seen at the tavern on the morning of the last-mentioned day. The evidence is undisputed that they appeared together in Stinson's automobile at the garage after the commission of the offense. The conduct of Peyton with relation to his absence from work is a circumstance tending to show the defendants previously planned to commit the robbery. The court properly admitted evidence of those facts.

[4] The court did not err in admitting evidence of the discovery of the bag of money and the revolver which were hidden in the pile of shook at the factory. That evidence is also competent. The concealing of the stolen money and the weapon which was used in the robbery was evidence of the guilt of the perpetrators. It is immaterial that Peyton probably hid them in that place. If Stinson was the "short man" who assisted in the hold-up, he was an accomplice in the crime with Peyton and therefore guilty as a principal under the provisions of section 31 of the Penal Code. The hiding of the stolen money and the weapon, regardless of which participant did so, is therefore equally competent as against either defendant.

[5, 6] The court did not err in admitting in evidence the shotgun and the rifle which were borrowed by Mr. Stinson from Mrs. Cook on the day of the robbery. They were procured by the officer from Mrs. Cook and fully identified as the guns which were borrowed by the appellant. Nor did the court err in permitting the officer to testify that he found in Stinson's automobile cartridges which fitted both guns. It is a circumstance tending to show the appellant was connected with the robbery. His machine was positively identified as the one which was used by the robbers. At the time of the robbery, Lola McIntyre saw them hastily get into the machine and flee from the premises. She saw the short man get into the rear seat with a gun in his hand. That evidence was therefore competent.

[7] We are of the opinion the court did not abuse its discretion in denying appellant's motion for a new trial which was

presented on the ground of newly-discovered evidence under section 1181, subdivision 7, of the Penal Code for the reason that by the exercise of reasonable diligence the defendant evidently could have adduced the alleged new evidence at the trial.

[8-10] The affidavits on motion for new trial fail to allege the exercise of diligence to procure during the progress of the trial the new evidence relied upon. The purpose of the new evidence was to show that Stinson was not present and that he did not participate in the robbery. He did not take the witness stand at the trial to deny that he participated in the crime. Nor did he call to the stand his codefendant for that purpose. Neither of the defendants took the stand in his own behalf. Certainly, when Peyton withdrew his plea of not guilty after the trial was partly completed, and entered a plea of guilty, Stinson then had the opportunity of calling him as a witness to prove all the facts relied upon in the affidavits for new trial. It has been held the affidavits must show by proper allegations that the defendant had no knowledge at the time of trial of the facts relied upon. The fact that the defendant believed his accomplice to be unfriendly or that he would not tell the truth furnishes no excuse for failure to call him as a witness. People v. Farber, 19 Cal.App.2d 189, 192, 64 P.2d 1138. It is self-evident in this case that Peyton knew who his associate in the perpetration of the crime was, and that Stinson was bound to presume he had that knowledge. After Peyton pleaded guilty and there was no longer a valid reason for him to conceal the identity of his accomplice, he should have been promptly called by Stinson to disclose that fact. He was actually present in the courtroom and could have been called to the stand. The failure to do so is proof of a lack of diligence on the part of the appellant.

[11,12] Moreover, the affidavits on motion for the new trial present sufficient conflict regarding appellant's contention that Ward and not Stinson participated with Peyton in perpetrating the robbery to warrant the court in denying the motion. Indeed, the truthfulness of appellant's alleged new evidence is open to grave suspicion. The testimony adduced at the trial is very convincing that Stinson was the man who participated in the crime. The record leaves little doubt of that fact. The appellant's affidavit on motion for new trial does not state that he did not participate in the robbery. It merely recites that he did not know that Manuel Ward was the man who assisted Peyton in the crime until after the appellant had been convicted of that crime by the jury. It is possible that three men participated in the crime. No facts are stated to indicate that Stinson exercised diligence to obtain that evidence at the trial. The record disclosed the fact that he exercised no diligence in that regard. The affidavit of Peyton merely avers that "Manuel Buster Ward is the person who aided and participated with him in the robbery". Likewise, the affidavit of Ward merely avers that he assisted Peyton in robbing Lasell. It is a belated and suspicious confession coming from an incarcerated convict who admitted that he had nothing to lose thereby. Ward was a close friend of Peyton, having previously served a sentence with him in state prison, and he was imprisoned in the same cell at the Sacramento county jail with Stinson and Peyton just prior to the motion for new trial. The belated confession under such circumstances is evidence that it was not prompted by conscientious scruples to tell the truth and to save an innocent man from unjust punishment. The counter-affidavit of James Lyons, a police officer, refutes the fictitious admission of guilt on the part of Ward. In the presence of two highway patrol officers, Lyons interviewed Ward a few days prior to the time of the motion for new trial, regarding his recent participation in criminal offenses in Sacramento county. Ward then positively assured him that he was never involved in any robberies in Sacramento county, with the exception of one which he perpetrated November 23, 1940, and one other robbery which occurred "one or two days later". Ward also stated that he had never robbed a barroom or a cafe, or any premises except "service stations". That amounts to a complete denial that he assisted Peyton to rob the Lasell tavern on February 7, 1941. The court was warranted in disbelieving the affidavit of Ward under the circumstances of this case, and in denying the motion for new trial.

[13] The rule is well established that courts will not grant new trials under subdivision 7 of section 1181 of the Penal Code except upon clear and satisfactory showings that alleged newly discovered evidence is material, not cumulative, previously unknown to the defendant and that he is not guilty of lack of diligence in failing to produce it at the trial. It must also appear to

the court that the evidence relied upon would have been likely to have caused the jury to reach a different conclusion regarding the guilt of the defendant. It is said in 8 California Jurisprudence section 452, at page 427, in that regard:

"The claim of newly discovered evidence warranting a new trial is universally looked upon by the courts with distrust and disfavor. Public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf. It has been said that the circumstances that the testimony has just been discovered when it is too late to introduce it is so suspicious that courts require the very strictest showing of diligence."

We are convinced there was no miscarriage of justice in the conviction of the appellant in the present case.

The judgment and the order are affirmed.

PULLEN, P. J., and TUTTLE, J., concurred.



47 Cal.App.2d 235

DENNA et al. v. RED RIVER LUMBER CO. et al.

Civ. 11571.

District Court of Appeal, First District, Division 2, California.

Oct. 9, 1941.

Rehearing Denied Nov. 8, 1941.

Hearing Denied Dec. 2, 1941.

1. Appeal and error ⇐1024(3)

Conflicting evidence as to residence of some defendants on motion to transfer cause to county of defendants' residence because of improper joinder of resident defendant must be addressed to the trier of the facts and not to appellate court, and the rule applies to documentary evidence as well as to oral evidence. Code Civ.Proc. § 395.

2. Venue ⇐68

On motion to transfer cause to county of defendants' residence on ground of improper joinder of resident defendant corporation, where there was direct evidence that such corporation was defunct and had done no business after 1935 and had not participated in incident alleged in complaint, mere proof that some of the plaintiffs had mentioned a company bearing a similar name and that, on examining books of corporate defendant, attorney concluded it was the company referred to, was insufficient to defeat claim of defendants that such corporation had been improperly joined as a defendant. Code Civ.Proc. § 395.

3. Venue ⇐70

Order transferring cause to county of defendants' residence because of improper joinder of a resident defendant was sustained by the evidence. Code Civ.Proc. § 395.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Marvin Denna and others against the Red River Lumber Company and others, for damages for injuries sustained as a result of conspiracy to drive plaintiffs from their homes. From an order transferring the action from the superior court of San Francisco to the superior court of the county of Lassen, plaintiffs appeal.

Order affirmed.

Gladstein, Grossman, Margolis & Sawyer and George Olshausen, all of San Francisco, for appellants.

Earl Warren, Atty. Gen., and John J. Dailey, Deputy Atty. Gen., for respondent Fitch.

Arthur J. Anderson, Dist. Atty., of Susanville, for respondents Johnson et al.

J. A. Pardee and Hardin Barry, both of Susanville, for respondent Pray and three hundred and forty-eight other respondents.

J. Paul St. Sure and Edward Moore, both of Oakland, and Bartley C. Crum, of San Francisco, for respondents Walter and others.

STURTEVANT, Justice.

The plaintiffs have appealed from an order transferring the above-entitled action from the superior court of San Francisco to the superior court of the county of Lassen. The complaint contains seventy-two counts. There were seventy-two plaintiffs and 504 defendants. Two of the latter were corporations. Another was Olin S. Johnson, sheriff of Lassen county. Thirteen others

were deputies of the sheriff. Each count, among others, contains the following allegations:

"V. That plaintiff is informed and believes and therefore alleges that on or about July 12th, 1938, defendants and each of them agreed and conspired with one another to drive plaintiffs and each of them by force and violence from their respective homes, from the Town of Westwood, and from Lassen County.

"VI. That on or about July 13th, the individual defendants and each of them, together with other persons unknown to plaintiffs, assembled together to form a mob in the said Town of Westwood; that defendant Red River Lumber Company (a corporation) gave pickhandles to said individual defendants and also gave said individual defendants the use of its trucks and high pressure fire hoses, and hydrants; that at said time, many members of said mob were also armed with rifles; that defendant Red River Lumber Company, at said time, directed said other defendants, who were then armed with said rifles, pickhandles and high pressure fire hoses, then and there to drive plaintiffs by force and violence from their respective homes, from the Town of Westwood and from the County of Lassen.

"VII. That defendants, who were at all times in this paragraph mentioned, assembled together and armed, as stated in Pargaraph VI, displayed their said weapons to plaintiffs, and each of them, turned the said high pressure fire hoses on plaintiffs, seized plaintiffs, put them in said trucks, and ordered all plaintiffs to leave said Town of Westwood and said County of Lassen within two hours, telling plaintiffs, and each of them, that if they did not do so within two hours, they would machine gun plaintiffs, and each of them."

The defendants' motion to change the place of trial was based on their claim that they resided in the county of Lassen and that the action should be tried there. Code Civ.Proc. sec. 395.

The parties introduced both written and oral evidence. After hearing all of the parties the trial court signed and filed a written order which contained among others the following recitals which the parties treat as findings:

"1. That at the time of the commencement of this action the said moving defendants and each of them with the exception of defendants Willis J. Walker, Brooks Walker and Clinton L. Walker were, ever since have been and now are, residents of the County of Lassen, State of California.

"2. That at the time of the commencement of this action said defendant Willis J. Walker was, ever since has been and now is, a resident of the County of Hennepin, State of Minnesota.

"3. That at the time of the commencement of this action said defendants Brooks Walker, Clinton L. Walker, and each of them were, ever since have been and now are, residents of the County of Alameda, State of California.

"4. That at the time of the commencement of this action none of the defendants named therein was a resident of the City and County of San Francisco, State of California, save and except the defendant Redwood Company, Inc., a corporation.

"5. That such defendant Redwood Company, Inc., a corporation was improperly joined herein as a defendant and has been made a defendant herein solely for the purpose of having this action tried in the City and County of San Francisco, State of California."

[1] The plaintiffs assert that the findings are not supported by the evidence. However, an examination of the record discloses that the most that can be said is, that as to some defendants who were sued as natural persons, the evidence was conflicting. But such fact was addressed to the trier of the facts and not to a court of review. That rule applies to documentary evidence as well as to oral evidence. 2 Cal.Jur. 932, Appeal and Error, sec. 547.

[2] The assertion just mentioned is stressed as to the Redwood Company, Inc. There was direct evidence Redwood Company, Inc., was defunct, that after 1935 it did no business, and that it did not in any manner participate in the incident alleged in the complaint. Moreover, the defendants called as a witness Mr. George Olshausen, one of the attorneys for the plaintiffs. He testified that a questionnaire was prepared and copies were sent to many of the plaintiffs. In the replies some plaintiffs mentioned a redwood company. The witness prepared the complaints. Through an abundance of precaution he attempted to identify such redwood company. On examining some books in San Francisco he found the name Redwood Company, Inc.

He concluded it was the company referred to in the replies above mentioned and, acting on that conclusion, he made Redwood Company, Inc., a party defendant. He was not entitled to do so and his reasons were not sufficient to defeat the claim of the defendants that Redwood Company, Inc., was improperly named as a defendant. San Francisco M. Co. v. Mordecai, 134 Cal.App. 755, 760, 26 P.2d 669.

[3] It follows that the findings are sustained by the evidence. It also follows that the trial court did not err in holding that no one of the defendants was a resident of San Francisco and that the action should be transferred from San Francisco to Lassen County for trial. Smith v. Smith, 30 Cal.App.2d 70, 85 P.2d 473.

The order appealed from is affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concurred.



47 Cal.App.2d 151

CAFE APOLLO CO. v. ANSELM.

Civ. 12555.

District Court of Appeal, Second District, Division 1, California.

Oct. 3, 1941.

1. Evidence ⇐461(1)

Where a provision granting sublessee of floor space in a cafe an option to extend term of sublease was admittedly ambiguous as to term for which sublease could be extended and would have little, if any, meaning if construed as contended by sublessor, it was proper to resort to extrinsic evidence for the purpose of explaining what was actually intended by the parties at time sublease was executed. Civ.Code, §§ 1638, 1643, 1647.

2. Evidence ⇐458

In construing admittedly ambiguous provision of sublease of floor space in cafe, the resort to extrinsic evidence for the purpose of showing the circumstances under which the language of such provision was used and applying it according to the intention of the parties did not constitute admission of parol evidence for the purpose of varying or altering the contract, or of putting a different sense and construction upon its language from that which it would usually bear.

3. Landlord and tenant ⇐86(1)

Where original lease of cafe and sublease of floor space therein by their respective terms terminated on the same day, the most reasonable interpretation of provision of sublease granting sublessee an option for the length of lease of sublessor "at the expiration of this contract under the same terms and conditions as hereinbefore set forth", if such option was accepted by sublessee at expiration of sublease, was that sublessee was given the right to a renewal of sublease for a term concurrent with that of sublessor's new lease, provided that option was exercised. Civ.Code, §§ 1638, 1643, 1647.

4. Landlord and tenant ⇐90(6)

Where sublessee of floor space in leased cafe remained in possession of subleased premises and paid the stipulated monthly rent, according to terms of such sublease, for nearly two years after expiration of sublease, payment of such rental and its acceptance by sublessor constituted an exercise by sublessee of option to extend sublease in compliance with provision of sublease granting option, which required acceptance of option by sublessee at expiration of sublease.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Cafe Apollo Company against Agnes Marie Anselm for unlawful detainer. From a judgment in favor of plaintiff, defendant appeals.

Judgment reversed.

Guy B. Graham and Robert E. O'Neill, both of Los Angeles, for appellant.

O. H. Myrick, of Los Angeles, for respondent.

YORK, Presiding Justice.

On June 1, 1933, Leroy and Anna Holt, as owners, leased to respondent Cafe Apollo Company those certain premises in the city of Los Angeles, known and operated as Italian Village Cafe, for the term beginning on said date and ending September 30, 1937. After expiration of said

lease, respondent held over as a tenant from month to month, under the terms of the lease, until April 26, 1938, when a new lease was executed between the same parties. Before the expiration of the original lease, to-wit, on April 1, 1936, respondent sublet to appellant Agnes Marie Anselm for the period ending on September 30, 1937, certain floor space in said Italian Village Cafe at a rental of $275 per month, said sublease containing, among others, the following provisions:

"It is further agreed that Party of the Second Part (appellant) is hereby granted an option for the length of lease of First Party (Respondent), at the expiration of this contract under the same terms and conditions as hereinbefore set forth.

"If said option is accepted by the Second Party (appellant) at the expiration of this contract.

"It is hereby agreed that this contract shall expire on the same date as the present lease held by the First Party.

"This lease and concession shall begin on the First Day of April, 1936, and shall terminate on the 30th day of September, 1937."

Appellant paid the stipulated rental of $275 per month from April 1, 1936, to and including July 1, 1939, and on or about the last named date received notice from respondent as follows:

"Referring to your month to month tenancy covering a portion of the premises known as Italian Village * * *

"Please take notice that commencing August 1, 1939, the terms of your tenancy will be changed as follows, to-wit: The rental which you will be required to pay for said premises under said tenancy will be raised from the sum of $275.00 per month to the sum of $500.00 per month, payable in advance on the first day of each month commencing August 1, 1939.

"This notice is intended to be a thirty-days notice of change in the terms of your month to month tenancy as provided by section 827 of the Civil Code of the State of California."

Appellant tendered to respondent the sum of $275 on August 1st, and again on September 1, 1939, but respondent refused to accept any sum less than $500 per month, and on August 2d, gave appellant a three-day notice to pay rent or quit the premises, later commencing the instant action in unlawful detainer.

From the judgment which was entered on October 27, 1939, in favor of respondent for the sum of $1,500, being rental for the months of August, September and October, 1939, at the increased rate, appellant sublessee prosecutes this appeal.

From the facts stated, it appears that the original lease and the sublease, by their respective terms, terminated on the same day, i. e., September 30, 1937, and that respondent corporation remained in possession of the premises under the original lease for a period of some seven months after such expiration, or until April 26, 1938, before a new lease was entered into between it and the owners of the property.

It also appears from the record that the only questions before the trial court were (1) the effect of the provisions of the sublease, and (2) the admissibility of certain conversations had between appellant and officers of the respondent corporation with respect to their understanding of such provisions, it being contended by respondent that under the sublease, appellant was granted an option upon the expiration of the original lease, to-wit, on September 30, 1937, "by which she could extend the term of her sublease for a period to and including September 30, 1937; in other words, as long as plaintiff's * * * lease continued in force".

Appellant took the position that the disputed paragraph meant that when respondent executed a new lease with the owners, she would have an option for a lease with the same terms and conditions as the sublease, and for the same period of time as was named in respondent's new lease. In support of such theory, appellant's counsel offered the following stipulation during the trial:

"Mr. Graham: * * * if the defendant were present * * * she would testify that on or about the first day of April, 1936, she entered into a lease with the Cafe Apollo Company, Incorporated, and that lease was signed and delivered to her at that time, and at that time there were present Joseph Tadini, who was an officer of the plaintiff corporation—The Court: to-wit, secretary.

"Mr. Graham: ———and the bookkeeper employed by the plaintiff at that time by the name of Josephine Grainitz, and the defendant. And there was a discussion at that time with reference to this lease * * * and that the defendant

was asked at that time whether or not she understood what that paragraph meant, and she would testify that she said, yes, it means that when the corporation gets their new lease, I will have an option for a lease with the same terms and conditions as this lease, and for the same period of time as the corporation will have in their new lease; and Mr. Tadini said, yes, that is what is meant by that paragraph. * * * Mr. Myrick: We stipulate to that. * * * Mr. Graham: Will counsel stipulate that if the defendant were present, she would so testify?

"Mr. Myrick: Yes, I will so stipulate, but most of that we object to on the ground —we object to anything said at all with reference to what was said at the time the sublease was made, on the ground that it is incompetent, irrelevant, and immaterial, and not binding on the corporation, and it is an attempt to vary the terms of a written instrument by parol testimony. We contend that everything is deemed to be merged in the lease at the time it was made.

"The Court: Is there any ambiguity about that clause of the lease that Mr. Graham has referred to?

"Mr. Myrick: It is very ambiguous, yes, but it is written in there and she took it for what it was worth."

The trial judge reserved his ruling on the respondent's objection to the admission of the evidence by stipulation until he had decided the case.

Subject to such objection, appellant's counsel made the following offer:

"Now, if Joseph Tadini were present and called as a witness * * * (he) would testify that he heard that conversation * * *. If the defendant were present, she would testify that after the plaintiff obtained a new lease she asked Joseph Tadini if she was to get a new lease, and he answered, no, you have a lease for the same length of time as we have. That was after they had obtained their new lease * * * about one month after the plaintiff had obtained a new lease."

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity" (Sec. 1638, Civ.Code); "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties" (Sec. 1643, Civ.Code); and "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates" (Sec. 1647, Civ.Code).

Respondent admits the disputed paragraph is ambiguous, but insists that appellant is nevertheless bound by it. Appellant's term under said sublease ran from April 1, 1936, to and including September 30, 1937. Respondent's original lease with the owners of the property ran for a term from June 1, 1933, to and including September 30, 1937. Why, then, should appellant be interested in procuring an option (as is contended by respondent) "by which she could extend the term of her sublease for a period to and including September 30, 1937", something which she already had under the terms of her sublease?

[1-4] A reading of the disputed paragraph of the sublease readily discloses that it has little, if any, meaning, unless it refers to the so-called "new" lease between respondent and the owners of the property. It would therefore appear to be proper to resort to extrinsic evidence for the purpose of explaining what was actually intended by the parties at the time when the sublease was executed. As was pertinently stated in Balfour v. Fresno C. & I. Co., 109 Cal. 221, 225, 41 P. 876, 877: "This is not allowing parol evidence for the purpose of varying or altering the contract, or of putting a different sense and construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intention of the parties."

From the facts and circumstances shown by the record herein, it would appear that the most reasonable interpretation of the paragraph in question is that upon expiration of appellant's sublease, she was given the right to a renewal thereof for a term concurrent with that of respondent's "new" lease, provided the option for such renewal was accepted by appellant when said sublease by its terms expired. It is admitted that appellant remained in possession and paid the stipulated rental of $275 per month for nearly two years after the expiration of her sublease. Such payment of the rental and its acceptance by respondent constituted an exercise of such option by appellant. As result, the trial court's finding to the effect that ap-

pellant, ever since April 1, 1936, has used and occupied, and does now use and occupy said floor space, "as such month to month tenant", is not supported by the evidence.

For the reasons stated, the judgment is reversed.

DORAN and WHITE, JJ., concurred.



47 Cal.App.2d 244

RIESS v. SANFORD et al.

Civ. 11867.

District Court of Appeal, First District, Division 2, California.

Oct. 9, 1941.

1. Injunction ⇐128
Master and servant ⇐66

In action for damages for unlawful manufacture and sale of cactus phonograph needles of type manufactured by plaintiff, and for injunctive relief, evidence sustained judgment against plaintiff's former employee on ground that he entered the employment and acquainted himself with plaintiff's trade secrets, with secret intention of gathering such information for purpose of using it in future competition with plaintiff, and that during the employment the employee secretly entered into contract with plaintiff's competitor under which employee made use of trade secrets to learn species and source of supply of cactus spines used by the plaintiff. St.1937, p. 260, § 2860.

2. Master and servant ⇐60

An agent or employee having been entrusted in the course of his employment with secret and valuable information known only to his employer may not thereafter utilize the secret knowledge against interests or to the prejudice of the employer. St.1937, p. 260, § 2860.

3. Injunction ⇐56

The disclosure by an employee of trade secrets and other confidential information obtained by him in the course of his employment is a "breach of trust", and a court of equity will restrain any threatened disclosure or use thereof to the detriment of the employer, and the character of the secrets if peculiar and important to the business is not material, and there may be secrets of trade, title, process of manufacture or any other secrets of the employer important to his business. St.1937, p. 260, § 2860.

See Words and Phrases, Permanent Edition, for all other definitions of "Breach of Trust".

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Floyd G. Riess, etc., against Jordan H. Sanford and another to restrain manufacture and sale of phonograph needles made of and from cactus spines of the species, type and character manufactured by the plaintiff, and for damages for unlawful manufacture and sale of such needles. From an adverse judgment, named defendant appeals.

Affirmed.

Glikbarg, Wolf & Selig and Samuel M. Roeder, all of San Francisco, for appellant.

Glickman & Glickman, of Oakland (A. W. Glickman and J. Clayton Orr, both of Oakland, of counsel), for respondent.

NOURSE, Presiding Justice.

The plaintiff had a judgment against defendant Sanford restraining him from manufacturing or selling cactus phonograph needles made of and from cactus spines of the species, type and character manufactured by the plaintiff. Damages for the unlawful manufacture and sale of such needles were awarded plaintiff against this defendant in the sum of $2,792. Judgment also went against the co-defendant granting similar injunctive relief and damages in the sum of $1,500. This defendant did not appeal and the judgment against it has become final. The defendant Sanford has appealed on a typewritten record.

The trial court found that the plaintiff had established a valuable business throughout the United States in the manufacture and sale of cactus phonograph needles under the trade name of "Kacti"; that in connection with said business he became the owner of certain trade or business secrets consisting of information as to the type of material used in the manufacture of said needles and the source of said material.

The defendant, who knew nothing about the business, entered the employment of the plaintiff and during a period of three years in the course of his employment became acquainted with and familiar with all the secrets of his employer with the secret intention of gathering such information for the purpose of using it in future competition with plaintiff. During such employment he secretly entered into a contract with his co-defendant, a competitor of the plaintiff in the manufacture and sale of phonograph needles, under which he undertook to make use of these trade secrets to learn the species of cacti used in the manufacture of said needles and the source of supply where such spines could be obtained, and to use such information in the manufacture of such needles and their sale to his co-defendant. Before entering into this contract the defendant learned from his employer that his co-defendant had unsuccessfully endeavored to obtain from plaintiff the exclusive right of distribution and sale of the phonograph needles manufactured by the plaintiff.

[1] The evidence fully supports the findings. The needles manufactured and sold by the plaintiff were made from a species of cacti known as the Sahuaro which grows in a particular belt north of Tucson, Arizona, and is not found in any other part of the country. This is one of some eight hundred species of cacti and the only one suitable for this purpose. These facts having been made known to the defendant, he secretly visited the tract on two occasions during his employment for the purpose of learning the source of supply and the method of collecting and delivering the spines. While still employed by the plaintiff, this defendant secretly manufactured a large number of needles either from the supply which his employer had on hand or from material obtained by the defendant during his employment from the Arizona field. These he exhibited to his co-defendant in his negotiations for the contract above referred to, and the plaintiff testified that after the defendant had left his employment he discovered that the defendant had failed to deliver about 25 per cent of the needles he should have received out of the raw material which the plaintiff had put in his possession.

In their briefs each party states four questions which represent his views as to the questions involved on the appeal, and both devote the greater part of their briefs to a discussion of the evidence. We disregard the points stated as well as the discussion of the evidence because whatever conflict there may be in the testimony of the witnesses the undisputed evidence amply supports the findings of the trial court, and that disposes of the question of the sufficiency of the evidence to support the findings.

[2, 3] The controlling point of law involved is the accepted doctrine that no agent or employee having been intrusted in the course of his employment with secret and valuable information known only to his employer, may thereafter utilize this secret knowledge against the interests or to the prejudice of his employer. 14 Cal.Jur. pp. 198, 199. This principle is well stated in 28 Am.Jur. p. 304, as follows: "The disclosure by an employee of trade secrets and other confidential information obtained by him in the course of his employment is a breach of trust, and it is well settled that a court of equity will restrain any threatened disclosure or use thereof to the detriment of the employer. The character of the secrets, if peculiar and important to the business, is not material. They may be secrets of trade, secrets of title, secrets of process of manufacture, or any other secrets of the employer important to his business." It is carried into the State Labor Code, St.1937, p. 260, section 2860, reading: "Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment." The doctrine has been approved in this state in Empire Steam Laundry v. Lozier, 165 Cal. 95, 100, 102, 130 P. 1180, 44 L.R.A., N.S., 1159, Ann.Cas.1914C, 628; Pasadena Ice Co. v. Reeder, 206 Cal. 697, 702, 703, 275 P. 944, 276 P. 995; Gloria Ice Cream, etc., Co. v. Cowan, 2 Cal.2d 460, 464, 41 P.2d 340; Langendorf United Bakeries v. Phillips, 5 Cal.2d 150, 153, 53 P.2d 363; Hollywood Motion Picture Equipment Co. v. Furer, 16 Cal.2d 184, 188, 105 P.2d 299, 301. In the latter case the court quoted with approval the statement in DuPont, etc., Co. v. Masland, 244 U.S. 100, 102, 37 S.Ct. 575, 61 L.Ed. 1016, that the "starting point" is not property or due process of law but the confidential relation between the parties and that "Whether the plaintiffs have any valuable secret or not the de-

fendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be * * * [and] the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations. If there is any disadvantage in the fact that he knew the plaintiffs' secrets, he must take the burden with the good."

The judgment is affirmed.

SPENCE, J., and DOOLING, J., pro tem., concurred.



47 Cal.App.2d 234

MEYERS v. JEWISH CONSUMPTIVE & EX-PATIENTS RELIEF ASS'N OF CALIFORNIA et al.

Civ. 12639.

District Court of Appeal, Second District, Division 2, California.

Oct. 8, 1941.

Waters and water courses ⇐126(2)

Evidence justified denial of damages and injunction to plaintiff on ground that defendants did not divert surface waters upon land of plaintiff, and that any such flow was result of a heavy rainfall and flood and was an act of God and not of the defendants.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Suit by George E. Meyers against Jewish Consumptive & Ex-Patients Relief Association of California and others, for damages allegedly resulting from diverting excessive flow of surface waters onto plaintiff's property, and for an injunction against further such acts. From an adverse judgment, the plaintiff appeals.

Affirmed.

A. Edward Nichols, of Hollywood, for appellant.

Chaim Shapiro and Harry Sherr, both of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiff appeals from an adverse judgment in a suit brought by him against defendant corporation and two of its employees.

Defendant corporation in the year 1938 maintained its buildings and grounds on the top of a hill overlooking the premises occupied by plaintiff. On March 2, 1938, excessive rainfall amounting to 5.88 inches fell in twenty-four hours, and flood waters running down the hill damaged the house and personal property of plaintiff. It appeared that plaintiff had one-sixtieth interest in the real property, evidenced by a quitclaim deed for which the owner testified she had received not more than five dollars. The personal property was largely old magazines and newspapers.

Plaintiff attributed the flood damage to acts of defendants which he claimed diverted onto the premises occupied by him an excessive flow of surface waters, and asked damages therefor and an injunction against further such acts. During the trial the judge inspected the property in question and credible testimony was introduced to show that the acts of defendants and the improvements made by them had actually lessened rather than increased the flow of water in the direction of the land occupied by plaintiff. The trial court properly found upon ample evidence that defendants did not divert water upon the land of plaintiff, and that any such flow of water was the result of the heavy rainfall and flood and was an act of God and not of the defendants. Pursuant to such finding the trial court concluded that plaintiff was not entitled to damages nor to an injunction restraining defendants from doing acts which it appeared they had neither done nor contemplated doing.

In view of our determination as to the sufficiency of the evidence no other questions raised by plaintiff on this appeal require discussion.

Judgment affirmed.

WOOD, Acting P. J., and McCOMB, J., concurred.

In re BROAD'S ESTATE.

Civ. 2918.

District Court of Appeal, Fourth District, California.

Oct. 7, 1941.

As Modified Nov. 3, 1941.

Hearing Granted Dec. 29, 1941.

1. Wills ⇐849

Under Probate Code relating to void bequests to charitable organizations, and providing that all property bequeathed contrary to code should go to certain heirs if and to the extent that they would have taken such property but for such devises or legacies, such heirs are to take such property when it is neither disposed of by the invalid provision of the will nor by any other provision which is valid. Probate Code, §§ 41, 126.

2. Wills ⇐858(1)

Where nothing to the contrary appears in a will, the intention to include all ineffectual bequests in the residuary clause is presumed. Probate Code, § 126.

3. Wills ⇐858(1)

Where there was a valid residuary clause covering all portions of the estate not otherwise effectually disposed of, and no contrary intent appeared in the will, the property included in the void bequests to charitable institutions was distributable to the heirs at law of the deceased. Probate Code, §§ 41, 126.

4. Wills ⇐566

Where testator at time will was made and at time of his death possessed an "indebtedness", a part of which he disposed of in second clause of his will and remainder of which he attempted to dispose of in the third clause of his will, which was void, provision of will leaving all "money" remaining in the estate after payment of indebtedness and the costs and expenses of administering the estate did not include $6,000 indebtedness which failed, particularly where will had a residuary clause.

See Words and Phrases, Permanent Edition, for all other definitions of "Money".

5. Wills ⇐13(1)

A residuary clause of will was void so far as charitable associations were concerned because made contrary to provisions of the Probate Code. Probate Code, §§ 41, 126.

6. Wills ⇐862

Where residuary clause of will was void as respects charitable associations and the property that would have gone to such associations was not otherwise disposed of by the will, such property went to testator's heirs as provided by the Probate Code and not to the other residuary legatees. Probate Code, §§ 41, 126.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Proceeding in the matter of the estate of William J. Broad, deceased, wherein the Security First National Bank of Los Angeles, executor, was a party, and William Broad and R. F. Pierce and another were contestants. From a judgment interpreting and applying portions of will executed by decedent, R. F. Pierce and another appeal.

Judgment reversed with directions to enter judgment in conformity with opinion.

Duckworth, Mussell & King, of San Bernardino, for appellants.

Fred A. Wilson, of San Bernardino, for respondent William Broad.

BARNARD, Presiding Justice.

This is an appeal from a judgment interpreting and applying portions of a will executed on April 8, 1939, by William J. Broad, who died on April 11, 1939. The testator left an estate, appraised at $28,331.49, including some real estate, several promissory notes, and about $2,700 in the bank. Nearly all of his estate was mentioned in devises and bequests of specific property, most of which were to friends and to a cousin. Among other things, he gave to the appellants an interest in certain real property, "all indebtedness owed to me by them" and "all money remaining in my estate after payment of my indebtedness and the costs and expenses of administering my estate". The appellants were also included in the residuary clause. The third paragraph of the will gave a $6,000 balance of a certain indebtedness to two charitable or benevolent societies or corporations. The ninth paragraph gave all the rest, residue and remainder of testator's estate, both real and personal, in equal shares to nine individuals, including these two appellants, and to three charitable or benevolent societies or corporations.

In this proceeding for interpretation of portions of the will, the court found and adjudged that the bequests to the charitable organizations under the third and ninth paragraphs of the will were void under the provisions of section 41 of the Probate Code, and it was ordered that the property represented by these bequests, "so failing of testamentary disposition", be distributed to the heirs at law of the deceased. It was further found that these heirs at law were certain nephews and nieces. From the judgment entered Mr. and Mrs. Pierce have appealed.

It is first contended that under the circumstances here appearing the portions of the estate represented by the ineffectual bequests to the charitable institutions are not distributable to the heirs at law. This contention must be sustained, except as it relates to the residuary clause.

[1] The respondent William Broad relies on that part of section 41 of the Probate Code, which reads: "All property bequeathed or devised contrary to the provisions of this section shall go to [certain heirs] if and to the extent that they would have taken said property as aforesaid but for such devises or legacies." It is argued that the purpose of section 41 is to protect the heirs at law, that this section contains a special law of succession, and that there would be no purpose in declaring that the existence of such heirs should invalidate such a bequest if the heirs were not to profit by it. This argument overlooks the provision in the quoted part of the section that the designated heirs are to take if and to the extent that they would have taken except for the invalid provisions of the will. In other words, such heirs are to take such property when it is neither disposed of by the invalid provision of the will nor by any other provision which is valid. In the instant case the residuary clause, which is in no way questioned, disposed of all the rest, residue and remainder of the testator's estate. Section 126 of the Probate Code provides that such a residuary clause passes all the real or personal property which the testator "was entitled to devise or bequeath at the time of his death, not otherwise effectually devised or bequeathed by his will".

[2] Where nothing to the contrary appears in a will, the intention to include all ineffectual bequests in the residuary clause is presumed. Estate of Walker, 196 Cal. 323, 237 P. 1070; Estate of Kelleher, 205 Cal. 757, 272 P. 1060, 1062. In the latter case, the court said:

"The rule is stated in the Estate of Upham, 127 Cal. 90, 59 P. 315: 'Where the residuary bequest is not circumscribed by clear expressions in the instrument and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid disposition, or other reason'. In O'Connor v. Murphy, 147 Cal. 148, 81 P. 406, the matter was discussed in the following language: 'It is not enough that it appears from a clause of the will, simply that the testator intended to make a particular devise of a portion of his estate which, however, for some reason, failed to be effectual; because, if that were the rule, it would apply to every lapsed or invalid bequest, and the residuary clause could never be effectual to carry it.

" 'On the contrary, it must appear unequivocally that it was the intention of the testator, not only to make a particular devise, but it must further appear from the terms of such devise, or from other provisions of the will, that it was the intention of the testator, that the residuary clause should not in any event carry such bequest should it become inoperative for any reason. The intention to include all ineffectual bequests in the residuary clause is presumed; the intention to exclude must appear from appropriate language evidencing that intention, or by clear implication.' "

In Estate of Fanning, 8 Cal.2d 229, 64 P. 2d 951, the court said: "The devise and bequest of the residue of an estate passes the title of all the property of the estate 'not otherwise effectually devised or bequeathed by his will.' Section 126, Probate Code."

[3] There being a valid residuary clause covering all portions of the estate not otherwise effectually disposed of, and no contrary intent appearing in the will, it must be held that the property included in the void portions of this will is, under the code sections and the authorities, not distributable to the heirs at law of the deceased.

[4] The appellants further contend that the property which the testator endeavored to give to charitable organizations should be ordered distributed to them alone and not to the nine persons, including them, who were named as beneficiaries in the residuary clause. They rely upon a part of the fourth paragraph of the will, reading as follows: "I also give, devise and bequeath to the said R. F. Pierce and Alberta Pierce all money remaining in my estate after pay-

ment of my indebtedness and the costs and expenses of administering my estate." It is contended that it was the duty of the executor to collect all debts owing to the estate, including this $6,000 debt, and after paying expenses and costs of administration to pay the remaining cash to the appellants under this provision. The testator, at the time the will was made and at the time of his death, possessed an "indebtedness" a part of which he disposed of in the second clause of his will and the remainder of which he attempted to dispose of in the third clause of his will. He also had some $2,700 in the bank. Having previously made a specific reference to this indebtedness in two clauses of his will it is obvious that the testator had no intention of having the amount thereof collected and turned into money for the purpose of including it in the "money" bequest to these appellants, provided for in the fourth clause of the will. To thus interpret the clause here in question would render a number of other clauses in the will nugatory and would obviously do violence to the intention of the testator. Moreover, if the testator had intended the clause here in question to pass the property not otherwise disposed of there would have been no reason for inserting a residuary clause. Under the circumstances here appearing, it must be held that the word "money" in the quoted portion of the fourth paragraph was not intended to, and does not include the proceeds of the indebtedness mentioned in the second and third paragraphs of the will.

[5, 6] A question remains as to the effect of the residuary clause which gave the residue in equal shares to nine individuals and to three charitable associations. This gift to these charities was also void. That portion of the estate, amounting to one-fourth of the residue, was not disposed of by any other valid provision of the will. The testator gave three-fourths of the residue to the nine named individuals, but he did not give them the remaining one-fourth. It follows that this one-fourth of the residue goes to the heirs, under section 41 of the Probate Code.

The judgment is reversed with directions to the trial court to enter a judgment in conformance with the views herein expressed. The appellants will recover their costs on appeal.

MARKS and GRIFFIN, JJ., concurred.

47 Cal.App.2d 176

MURPHY v. DRAKES BAY OYSTER CO. et al.

Civ. 11864.

District Court of Appeal, First District, Division 2, California.

Oct. 6, 1941.

1. Navigable waters ⇐36(7)

In action by holder of tide land patents to quiet title to such lands, the inference that extension of both high tide line and low tide line seaward from the location of such lines at time patents were granted was the result of "accretions" was properly drawn from fact that land lying seaward of original low tide line was composed of sand and mud and undisputed testimony that certain of the land below ordinary high tide line at time of original survey by gradual alluvial deposit or some sort of accretion was raised above tide line, and hence warranted judgment quieting title to tide lands lying seaward of original patents.

See Words and Phrases, Permanent Edition, for all other definitions of "Accretion".

2. Navigable waters ⇐36(7)

In action by holder of tide land patents to quiet title to lands to the line of ordinary low water, which due to accretions was seaward of location of such line at time patents were granted, burden rested upon defendant to prove existence of other tide lands entitled to an apportionment of such accretions and not upon plaintiff to negative the existence of such tide lands.

3. Navigable waters ⇐36(7)

In action by holder of tide land patents to quiet title to lands to the line of ordinary low water, which due to accretions was seaward of location of such line at time patents were granted, in the absence of showing as to existence of other tide lands, title to which had been retained by state, entitled to an apportionment of such accretions, title to lands to the line of ordinary low water, including all such accretions, was properly quieted in plaintiff.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Leland S. Murphy against the Drakes Bay Oyster Company and others to quiet title to certain tide lands and for damages for named defendant's occupation and use of a portion of such lands for oyster culture during a period of three years.

From a judgment in favor of plaintiff, the named defendant appeals.

Judgment affirmed.

Crist & Beene, of Palo Alto, for appellant.

Martinelli & Gardiner, of San Rafael, for respondent.

DOOLING, Justice pro tem.

This appeal is taken by Drakes Bay Oyster Company, a corporation, from a judgment quieting plaintiff's title to certain tide lands lying between the lines of ordinary high tide and ordinary low tide, and for $300 damages for appellant's occupation and use of a portion of such tide lands for oyster culture during a period of three years.

These tide lands lie within certain esteros or fingers running from Drakes Bay into the upland. Plaintiff by mesne conveyances has become the owner of the uplands bordering on these esteros and also of five tide land patents issued by the state of California in 1874 to the tide lands at that time lying within such esteros. The evidence showed that at the present time both the lines of high and low tide lie seaward of the lines of the original grants.

The judgment quiets plaintiff's title in the tide lands in question to the present line of ordinary low water in each case. Appellant contends that this judgment is erroneous because there is no evidence that the tide lands lying seaward of the original patents are the result of accretions.

[1] The only direct testimony on the subject was given by the witness Oglesby who was employed by both parties to make a survey of the disputed tide lands. He testified that certain of the land below the ordinary high tide line at the time of the original survey by gradual alluvial deposit or some sort of accretion is now above the tide line. It also appears that the disputed land lying seaward of the original low tide line is composed of sand and mud. The inference that the extension of both high tide line and low tide line seaward from the lines of the original surveys is the result of accretions was properly drawn from these facts.

Appellant further urges that the court erred in not apportioning these accretions between the tide lands owned by plaintiff and other tide lands title to which was retained by the state, citing Fraser's Million Dollar Pier Co. v. Ocean Park Pier Co., 185 Cal. 464, 197 P. 328 198 P. 212, and Swarzwald v. Cooley, 220 Cal. 438, 31 P.2d 381.

[2, 3] The difficulty with this argument is that the record is entirely devoid of any proof that there were any tide lands along the shores of the esteros in question retained by the state. The several patents to plaintiff's predecessor describe the tide lands conveyed by the state by running a course along the outer boundaries of the upland grant, which ran to the line of ordinary high tide, and closing it in each instance by "thence leaving said boundary and following the line of ordinary low water * * * to the place of beginning". The evidence shows that the banks along these esteros are from two to more than twenty-five feet in height. Plaintiff having proved these facts and further proved that the line of low tide adjacent to the low tide line described in these patents now lies seaward of the original line, in the absence of any showing that there had ever been any other tide lands to which a portion of these accretions might have attached, was entitled to the judgment given. It was not incumbent upon plaintiff to prove the negative that there were no other tide lands adjacent to any portion of these accretions, but the burden was on defendant to prove that such tide lands in fact existed. In the absence of such proof the court was entitled to find that all of such accretions were to the only tide lands proved to lie adjacent thereto. It is conceded, as it must be, that if these accretions were to plaintiff's tide lands the judgment quieting plaintiff's title thereto was proper. City of Oakland v. Buteau, 180 Cal. 83, 87, 179 P. 170.

Appellant does not question the judgment for $300 if the judgment quieting title is correct.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



47 Cal.App.2d 207

SCOTT v. DILKS.

Civ. 12513.

District Court of Appeal, Second District, Division 2, California.

Oct. 7, 1941.

Rehearing Denied Nov. 3, 1941.

Hearing Denied Dec. 2, 1941.

1. Judgment ⇐443(1)

Where jurisdiction of court has been imposed upon and prevailing party by some

extrinsic fraud has prevented a fair submission of controversy, equity will relieve injured party from effect of judgment.

2. Judgment ⇐443(1)

Where a stipulation for judgment induced by fraudulent representations of defendant withdrew issues from judicial consideration and there was no judicial examination of facts, equity would relieve injured party from effect of judgment under rule authorizing such relief where jurisdiction of court has been imposed upon and prevailing party by some extrinsic fraud has prevented a fair submission of controversy.

3. Judgment ⇐443(1)

The submission of stipulation for judgment to court for signing of formal judgment did not put it beyond power of court of equity to set aside judgment in subsequent action directly attacking former judgment on ground of extrinsic fraud.

4. Limitation of actions ⇐195(5)

Where plaintiff sues for fraud, seeking to avoid three-year period of limitation because he did not discover it until after perpetration, he must not only show that he did not discover the fraud until within three years, and that it was committed under such circumstances that his knowledge at time will not be presumed, but must also set forth time when and circumstances under which facts constituting fraud came to his knowledge.

5. Limitation of actions ⇐100(4)

An action to set aside judgment on stipulation, induced by fraudulent representations of defendant, was not barred by limitations, notwithstanding that action was instituted nearly 10 years after rendition of judgment on May 24, 1929, where plaintiff did not learn of falsity of defendant's representations until April, 1938, from a former employee of defendant, and made a prompt independent inquiry, and commenced action less than a year later. Code Civ.Proc. § 338.

6. Judgment ⇐443(1)

In case of direct attack on judgment on ground that judgment was procured by fraud, doctrine of "res judicata" is not applicable.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action in equity to set aside judgment by Harry T. Scott against William H. Dilks. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Fred Mansur, of Los Angeles, for appellant.

Paul Overton, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Defendant appeals from a judgment for plaintiff in an action in equity to set aside a judgment in a former action in which the same plaintiff brought suit against the same defendant to dissolve a partnership and for an accounting.

Plaintiff and defendant had been partners in the business of making and selling patented oilers. Less than one year after the partnership was formed plaintiff sued defendant for dissolution of the partnership and for an accounting. Prior to the trial of that action the parties entered into a stipulation for judgment predicated upon a statement by defendant as to the financial condition of the partnership. Pursuant to that stipulation judgment was signed May 24, 1929. It awarded $10,000 to plaintiff, awarded the business to defendant and gave the right to each to use the patent to manufacture the oiler.

Nearly ten years later plaintiff filed this suit against defendant. The amended complaint was filed January 18, 1939, and sought to vacate the stipulated judgment above referred to and to secure an accounting on the grounds of extrinsic fraud on the part of defendant in securing the stipulation for the former judgment. Plaintiff contends and the trial court in this case found that defendant's representations as to the assets and financial condition of the partnership in 1928 and 1929 were knowingly false and untrue; that they induced plaintiff to enter into the stipulation for a consent judgment in the first case and that such first judgment should be set aside. The court further found that an accounting showed that, allowing credit for the $10,000 already paid, plaintiff was entitled to judgment for an additional amount of $1,500 with interest from May 24, 1929. Thereupon judgment was rendered for plaintiff awarding that amount and including provisions similar to those contained in the former judgment, dissolving the partnership and giving the parties equal rights to use the patent.

On appeal defendant questions the right of plaintiff to bring such an action, challenges the sufficiency of evidence to support the findings and asserts that the action was barred by the statute of limitations and was res adjudicata.

A review of the evidence shows ample support for the findings. Defendant had control of the books of the partnership, and they did not show the true financial operations and condition. Among other matters it appears that $4,781.76 in good accounts were deducted as "bad debts" and that $1,700 was set up as loss on old oilers which were brought in to be exchanged for new ones, although each such exchange required payment by the customer of a sum which more than covered the entire cost of the new oiler plus a profit.

[1-3] Where the jurisdiction of the court has been imposed upon and the prevailing party by some extrinsic fraud has prevented a fair submission of the controversy, equity will relieve the injured party from the effect of the judgment. Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P. 184; Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L.R.A.,N.S., 579. Because of the stipulation, induced by the fraudulent representations of defendant, there was no judicial examination of the facts prior to judgment in the former case in 1929. The issues were as effectually withdrawn from any judicial consideration as if they had never been submitted to the court. The fact that the parties had submitted their stipulation to the court for the signing of a formal judgment in no way put it beyond the power of a court of equity to set aside that judgment in an action such as this, which directly attacks the former judgment on the ground of extrinsic fraud. Bergin v. Haight, 99 Cal. 52, 33 P. 760; Milekovich v. Quinn, 40 Cal.App. 537, 181 P. 256.

[4, 5] Passing then to defendant's suggestion that plaintiff's right of action was barred by the statute of limitations (Code Civ.Proc., § 338), we find that it is not supported by the evidence nor the findings. As stated in Galusha v. Fraser, 178 Cal. 653, at page 657, 174 P. 311, at page 312: "Where the plaintiff sues for relief on the ground of fraud, and seeks exemption from the three-year period of limitation for the reason that he did not discover the fraud until after it was perpetrated, he must not only show that he did not discover the fraud until within the three years next before the action was begun, and that the fraud was committed under such circumstances that he would not be presumed to have had knowledge of it at the time, but he must also set forth the times and circumstances under which the facts constituting the fraud came to his knowledge, so that the court may determine upon the allegations of the complaint whether the discovery was within that period. Lady Washington [Consol. Co.] v. Wood, 113 Cal. [482], 487, 45 P. 809."

Plaintiff has complied with these requirements. Plaintiff alleged and testified and the trial court found that he did not learn of the falsity of said statements and representations until some time during the month of April, 1938, when he was apprised thereof by one Westhaver, who had continued as manager of the defendant's business until its discontinuance in 1933 and had then departed and remained away from the county of Los Angeles until 1938. This suit was commenced less than a year later.

Defendant relies upon Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268, and says that "plaintiff in this case alleges that he was kept from seeing the books, that he was unable to obtain a financial statement and that he was not permitted to know the details of the business. All of which should have put him upon his guard and have caused him to question the financial statement presented to him." The excuse and explanation for his delay in discovering the fraud was adequately covered by the amended complaint and by the evidence that plaintiff's first knowledge came from a former employee of defendant in April, 1938, leading to prompt independent inquiry to corroborate it.

[6] As to defendant's final suggestion, it needs only to be observed that "the doctrine of res adjudicata has no application to a direct attack". 15 Cal.Jur. 9, sec. 120. In a case of a direct attack upon the ground that a judgment has been procured by fraud "it is well established that the principle of res adjudicata invoked here does not apply". Lake v. Bonynge, 161 Cal. 120, 118 P. 535, 540.

Judgment affirmed.

MOORE, P. J., and WOOD, J., concurred.

SAN FRANCISCO BANK v. ST. CLAIR.

Civ. 12515.

District Court of Appeal, Second District, Division 1, California.

Oct. 7, 1941.

As Amended on Denial of Rehearing and On Application for Taking Additional Evidence Nov. 5, 1941.

Hearing Denied Dec. 4, 1941.

1. Executors and administrators ⇐437(7)

Declaration of executrix in her first and final account and petition for distribution that contingent liability of decedent and his estate for amount of a deficiency remaining after trust deed foreclosure, for which claim had been filed, was eliminated and was void was in effect a "rejection" of the claim and hence the mortgagee was required to bring suit thereon within three months after receiving written notice of such rejection. Probate Code, § 714.

See Words and Phrases, Permanent Edition, for all other definitions of "Rejection".

2. Executors and administrators ⇐437(7)

Where executrix rejected claim in her first and final account and petition for distribution by stating therein that the contingent liability of decedent and his estate for amount of deficiency judgment remaining after trust deed foreclosure for which a claim had been filed was eliminated and was void, and the account and petition were received and studied by mortgagee, the mortgagee could not complain that it had failed to receive written notice of rejection of its claim, and action on the claim brought seven months after objections and exceptions to the account and petition were filed was barred by 3-month limitation provided by probate code. Probate Code, §§ 712, 714.

3. Mortgages ⇐375

Where notes which were secured by trust deed, and were endorsed by decedent, fell due April 18, 1933, action brought June 7, 1938, against decedent's estate for amount of deficiency remaining after foreclosure of trust deed was not barred by four-year limitation, in view of moratorium laws under which the time for bringing such a suit was extended to July 1, 1939. Code Civ.Proc. § 337, subd. 1; St.1937, p. 460, § 19.

4. Mortgages ⇐375

Under moratorium laws, a suit for deficiency judgment which was not filed within three months after foreclosure sale as provided by statute, but was filed within the time prescribed by the moratorium laws, was filed in time and was not barred by limitation. Code Civ.Proc. §§ 337, subd. 1, 580a; St.1937, p. 460, § 19.

5. Executors and administrators ⇐437(3)

The evident purpose of the statute requiring action to be brought against a decedent's representatives within one year after issuing letters testamentary is to secure to one having a cause of action against decedent one year after appointment of legal representative in which to bring his action. Code Civ.Proc. § 353.

6. Executors and administrators ⇐437(3)

Under statute providing that an action may be commenced against a decedent's representatives within one year after issuing of letters testamentary, if it is necessary in order that such person shall have one year after appointment of legal representative in which to bring action, the action may be brought after expiration of the general limitation and otherwise the statute has no effect on his rights, and the statute does not shorten the period of limitations provided by the general statute. Code Civ.Proc. § 353.

7. Executors and administrators ⇐437(3)

An action against decedent's estate for a deficiency judgment which was not barred by general limitation statutes in view of moratorium act, but which was not filed within one year after issuance of letters testamentary, was not barred by statute authorizing the commencement of an action against decedent's estate within one year after issuing of letters testamentary, since the statute did not have the effect of shortening the time within which to bring an action, as limited by the general limitation statute. Code Civ. Proc. §§ 337, subd. 1, 353, 580a; St.1937, p. 460, § 19.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by the San Francisco Bank against Stacia St. Clair as executrix of the estate of Charles T. Burch, deceased, for a deficiency judgment, based on liability of the deceased as an endorser on certain notes. From an adverse judgment, defendant appeals.

Reversed and remanded with instructions.

Hearing denied; HOUSER and CARTER, JJ., dissenting; EDMONDS, J., did not participate.

Euler & Subith and Louis J. Euler, all of Los Angeles, for appellant.

Gordon M. Snyder, of Los Angeles, and Raymond Haizlip, of San Francisco, for respondent.

DESMOND, Justice pro tem.

Appellant, executrix of the estate of Charles T. Burch, deceased, appeals from a judgment in the sum of $12,632.49, based upon the liability of decedent as an endorser upon two notes for $10,000 and $50,000 respectively. The notes were executed on April 18, 1932, by Western Hotel Company, a corporation, and were secured by a trust deed of certain Sacramento real estate. A default arose when the notes were not paid one year after date, to-wit: on April 18, 1933, but foreclosure was postponed until May 6, 1937. Mr. Burch died on October 5, 1933, and on October 30, 1933, under the terms of his will, Mrs. St. Clair, his principal legatee and beneficiary, was appointed executrix. She grounds her appeal upon the provisions of various statutes of limitation, including that portion of section 714 of the Probate Code which reads as follows:

"When a claim is rejected either by the executor or administrator or by the judge, written notice of such rejection shall be given by the executor or administrator to the holder of the claim or to the person filing or presenting it, and the holder must bring suit in the proper court against the executor or administrator, within three months after the date of service of such notice if the claim is then due, or, if not, within two months after it becomes due; otherwise the claim shall be forever barred. * * *"

On March 19, 1934, within the statutory period provided for the presentation of claims against the estate of a decedent, respondent presented to the appellant a claim in the usual form for $60,000, the face value of the notes. "Upon the receipt of that claim", to quote from appellant's brief, "the executrix took no action", but long afterward, on October 8, 1937, she mentioned the claim in her first and final account filed on that date, together with her petition for final distribution. A copy of each document was served upon respondent's attorney, who had made a request for special notices under section 1202 of the Probate Code. In paragraph VIII of her account the executrix alleged that "* * * all of the claims presented to her by creditors have been paid and that all of the debts, obligations of said probate estate have been paid"; further, that the decedent "as an endorser" signed the two notes above mentioned, due one year after their date and "secured by a deed of trust on the property of the Western Hotel Company, * * * a corporation, signed by its president and secretary. That the San Francisco Bank, a corporation, filed its creditor's claim in the above entitled estate because of the contingent liability of Charles T. Burch, deceased, in the event of a deficiency judgment secured by the San Francisco Bank against the Western Hotel Company. That the contingent liability of Charles T. Burch, deceased, and of his estate, is now *eliminated and is null and void* for the reason that the San Francisco Bank, payee of said note, recorded its notice of breach and election of sale on January 13, 1937, a trustee's sale was held, and the property of the Western Hotel Company given as security was sold on May 6, 1937; that there was a deficiency at the time of sale in the sum of Eleven Thousand One Hundred Twenty-five and 03/100 Dollars ($11,125.-03) but that more than ninety (90) days have elapsed from the date of the sale of said property, to-wit, on May 6, 1937, and no suit has been instituted by the payee of said note upon which to secure a deficiency judgment and that five (5) months have elapsed since the date of said sale." (Emphasis added.) Parenthetically we may say that the ninety-day period above mentioned undoubtedly refers to the three months statute of limitations set up by the provisions of subdivision 1, section 337, Code of Civil Procedure, and also of section 580a of the Code of Civil Procedure, both of which are hereafter quoted, so far as pertinent, for discussion of points raised in this appeal.

On November 8, 1937, respondent filed exceptions and objections to said first and final account and to the petition for final distribution, denying "that said claim was presented or filed because of any contingent liability of said decedent, and in this connection alleges that said claim was presented upon the independent liability of said decedent as an endorser upon said promissory notes. Denies that the liability of decedent upon said promissory notes was contingent, and denies that the liability of said decedent thereon is or has been eliminated, or is or has been null or void, for the reasons set forth in said First and Final Account, or for any reasons set forth in said First and Final Account, or for any other reason whatsoever. Admits that the San Francisco

Bank recorded a notice of default on January 13, 1937, and that a trustee's sale of said real property was held on May 6, 1937. Admits that at said sale a deficiency resulted in the sum of $11,125.03. Denies that more than ninety (90) days elapsed from the date of said trustee's sale before action was instituted upon said notes for the recovery of a deficiency judgment, and in this connection alleges that on August 4, 1937, The San Francisco Bank filed an action in the Superior Court of the State of California, in and for the City and County of San Francisco, No. 275,402 entitled: 'The San Francisco Bank, a corporation, plaintiff, v. Western Hotel Company, a corporation, et al., defendants,' for the purpose of recovering a judgment against the defendants therein named for the said deficiency in the sum of $11,125.-03."

In these exceptions, the respondent denied, also, the allegation contained in the petition for final distribution "that all the debts of said decedent and of said estate have been paid or discharged, and further denies that said estate is in a condition to be closed, for the reason that the debts of said decedent and said estate have not been paid. * * * Alleges * * * That said creditor's claim was filed in the sum of $60,000.00, * * *. That said claim has never been rejected by said executrix; that The San Francisco Bank has never received any notice, in writing or otherwise, of any rejection of said claim. * * * That there is now due, owing, and unpaid from the above named decedent to The San Francisco Bank an absolute debt in the sum of $11,125.03, together with interest at the rate of six (6%) per cent per annum from May 6, 1937, no part of which has been paid. That a claim founded upon said debt was duly presented by The San Francisco Bank to said executrix in the manner and within the time prescribed by law, but that same has never been rejected nor paid."

The present action praying for the amount of the deficiency was filed on June 7, 1938, seven months after the filing date, November 8, 1937, of respondent's exceptions and objections to the first and final account and petition for distribution. Appellant in her answer and in her brief relies upon this lapse of time to defeat the action under the bar created by section 714, Probate Code, supra, which, as will be noted, fixes three months after service of written notice of rejection of a claim as the time within which suit must be brought. In her answer the executrix denied "that said claim has not been rejected and further denies that defendant has received no notice in writing or otherwise of the rejection of said claim. On the contrary, defendant alleges that written notice of the rejection of said claim was served upon plaintiff's attorney, * * * on or about the first day of November, 1937, by and through a First and Final Account and Petition for Distribution." Then follows a recital similar to that appearing in paragraph VIII of the account as hereinbefore quoted, concluding with the statement "That the contingent liability of Charles T. Burch, deceased, and his estate is now eliminated and is null and void".

[1] It will be seen from this language that appellant contends that her declaration that the contingent liability of decedent was "eliminated * * * null and void" was, in effect, a rejection of respondent's claim, and we accept this view for it is not to be thought that an executrix would recognize or allow an invalid claim against the estate. It is true that the respondent, in its exceptions and objections to the account, pointed out that the declaration of invalidity or nullity was based upon a false premise, namely, that suit to collect the deficiency had not been filed within three months from the date of foreclosure, to-wit, May 6, 1937, whereas in fact such a suit against the maker of the note (but not against the estate of the endorser), had been filed in the court at San Francisco on August 4, 1937. But this attempted refutation of the declaration of invalidity, and likewise respondent's denial that the claim was based upon a contingent liability, constituted nothing more than arguments or contrary views, which apparently produced no effect whatever upon the executrix. So far as she was concerned, if we may judge from the record, the status of the claim remained unchanged—in her expressed opinion, null and void and eliminated, as a liability against the estate, by process of law. It is clear from all this that she declined to pay it and respondent was advised of this situation during all of the ensuing three months but for some reason did not accept the rejection, and failed to file its action within the period provided by the statute. As a matter of fact, no waiting period need have elapsed, for section 712 of the Probate Code provides that if a claim is not approved within ten days after presentation it may be treated as rejected by a creditor and suit filed thereon.

[2] On the question as to whether the declaration of the executrix contained in her first and final account constituted a rejection, the New York case of Van Ness v. Kenyon, 208 N.Y. 228, 101 N.E. 881, 882, Ann.Cas.1914D, 221, is interesting. Section 1822 of the Code of Civil Procedure in that state fixes a six months' period for bringing suit when an executor or administrator "disputes or rejects a claim". In the Van Ness case the executor, in acting upon a claim, wrote the claimant, "I hereby dispute the same". Commenting upon this the court said, "If an executor disputes a claim, it quite necessarily follows that he does not admit its validity, but, on the contrary, rejects it". In the instant case the executrix, far from admitting the validity of the claim or any part thereof, contended and notified the claimant that the liability was "eliminated and is null and void".

Respondent states in its brief: "* * * it is the well-established practice for the representative of an estate, in rejecting a creditor's claim, to address to the creditor a direct, definite rejection thereof, something which purports to be a rejection; it is definitely not the practice for the estate to serve the claimant with a sheaf of documents purporting to be a First and Final Account and a Petition for Final Distribution * * * and later to advance the contention that the document so served constituted a notice of rejection of the creditor's claim." That is a correct statement, but in this case copies of the first and final account and petition for final distribution were received and studied by the respondent, and objections, particularly to the proposed disposition of the claim, were filed by it, in response thereto. It cannot be said, therefore, that the claimant failed to receive written notice of the rejection of its claim. It is in somewhat the same position as the appellant in Faias v. Superior Court, 133 Cal.App. 525, 24 P.2d 567, 568, who complained that the provisions of section 711 of the Probate Code, calling for an indorsement of approval or rejection upon the claim itself, had not been followed. In that case the court said: "* * * such an indorsement is but a manifestation of intention, and does not go to the essence of the thing done. * * * This provision, in our opinion, was adopted with a view to convenience rather than substance; and any act in writing by the estate's representative or by the judge sufficiently indicating an intention to reject or approve should, in so far as concerns the estate, be held to have the same effect as an indorsement upon the claim." Faias v. Superior Court, supra.

The code does not provide that any formal notice of rejection be served, but merely requires that the notice be in writing. There was nothing in the caption or title of the papers served by the executrix to indicate that a rejection of the claim was contained therein, and if the rejection had escaped the notice of respondent, it might then be heard to say that it had not received such "notice in writing" as the statute contemplates. But as we have seen, such is not the case, and respondent is bound, therefore, by the three months' rule specified in section 714 of the Probate Code.

Appellant argues that certain other statutes of limitation would also require a reversal of the judgment, but with this we do not agree. It may be well to state the grounds of our disagreement.

In a demurrer filed in this action, it was maintained that suit was barred by the provisions of subdivision 1 of section 337, and section 580a of the Code of Civil Procedure. These two sections read as follows:

Subdivision 1, section 337, Code of Civil Procedure: "Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in section 336a of this code; provided that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage."

Section 580a, Code of Civil Procedure: "Deficiency judgment: Complaint in action for: Appraisal: Amount for which judgment may be rendered: Limitation of action: No judgment until after sale. * * *

"Limitation of actions. Any such action must be brought within three months of the time of sale under such deed of trust or mortgage. No judgment shall be rendered in any such action until the real property or interest therein has first been sold pursuant to the terms of such deed of trust or mortgage, unless such real property or interest therein has become valueless."

[3] We have already stated that the notes which decedent endorsed fell due on

April 18, 1933, and under ordinary circumstances the four-year limitation set up in the opening words of subdivision 1 of section 337 of the Code of Civil Procedure would have barred this action on April 19, 1937, and thereafter. But by adopting chapter 5, Statutes of 1937, page 57, effective January 29, 1937, the legislature extended the period in which a suit such as this might be brought, to October 1, 1937, and later at the same session, passed, in due time, another moratorium extending the period until the first day of July, 1939. (See § 19, chap. 167, Stats. of 1937, p. 460.) This suit was filed June 7, 1938.

[4] As will be noted, section 337 of the Code of Civil Procedure in subdivision 1 sets up a limitation also for bringing suit for a deficiency; namely a three months' period after a foreclosure sale. Section 580a of the Code of Civil Procedure lays down a similar rule. But, under the same moratorium laws which we have cited, a suit filed later than the three months specified in sections 337 and 580a of the Code of Civil Procedure but within the time prescribed by those acts is filed in time. Bakersfield, etc., Co. v. McAlpine, etc., Co., 26 Cal.App.2d 444, 79 P.2d 410; Everts v. Newhouse, Inc., Ltd., 28 Cal.App.2d 407, 82 P.2d 703.

We hold, then, that the demurrer to the complaint was properly overruled by the trial judge who considered it.

The last remaining statute of limitation which appellant invokes, is section 353 of the Code of Civil Procedure, reading as follows:

"* * * If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

[5-7] This statute has no application in the instant case under the reasoning of the court in McMillan v. Hayward, 94 Cal. 357, 29 P. 774, 775, wherein it is said, "The evident purpose of section 353 is to secure to a party who has a cause of action against a decedent one year after the appointment of a legal representative within which to bring his action. This may or may not have the effect of extending the time. If it be necessary, in order that such person shall have one year after the appointment of a legal representative, then suit may be brought after the expiration of the general limitation; otherwise this section does not have, nor was it intended it should have, any effect whatever upon his rights. *Such construction does not shorten his time, as limited by the general statute.* It simply leaves him to that statute, because it was not necessary to extend the time in order to give him his year." (Emphasis added.)

For the reasons presented in our discussion of the application of section 714, Probate Code, to the facts of this case, the judgment is reversed, and the case is ordered remanded with instructions to enter judgment in favor of the defendant executrix.

YORK, P. J., and DORAN, J., concurred.

On Petition for Rehearing and Application for Order Permitting Taking of Additional Evidence.

The application for order permitting taking of additional evidence is amended, upon the request of applicant, to show in line 17 of page 1 of statement of the case thereof, the words "The First and Final Account", in place of the words "The Petition for Distribution", and as so amended, is denied.

YORK, P. J., and DORAN, J., concurred.



47 Cal.App.2d 239

WHEELER v. BROWN et al.

Civ. 11644.

District Court of Appeal, First District, Division 2, California.

Oct. 9, 1941.

Hearing Denied Dec. 2, 1941.

1. Evidence ⇐89, 591

A fact is proved as against a party when it is established by uncontradicted testimony of party himself or of his witnesses, under circumstances which afford no indication that the testimony is product of mistake or inadvertence, and when the fact so proved is wholly irreconcilable with a presumption sought to be invoked, the presumption is dispelled.

2. Automobiles ⇐246(60)

In action for death of motorist when struck by automobile while standing at left-hand side of automobile which had stalled in one of inner lanes of four-lane highway,

evidence produced by plaintiff did not establish contributory negligence of deceased so as to render erroneous the giving of instruction combining two statutory provisions, one of which involved disputable presumption that a person takes ordinary care of his own concerns and the other the rule that jury is not bound by declarations of any number of witnesses which do not produce conviction in their minds as against a presumption or other satisfactory evidence. Code Civ.Proc. §§ 1963, subd. 4, 2061, subd. 2.

3. Trial ⇐241

In death action, an instruction which was so worded as to be a fair summary of two statutory provisions, one of which involved disputable presumption that a person takes ordinary care of his own concerns and the other the rule that jury is not bound by declarations of any number of witnesses which do not produce conviction in their minds as against a less number, a presumption or other satisfactory evidence, was not objectionable as being an incorrect statement of the law. Code Civ.Proc. §§ 1963, subd. 4, 2061, subd. 2.

4. Trial ⇐121(1)

In death action, defendant may properly argue to jury the facts, as shown by the evidence, with respect to age and life expectancy of plaintiff, deceased's salary at time of death and contributions to plaintiff, and other facts showing possibilities and probabilities of contributions by deceased had he lived, as bearing on the amount of damages to be awarded.

5. Appeal and error ⇐1004(1)

Jury's verdict may not be disturbed by reviewing court as being excessive, unless the excess appears as a matter of law or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury.

6. Death ⇐99(5)

Award of $20,000 damages for death of son, which was reduced by trial court to $15,000, was not excessive as matter of law.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Sarah O. Wheeler against Jessie Brown and others to recover damages for death of plaintiff's son resulting from injuries sustained when struck by named defendant's automobile. From a judgment in favor of plaintiff, the named defendant appeals.

Judgment affirmed.

O'Connor, Neubarth & Moran, and Harold H. Cohn, all of San Francisco, for appellant.

Jos. H. Huberty, of San Andreas, and Edmund Scott, of Redwood Falls, for respondent.

STURTEVANT, Justice.

On the evening of November 23, 1935, after attending the football game between Stanford University and the University of California, the parties hereinafter named were driving north on the Bayshore highway between Palo Alto and Redwood City. David Wheeler was driving a Chevrolet coupe. Miss Margaret Martin was seated at his right, Richard Wheeler, his brother, was seated on the extreme right-hand side, Mrs. Snyder, formerly Miss Laura Colby, was seated in his lap. As they drove up the coast an automobile accident occurred and as a result of the collision Richard Wheeler was killed and his mother commenced this action to recover damages.

At the place of the accident the highway is divided into four lanes. Down the middle of the highway extends a double white line. Traveling from south toward the north the first right-hand lane is known as the fast lane, the second is known as the slow lane, and still to the right is a ten-foot shoulder. The first left-hand lane is known as the fast lane, the second is known as the slow lane, and farther to the left is a ten-foot shoulder. In places the traffic was heavy, in other places it was not. The Wheeler car was, as stated above, a Chevrolet coupe. As it proceeded in the fast lane it overtook and bumped the right rear end of a Buick car occupied by Mr. and Mrs. Batelle. The impact caused the Chevrolet car to come to a full stop. It also caused an interlocking of its front bumper with the rear bumper on the Buick. The evidence discloses that Mr. Batelle, David Wheeler, and Richard Wheeler got out of their respective cars, unfastened the interlocking above mentioned, moved the Buick car five or six feet forward, and both David and Richard attempted to move the Chevrolet. The motor would run but the car could not be moved forward or backward. The evidence discloses that David Wheeler at times moved all around the Chevrolet car, at another time he entered the car, attempted to move it, failed in the attempt, and again stepped out of the car on the

left-hand side. The evidence also discloses that at one time both Mr. and Mrs. Batelle and Richard Wheeler were standing on the left-hand side of the Chevrolet near its left-hand door and a few feet back of the rear end of the Buick. While they were in that position Mr. and Mrs. Frank Brown drove their Buick car from south to north. They had been traveling in the slow lane but as they approached the rear end of the Chevrolet Mrs. Brown swerved her car to the left, passed the Chevrolet on its left-hand side, brushed it as she did so, continued forward and knocked down Richard Wheeler, Mr. Batelle, and Mrs. Batelle. From the injury received by being knocked down Richard Wheeler died.

The Wheelers had purchased theater tickets and their party was traveling to San Francisco to attend the theater. There was evidence that the Batelles and the Wheeler party had been at the point of the collision from three to five minutes before the Brown car approached. At the exact moment of the impact the evidence discloses that Mr. and Mrs. Batelle had offered to take Miss Colby and Miss Martin to San Francisco. Richard Wheeler was in the act of searching his pockets for theater tickets and was standing to the left of the Chevrolet. There was no evidence as to where he looked from the time the Chevrolet hit the Batelle car until the Brown car hit him. The testimony on those specific facts was given by witnesses produced by the plaintiff. Mr. Brown testified that he did not see Mr. and Mrs. Batelle or Richard Wheeler before the accident, neither did he see the Buick car until his car had passed the Chevrolet. Mrs. Brown's deposition was introduced in evidence. In that deposition she testified that her car hit the rear end of the Batelle car but she did not know that it hit the Chevrolet or any human being. Neither Mr. nor Mrs. Batelle was called as a witness. There was no evidence of where decedent looked at any time. Except as mentioned, there was no other eye-witness.

[1, 2] The plaintiff asked and the trial court gave an instruction which embodied the provisions of subdivision 4, section 1963, together with the provisions of subdivision 2 of section 2061 of the Code of Civil Procedure. The defendant claims that under all of the facts said instruction should not have been given. Clary v. Lindley, 30 Cal.App.2d 571, 86 P.2d 920. That is, the defendant contends that in an action in which the plaintiff personally, or his witnesses, give uncontradicted testimony as to the acts and conduct of the injured person at the time of the accident, the presumption is dispelled and the issue should be submitted and tried on the direct evidence. Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 9, 210 P. 269, 273. At the pages cited the court said: "From the foregoing we deduce that a fact is proved as against a party when it is established by the *uncontradicted testimony* of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case." (Italics ours.) It will be noted that the rule quoted was addressed to a case where the issue "* * * is established by the *uncontradicted testimony* of the party himself or his witnesses * * *." The importance of that limitation is clearly shown by what is said in Westberg v. Willde, 14 Cal.2d 360, 367, 94 P.2d 590. This defendant earnestly contends that in the instant case there was no conflict in the testimony and that the testimony showed that Richard Wheeler was guilty of contributory negligence. From what we have said above we are unable to say there was any evidence of contributory negligence on the part of the decedent. Furthermore, it will hardly be contended that the decedent was not entitled to get out of the car in which he was riding. It will be conceded at once that he was in a position of danger, but it must also be conceded that both he and his brother were entitled to move their car if they could do so. The defendant stresses the fact that the decedent was standing in the road three to five minutes. It is not claimed, however, and there was no evidence, that he stood in a fixed position from three to five minutes while he was in the act of attempting to locate the theater tickets. Except as we have noted no direct evidence was adduced showing the omission on the part of Richard Wheeler to exercise due care for his own safety. We conclude, therefore, that the trial court did not err in giving the instruction complained of. Westberg v. Willde, supra.

[3] The defendant also contends that the instruction as given was an incorrect statement of the law. However, as hereinabove recited, a comparison shows that the instruction was so worded as to be a fair summary of two code sections.

[4-6] The jury returned a verdict in the sum of $20,000. In denying the motion of the defendant for a new trial the trial court reduced that amount to $15,000. The defendant now contends that the amount of the judgment is excessive. She calls attention to evidence showing the age of the plaintiff, her life expectancy, the contributions of the decedent, his salary at the time of his death, and numerous other facts showing both the possibilities and the probabilities of his contributions had he lived and, basing her contention on all of these facts, she contends the verdict was excessive. Such argument was proper to be made to the jury and we may assume the defendant made it. But the power of this court to disturb a verdict as being excessive rests on a basis that is now well established by a long line of decisions. That rule is that unless the excess appears as a matter of law or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury, the verdict may not be disturbed by a court of review. Wiezorek v. Ferris, 176 Cal. 353, 358, 167 P. 234. None of those elements are shown in the record before us. The contention now made is not well founded.

The judgment appealed from is affirmed.

NOURSE, P. J., and DOOLING, J. pro tem., concurred.



47 Cal.App.2d 179

JAEGEL v. JACQUES.

Civ. 11875.

District Court of Appeal, First District. Division 2, California.

Oct. 6, 1941.

Rehearing Denied Nov. 5, 1941.

Hearing Denied Dec. 2, 1941.

1. Divorce ⇐184(4)

The reviewing court must assume, in support of order denying motion to set aside interlocutory divorce decree, that where affidavits were in conflict on a material matter, trial judge believed the version opposed to appellant's version.

2. Witnesses ⇐317(2, 3)

On motion to vacate interlocutory divorce decree on ground of extrinsic fraud, heard on affidavits which conflicted on a material matter, trial judge believing one version could find that plaintiff had wilfully sworn falsely to a material fact in her conflicting version, and if he so found, could disbelieve her affidavit in toto. Code Civ. Proc. § 2061, subd. 3.

3. Witnessse ⇐317(2, 3)

If it can fairly be said that witnesses wilfully swore falsely as to any material facts, the court could reject their whole testimony. Code Civ.Proc. § 2061, subd. 3.

4. Divorce ⇐165(3)

That plaintiff was disappointed with what attorney procured for her by way of property settlement or that some other lawyer might have procured more would not justify setting aside interlocutory divorce decree.

5. Divorce ⇐165(5½)

Conflicting affidavits *held* to authorize refusal of wife's motion to set aside interlocutory divorce decree procured by her, allegedly by extrinsic fraud of husband and her attorney who allegedly represented husband.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action for divorce by Estelle Jaegel against her husband, wherein an interlocutory decree was entered. On plaintiff's motion, after death of the original defendant, to set aside the interlocutory decree, opposed by Joseph R. Jacques, as executor. From an order denying the motion, plaintiff appeals.

Affirmed.

Philip S. Ehrlich and Albert A. Axelrod, both of San Francisco (Julian R. Bauer, of San Francisco, of counsel), for appellant.

Charles A. Christin and T. J. Keegan, both of San Francisco, for respondent.

DOOLING, Justice pro tem.

Plaintiff, after the death of the original defendant, made a motion to set aside an interlocutory decree of divorce on the

ground of extrinsic fraud. From an order denying her motion plaintiff appeals.

The motion was submitted on an affidavit of appellant and the oral testimony of William T. Eckhoff, who appeared as appellant's attorney in procuring the interlocutory decree.

It is appellant's position that the uncontradicted evidence contained in her affidavit establishes without conflict that her husband forced her against her will to procure the divorce, instructed her to employ his attorney in connection therewith and took advantage of this situation to impose upon her an unfavorable property settlement agreement. It is true that as to the incidents alleged in appellant's affidavit to have occurred between her husband and herself with no third person present there is no express contradiction in the record, and this must be so because at the time of the motion the husband was no longer living.

There are, however, substantial conflicts between material facts set out in the affidavit and as testified to by Mr. Eckhoff. He testified that he had never been the husband's attorney although he had acted as attorney for other members of his family; that on January 2, 1940, the husband requested him to act as his attorney in procuring a divorce from appellant and that he refused to do so because the husband wished to make charges which would stigmatize appellant unnecessarily and his corroboration seemed very slight; that two or three days later appellant called on him at his office and told him that she wanted to get a divorce and wanted him to get it for her; that she had discussed it with her husband and as long as Mr. Eckhoff knew all the facts she wanted him to represent her; that they made an appointment to meet with the husband on January 8, 1940, at which time the property rights of the parties were discussed and an agreement reached between appellant and her husband; that pursuant to the arrangement arrived at Mr. Eckhoff prepared a property settlement agreement which was signed the next day; that the husband agreed orally in the conversation of January 8 to pay Mr. Eckhoff's fee and that after the divorce the husband was sent a bill for $225, which he paid.

Appellant's affidavit recites that on her first visit to Mr. Eckhoff's office she advised him that she did not want to get a divorce and that she had no grounds for divorce; that Eckhoff attempted to persuade her to get a divorce and then made arrangements for the meeting with her husband; that at this meeting she repeated that she did not want a divorce and that Eckhoff persuaded her to agree to get one by suggesting that the husband was ill and his illness might be aggravated by her refusal.

It will be seen from this brief recital that there is a flat conflict on the material question of whether Eckhoff persuaded appellant against her wishes to sue for divorce or appellant told Eckhoff that she wanted a divorce and employed him for that purpose. To point the conflict we quote the following from Eckhoff's testimony.

"She said she wanted the divorce, and I asked her what the grounds were that she was complaining of, and she told me, generally."

[1, 2] In view of this conflict on a material matter the trial judge, if he believed Eckhoff's version, as we must assume in support of his order, could find that appellant had wilfully sworn falsely to a material fact. If he so found he was entitled to disbelieve her affidavit in toto. The Supreme Court said in Estate of Friedman, 178 Cal. 27, 32, 172 P. 140, 143:

[3] "If it can fairly be said that these witnesses willfully swore falsely as to any material fact, the court was justified in rejecting their whole testimony. Section 2061, subd. 3, Code Civ.Proc. * * * If this testimony was willfully false and material, or if the trial court was justified in arriving at the conclusion that it was willfully false, then the testimony of these witnesses might have been entirely disregarded, and we are not required to consider whether or not the court had the power arbitrarily to reject the testimony of a witness."

[4] Taking Mr. Eckhoff's testimony as true he honestly represented appellant at her solicitation and was not then nor ever had been the attorney for the husband. That appellant is disappointed with what he procured for her by way of property settlement or that some other lawyer might have procured more would not justify the setting aside of the decree.

[5] The claim that her husband coerced and overreached her while no one else was present rests on her uncorroborated affida-

vit which the court was privileged to disbelieve.

The fact that Eckhoff collected a fee from the husband after drawing a property settlement agreement waiving appellant's right to collect an attorney's fee from her husband in the event of her bringing an action for divorce was explained in Eckhoff's testimony by the fact that this was pursuant to an oral agreement made by the husband in appellant's presence.

Some complaint is made of certain comments of the trial judge at the time the motion was being heard before him. No error in any ruling is claimed and we need not concern ourselves further on this appeal than to find that the order made is supported by the evidence.

The order appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



47 Cal.App.2d 253

FLORES et al. v. SMITH et al.

Civ. No. 2788.

District Court of Appeal, Fourth District, California.

Oct. 9, 1941.

1. Appeal and error ⇐957(1)
Judgment ⇐143(3)

A motion to set aside default judgment on grounds of defendant's inadvertence, mistake, surprise, and excusable neglect is addressed to sound discretion of trial court, whose ruling thereon will not be disturbed on appeal unless abuse of discretion clearly appears. Code Civ.Proc. § 473.

2. Judgment ⇐143(11)

A defendant failing to appear as result of his attorney's negligence is chargeable therewith and cannot claim that trial court abused discretion in refusing to set aside default judgment without showing that such neglect was excusable. Code Civ.Proc. § 473.

3. Judgment ⇐159

On motion to set aside default judgment against defendant failing to appear as result of his attorney's negligence, trial court's conclusion that defendant's affidavits of due diligence and excusable neglect were insufficient to warrant such relief on grounds of inadvertence, mistake, surprise, and excusable neglect *held* not abuse of discretion. Code Civ.Proc. § 473.

4. Judgment ⇐138(1)

Where complaint did not allege that plaintiffs were ignorant of name of any defendant, trial court erred in denying motion to set aside default judgment against one who was not definitely named as party defendant in complaint, but was sued as "John Doe One". Code Civ.Proc. § 474.

5. Judgment ⇐117

A default judgment, whether entered with or without court's action, cannot properly be for amount not shown by complaint to be due plaintiff. Code Civ.Proc. § 580.

6. Judgment ⇐117

Interest may be allowed plaintiff by default judgment only to extent to which it is claimed in complaint. Code Civ.Proc. § 580.

7. Judgment ⇐248

In action involving title to or rights in land, default judgment, describing land differently from complaint, is erroneous and should be reversed on appeal or set aside on motion. Code Civ.Proc. § 473.

8. Judgment ⇐248

In action to rescind contract for exchange of lands and to cancel deeds or recover damages for fraud, where complaint described various parcels of land belonging to plaintiff in general language by street numbers in certain city, lot and block number in another city, and values thereof, and was never amended to show proper legal description of property, default judgment describing property by its legal description was erroneous and should have been set aside on defendant's motion. Code Civ.Proc. § 473.

9. Judgment ⇐117

In action to rescind contract for exchange of lands and to cancel deeds or recover damages for fraud, where prayer of complaint sought no interest, default judgment, awarding plaintiffs interest on sum allowed them in lieu of conveyance to them of judgment defendant's interest in lands conveyed by plaintiffs to defendants, was erroneous. Code Civ.Proc. § 580.

10. Judgment ⇐138(1)

In action to rescind contract for exchange of lands and to cancel deeds or recover damages for fraud, where complaint, not alleging that plaintiffs were ignorant of name of any defendant, nor giving proper legal description of property involved, was not amended, so as to allege that person sued as "John Doe One" was intended to be made a party defendant and show proper legal description of property, after service of complaint on such person, and plaintiffs did not seek such amendment before entry of default judgment against him, trial court's order denying his motion to set aside such judgment must be reversed. Code Civ. Proc. § 474.

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Action by Victor Flores and others against H. K. Smith, D. H. Smith, and others, to rescind a contract for exchange of lands and cancel deeds or recover damages for fraud. From a default judgment against defendant D. H. Smith and an order denying his motion to set aside the judgment, he appeals.

Reversed.

Evans, Pearce & Campbell, of Los Angeles, and Harry W. Chase, of Glendale, for appellant.

David C. Marcus, of Los Angeles, for respondents.

GRIFFIN, Justice.

The original complaint, filed May 3, 1938, was for rescission of a contract for the exchange of lands and for the cancellation of deeds or in the alternative for damages. It alleged that about May 5, 1933, plaintiffs (33 in number), owners of interests in certain properties in Ventura county, quitclaimed those properties to defendants in exchange for 3,715 acres of land in Mexico; that defendants induced and aided plaintiffs to form a group composed of Mexican people to colonize certain lands belonging to defendants in Mexico; that defendants fraudulently represented the Mexican lands, both as to value and as to character; that this group had no knowledge of the lands except that furnished by defendants. Plaintiffs alleged that about June 15, 1935, they first had knowledge of the true character of the lands and thereafter on April 21, 1938, these plaintiffs gave notice of rescission; that about April 28, 1933, they had some right, title or interest in certain properties in Ventura county, setting them out in their complaint by indefinite descriptions with certain alleged valuations; that plaintiffs would ask leave to amend the complaint and assert the true legal descriptions when ascertained. The complaint did not definitely name as a party defendant appellant D. H. Smith. Plaintiffs in their prayer, asked for a rescission of the exchange agreement as to them, and for the return of the "above described property", or in the alternative for damages as ascertained.

The affidavit of service of summons shows that a copy of the complaint and summons was served on D. H. Smith, sued herein as John Doe One, on November 22, 1938.

Judgment by default against D. H. Smith was rendered on June 10, 1939, adjudging that he convey, transfer and return to the plaintiffs by good and sufficient deeds, any right, title and interest that he had in the property. The judgment then described the parcels of real property involved by legal description and then provided that the interest of defendant D. H. Smith "sued as John Doe One", be conveyed to plaintiffs or in lieu thereof that plaintiffs have judgment against him in certain sums totaling $31,515, together with interest at 7 per cent per annum from April 15, 1933.

July 5, 1939, appellant D. H. Smith filed a motion to set aside the judgment entered by default. A proposed demurrer and answer were submitted therewith. Affidavits and counter-affidavits were filed before the motion was heard and are a part of the record on appeal.

Respondents' counter-affidavits show that respondents' attorney did, on April 23, 1938, mail a copy of a notice of rescission to D. H. Smith, and he admittedly received a copy thereof, but claims that because the notice was entitled "To Clarence W. Ingham, H. K. Smith, John Doe One, etc." and referred to the properties as described in the complaint, he was not personally charged with notice of rescission.

The affidavit of respondents' attorney D. C. Marcus recites that the action was filed May 3, 1938; that on May 4, 1938, he received a telephone call from an attorney named Anspach, who related that he was the attorney for defendant D. H. Smith; that he would call at Marcus's offices for a copy of the complaint and summons; that

on May 5, 1938, Anspach called at affiant's office, discussed the details of the complaint and told Marcus that "Smith had advised him that he had no interest in said property or in the transaction whatsoever, * * * that he had no knowledge of the condition of said land, its location or the agricultural purposes to which said lands could be devoted; that said land was owned by another person other than D. H. Smith and that he had acted in such transaction as an intermediary"; that Marcus advised Anspach, as part of that conversation, that defendant D. H. Smith had been receiving the rentals for the past several years, and was selling and disposing of said properties; that at that time Marcus handed a copy of the complaint and summons to Anspach which were then and there read by him; that Anspach stated "that it was not necessary to serve defendant D. H. Smith, personally; that he would enter an appearance on his behalf * * * before the expiration of the thirty days time"; that the foregoing visit was the one and only time that Anspach ever personally called at Marcus's office; that on June 2, 1938, Marcus called Anspach, advising him to file his answer; that Anspach stated that "he was preparing the answer and asked for a week's additional time"; that on June 11, 1938, Marcus called Anspach again and Anspach replied "that he was writing the answer * * * but that same would be done immediately and would be filed"; that again on June 22d, Marcus called Anspach's office and advised his secretary to file his answer immediately; that on July 15, 1938, Marcus again called Anspach requesting that the answer be filed and that Anspach replied "* * * that he would personally come to Marcus's office the following day and deliver the answer which he had already prepared and had been signed by said defendant Smith"; that on July 22, 1938, affiant called Anspach and said: "that he could not understand his attitude"; that Marcus felt that Anspach should not take advantage of the situation because the complaint had been personally delivered to him and that service would have to be perfected on Smith before he could proceed in the matter; that no action was taken by Anspach; that again on September 21, 1938, Marcus called Anspach who stated that "he was guilty of every name under the sun but that he was coming in to Marcus's office on that day to apologize in person for his actions"; that Anspach failed to appear; that similar calls were made on October 8th and 15th; that on October 24, 1938, Marcus called the defendant D. H. Smith directly; that Smith stated "that he had received a notice of rescission but that he had no interest in the property in Ventura County which was involved in this law suit nor did he at any time own or have any interest in the Mexican land, but he had nevertheless referred the matter of notice of rescission to Mr. Anspach, his attorney, who felt that under the circumstances he was not the party liable in the matter; that the persons responsible were H. K. Smith and Clarence Ingham; that they were the owners of the property and receiving the benefits therefrom, and it was up to them to protect their own interests; that he was only collecting the rents on the properties for H. K. Smith and Clarence Ingham; that Marcus informed Smith to contact Anspach, his attorney, and have him enter the appearance which he had promised on some ten different occasions; that Smith then stated "that he was under no obligation to file an answer as he had never been served with any complaint and he knew what his rights were and would protect them when the proper time arrived"; that he informed Marcus to call Anspach if he desired any further information as he was relying on Anspach's actions in not filing the answer; that on the same date Marcus called Anspach and was advised by his secretary "that he was not in and was not expected for a week"; that on October 25, 1938, one Bloom, Marcus's associate, called Anspach, using the fictitious name of Edwards, and was immediately connected with Anspach; that Marcus thereupon talked with Anspach and advised him of his conversation with Smith; that Anspach stated "that he was coming down to Marcus's offices that same afternoon with the papers"; that Marcus stated to Anspach "that unless he entered his appearance he would be compelled to serve his client Smith"; that again Anspach failed to keep his promise; that Marcus thereupon ordered the service of the complaint on defendant D. H. Smith; and that Smith was served with the complaint and summons on the 22d day of November, 1938.

Attached to the affidavit of Marcus are the telephone company's original statements for the months involved showing that telephone calls were made on the dates and to the number of Anspach at Glendale. The affidavit of Marcus further shows that prior to June 8, 1939, he again called D. H.

Smith by telephone and advised him "that some seven months had elapsed since the service of the complaint upon him and that he had not answered the complaint nor had his attorney taken any action whatsoever"; and that he stated he had not taken a default, but unless said defendant entered his appearance and answered the complaint he would be compelled to take his default and would do so on the 8th day of June, 1939. Judgment by default was not signed nor entered until the 16th day of June, 1939.

Appellant Smith secured new attorneys and filed the motion to vacate the default judgment approximately 30 days after the claimed conversation Smith had with Attorney Marcus notifying him he was going to take a default. Attorney Anspach filed an affidavit in support of appellant's motion, reciting generally that D. H. Smith brought to him a notice of rescission which he received through the mails; that Smith had told him of the facts surrounding the transaction; that he advised Smith he had a valid defense; that he would get in touch with Marcus and would take care of the matter for him; that he did get in touch with Marcus on several occasions and advised him that D. H. Smith had a defense to the charge; that he agreed with Marcus that no further proceedings would be had until he, Anspach, was notified so that he could contact the other defendants and see if they desired to have him represent them; that he called Marcus on several occasions but was unable to find him in; that D. H. Smith brought to him the complaint that was served upon him and he advised Smith he would take care of the matter; that Marcus "stated or implied" in a conversation with him that no default would be taken without proper notice to Anspach; that Smith called him on June 8, 1939, and notified him that Marcus had called him and said that if an answer were not filed soon that he would enter a default; that he called Marcus and found he was not in and that Marcus failed to return the call; that on June 12, 1939, H. K. Smith brought him a newspaper clipping stating that a default judgment had been taken in the case; that he (Anspach) advised D. H. Smith that Marcus had told him that he would take no default without first notifying him, and relying thereon, he had "unwittingly misled his client D. H. Smith" in this respect.

There was a long distance phone toll between the offices of the attorneys here involved. Respondents produced records of all long distance calls between their offices, and those records showed but one such call by Anspach over the period involved, and that was in May, 1938. D. H. Smith, in his affidavit, denied several of the claimed conversations with Marcus, and admitted being served with a copy of the complaint and summons as entitled, but relied upon the advice of his attorney Anspach to the effect that judgment could not be taken against him by default because of the fact that the other defendants had not been served and that he relied upon such understanding; that relying upon his attorney he made no further inquiry into the matter until June 12, 1939, when he was in receipt of a newspaper clipping stating that 33 Mexicans who had exchanged acreage in Ventura county for property in Mexico had had a "wrong righted"; and that he immediately employed other counsel to institute the above-mentioned proceedings.

Upon these facts the appellant claims the judgment should have been set aside based upon his inadvertence, mistake, surprise and excusable neglect.

[1] An application for relief under section 473 of the Code of Civil Procedure is addressed to the sound discretion of the trial court and its ruling either granting or denying the motion will not be disturbed unless an abuse of discretion clearly appears.

[2, 3] It was held in United States v. Duesdieker, 118 Cal.App. 723, 5 P.2d 916, that if defendants' failure to appear was the result of negligence on the part of their former attorney, they were chargeable therewith, and they could not claim that the trial court abused its discretion in refusing to set aside their default without showing that such neglect was excusable. The trial court in the instant case concluded that the affidavits of due diligence and excusable neglect were insufficient to set aside the judgment by default on the grounds above stated. We find no abuse of discretion in this respect. Alferitz v. Cahen, 145 Cal. 397, 78 P. 878; Beard v. Beard, 16 Cal.2d 645, 107 P.2d 385; Wattson v. Dillon, 6 Cal.2d 33, 56 P.2d 220.

The second contention presented on this appeal from the order refusing to set aside the judgment is that the judgment is erroneous and void for the following reasons: (1) That appellant never was a party to the action in that he was never mentioned in the complaint or summons

and therefore the lower court was without jurisdiction to render a judgment against him, which judgment is therefore void; (2) that the judgment rendered against appellant did not require that plaintiffs do equity; (3) that the complaint on its face shows no reason for the unexplained delay in plaintiffs attempting to rescind or to file their action; that their action is barred by laches; (4) that the judgment exceeded the relief asked for by the plaintiffs in the prayer of the complaint in that it included interest and properties not described in the complaint; (5) that the complaint was never amended to show the legal descriptions of the properties nor the true designation of appellant D. H. Smith.

[4] Under this second contention it is pointed out that section 474 of the Code of Civil Procedure provides that "When the plaintiff is ignorant of the name of a defendant, he *must* state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding *must* be amended accordingly." (Italics ours.) The plaintiffs in the instant action did not plead in the complaint that they were ignorant of the name of any defendant and that pleading at no time was amended to set forth any allegation that D. H. Smith was intended as, or to be made, a party defendant.

[5-8] Section 580 of the Code of Civil Procedure provides: "Relief to be awarded to plaintiff. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; * * *." A default judgment, whether entered with or without the action of the court, cannot properly be for an amount not shown by the complaint to be due. Interest may be allowed only to the extent to which it is claimed in the complaint. In an action involving the title to or rights in land, if the default judgment describes the land differently from the complaint, it is erroneous and should be reversed on appeal or set aside on motion. Balfour-Guthrie Inv. Co. v. Sawday, 133 Cal. 228, 65 P. 400; McFarland v. Martin, 144 Cal. 771, 78 P. 239; Holman v. Vallejo, 19 Cal. 498, 499; Lamping v. Hyatt, 27 Cal. 99; First State Bank v. Blackinton, 16 Cal.App. 141, 116 P. 311; Brown v. Caldwell, 13 Cal.App. 29, 108 P. 874. The complaint in the instant action describes the various parcels of land belonging to respondent in this general language:

"* * * plaintiffs * * * held some * * * interest in * * * the following described real properties * * *

"Victor Flores and Teofilade Flores, 308 North Sycamore Street, Santa Paula, California, value: $825.00.

"Soledad Garcia, Aurora Cachu and Jose Maria Cachu, 319 South Mill Street, Santa Paula, California, value: $1,650.00.

* * *

"Alejo Garnica, Lot 7, block 10, Fillmore, California, value: $825.00.

"Lucina G. Bonilla, Fillmore, California, value: $550.00."

The complaint was never amended to show the proper legal description of the property involved. The judgment described that property by its legal description. The various descriptions, as set forth in the complaint and in the judgment, are not comparable. The rule above cited, therefore, becomes applicable.

[9] It should also be noted that in the prayer of the complaint no interest is sought. The judgment awards interest at 7 per cent from April 15, 1933. The judgment also reads in the alternative in this respect, that it provides that in event the described properties are not returned (no time specified) plaintiff should have judgment in the sums mentioned in the decree.

The complaint also seeks a rescission of the exchange agreement. The answer of appellant, proposed for filing, in addition to alleging that the action is barred by section 338, subdivision 4 of the Code of Civil Procedure and by laches, avers that the title to the Mexican property involved was in Clarence W. Ingham; that appellant had only a one-third interest therein; that Ingham deeded that property to respondents; that defendants paid respondents $2,500 as a part of the consideration, and that respondents have not tendered or offered to return the property or money thus received. Appellant denies generally the allegations of the complaint in reference to the fraud.

[10] Under the rule above cited, the order denying appellant's motion to set aside the default judgment must be reversed. There is also this additional reason: After the service of the complaint on appellant, the complaint was not amended as required by section 474 of the Code of Civil Procedure. Respondents did not seek said

amendment before entering the default judgment nor did they include such a prayer in their complaint. The following authorities require a compliance with that section: Roseborough v. Campbell, —— Cal.App.2d ——, 115 P.2d 839; Baldwin v. Morgan, 50 Cal. 585; McKinlay v. Tuttle, 42 Cal. 570; Farris v. Merritt, 63 Cal. 118; Rosencrantz v. Rogers, 40 Cal. 489; Bachman v. Cathry, 113 Cal. 498, 45 P. 814; Union Tank & Pipe Co. v. Mammoth Oil Co., Ltd., 134 Cal.App. 229, 25 P.2d 262; United States v. Duesdieker, 118 Cal.App. 723, 5 P.2d 916.

Order and judgment reversed.

BARNARD, P. J., and MARKS, J., concurred.



47 Cal.App.2d 225

STEVENSON et al. v. FLEMING.
RUBIDOUX v. SAME.

Civ. 2487, 2488.

District Court of Appeal, Fourth District, California.

Oct. 7, 1941.

Hearing Denied Dec. 2, 1941.

1. Negligence ⇐93(1)

Alleged negligence of automobile host could not be imputed to guests so as to preclude recovery from other motorist for injuries sustained in intersectional collision.

2. Automobiles ⇐201(8)

If defendant motorist and driver of automobile in which plaintiffs were riding as guests were both guilty of negligence which concurred in causing accident, guests could recover from defendant motorist for resulting injuries.

3. Automobiles ⇐245(64)

Whether defendant motorist and driver of automobile in which plaintiffs were riding as guests were guilty of negligence which concurred in causing accident so as to entitle guests to recover from defendant motorist for resulting injuries was for jury.

4. Automobiles ⇐244(11)

Evidence that motorist approaching street intersection at night looked to his left but did not see approaching automobile which had its headlights burning would support finding of negligence, since to look and not see may be as negligent as not to look at all. Vehicle Code § 550, St.1937, p. 619.

5. Automobiles ⇐168(6)

A driver in enforcing his lawful right of way at intersection may violate provisions of speed statute and may thus be guilty of negligence for which he may be held to be legally responsible. Vehicle Code, § 510, St.1935, p. 176, and § 550, St.1937, p. 619.

6. Appeal and error ⇐662(1)

In determining correctness of instruction that violation of speed law is of no consequence unless it is the "maximum" cause of injuries, appellate court is bound by official record showing that the word "maximum" and not the word "proximate" as contained in proposed instruction was used. Vehicle Code, § 510, St.1935, p. 176.

7. Negligence ⇐97

The negligence of two automobile drivers cannot be compared in California in order to determine which one was most negligent and attach liability to him.

8. Negligence ⇐141(12)
Trial ⇐243

An instruction that violation of basic speed law is of no consequence unless it is the "maximum" cause of injuries was erroneous, notwithstanding instruction was general and was not specifically pointed at defendant where it could have been pointed to no other person and instruction was in conflict with other proper instructions on proximate cause, none of which was given in connection with statute mentioned. Vehicle Code, § 510, St.1935, p. 176.

> "Maximum" means the greatest possible quantity, amount or degree, and implies the comparison of one thing with another of a lesser degree.
>
> See Words and Phrases, Permanent Edition, for all other definitions of "Maximum".

9. Trial ⇐296(1)

Incorrect instructions do not always constitute reversible error and incorrect instruction may be cured by other correct instructions.

10. Trial ⇐296(1)

If single instruction omits an essential element of cause, but is a correct declaration

of law so far as it goes, and omitted element is correctly given in another instruction, omission will ordinarily be cured thereby, but if essential principle of law is stated materially incorrect, error will not ordinarily be cured by a correct declaration of same principle in another instruction.

11. Appeal and error ⇐1064(1)

The giving of instructions which are contradictory in essential elements may warrant the reversal of a judgment, since it is impossible to determine which charge controlled determination of jury.

12. Trial ⇐296(4)

In actions for injuries sustained when automobile in which plaintiffs were riding was struck by defendant's automobile, error in instruction which incorrectly assumed that plaintiffs' host was guilty of negligence was harmless where jury was instructed that host's negligence could not have been imputed to plaintiffs, and host's negligence was seemingly apparent from the record.

13. Automobiles ⇐246(60)

In actions for injuries sustained when automobile in which plaintiffs were riding was struck by defendant's automobile, instruction that each party was entitled to presumption that every person takes ordinary care of his own concerns and that he obeys the law should not have been given since such instruction should not be given in a case where all parties are alive and testify and all facts are placed before jury by testimony of parties and witnesses. Code Civ.Proc. § 1963, subd. 4.

14. Negligence ⇐63

Generally, where accident was caused by negligence, there is no room for doctrine of "unavoidable accident".

See Words and Phrases, Permanent Edition, for all other definitions of "Unavoidable Accident".

15. Automobiles ⇐246(57)

Where complaint in actions for injuries sustained in automobile collision pleaded negligence in general terms and answer denied it in general terms, instruction on "unavoidable accident" at request of defendant was not erroneous on ground that accident could have been avoided by use of ordinary care, since general denial of general allegation of negligence permitted defendant to rely on such defense.

Appeals from Superior Court, Riverside County; G. R. Freeman, Judge.

Actions by Geraldine Stevenson and others and by Lucinda Rubidoux against Grant M. Fleming to recover for injuries sustained in an automobile accident. From judgments for defendant, plaintiffs appeal.

Reversed.

See, also, 43 Cal.App.2d 641, 111 P.2d 420.

Gibson, Dunn & Crutcher, Philip C. Sterry, Taylor, Kolliner & Bolton and Joseph D. Taylor, all of Los Angeles, for appellants.

Kelley & Hews and Loyal C. Kelley, all of Riverside, for respondent.

MARKS, Acting Presiding Justice.

These are appeals from judgments in favor of defendant in actions to recover damages suffered in an automobile collision which occurred shortly after 11 o'clock on the night of August 19, 1939, in the intersection of Tenth and Lime streets in the city of Riverside. Tenth street runs east and west and Lime street north and south. Both streets were paved and were about 40 feet wide between curbs. The cases were consolidated for trial and have been consolidated on appeal.

Plaintiffs alleged negligence of defendant in general terms. Defendant denied his negligence and alleged: (1) that the accident was caused solely by the negligence of Raymond Meyers, who was driving the car in which Geraldine Stevenson and Lucinda Rubidoux were riding as guests, and (2) unavoidable accident. Other special defenses interposed by defendant were abandoned. There is no suggestion of contributory negligence on the part of plaintiffs.

[1] As any negligence on the part of Meyers could not have been imputed to plaintiffs, the only ground upon which the verdicts for defendant could have been based must have been either that the negligence of Meyers was the sole proximate cause of the accident or that Fleming was not guilty of any negligence that concurred with that of Meyers in causing the accident or proximately contributing to it.

Plaintiffs urge two grounds for a reversal of the judgment: first, that there is no evidence sufficient to sustain it and, second, erroneous instructions which they urge

were prejudicial to them. Both arguments involve an analysis of the evidence.

The intersection of Tenth and Lime streets is badly obstructed. No clear view of either street can be had from the other very many feet back from the exterior lines of the intersection. Lime street rises on a slight grade to the north between Eleventh and Tenth streets. There is no material change of grade on Tenth street.

Kenneth W. Hadley, a witness called by plaintiffs, was sitting on the lawn in front of a house at the southeast corner of the intersection and described the accident in detail. We find the following in his testimony:

"Well, I was sitting in the front yard of Mrs. Walters' and waiting for a car, and about a block and a half down the street I saw a Chevrolet—I found out later it was a Chevrolet—coming—going east—coming east on 10th, and I kind of watched a little carefully. It was on the right side of the street, and had its lights burning. I kind of watched kind of close; I thought that that might be it. A little later I saw this other car coming north on Lime, and saw it about half a block down the street, and it was also on the right side of the road, and the lights were burning; and as it neared the corner, well, I saw there was going to be a wreck unless one of the cars put on the brakes."

He testified further that both cars were traveling between thirty and thirty-five miles per hour; that neither slowed up at all before the collision; that the Meyers car entered the intersection first; that the front of the Fleming car struck the center of the right-hand side of the Meyers car at a point about five feet east and two or three feet south of the center of the intersection; that the Meyers car swerved a little to its left just before the collision; that after the collision it turned around and came to rest headed west, against the north curb of Tenth street; that "I saw a woman (Mrs. Rubidoux) fall out of the car, she bounced a couple of times on the pavement and hit her head on the curb and ended up by a tree"; that the Fleming car stopped practically where it hit the Meyers automobile.

[2] This is the only witness who was able to give a complete description of the accident and the courses of the two automobiles just preceding it. Hadley was apparently a disinterested witness. It should be unnecessary to say that his evidence points to negligence on the part of both drivers that concurred in causing the accident and, if accepted as true, would have supported a judgment in favor of plaintiffs.

Meyers testified in substance as follows: that on the night of the accident he was driving a 1932 Chevrolet coach; that Mrs. Rubidoux was sitting on the seat beside him and Geraldine Stevenson was sitting on the rear seat; that he was driving east on Tenth street and was traveling between eighteen and twenty miles per hour on his own right-hand side of the street; that his headlights were illuminated; that when he was about sixty feet west of the intersection he looked to his right and saw the beams of light from a car approaching the intersection from the south on Lime street; that when he had proceeded about thirty feet he looked to his left for traffic on Lime street approaching the intersection from the north and saw nothing; that he entered the intersection at about fifteen miles per hour; that "as I was inside of the intersection, I looked to my right and seen a car"; that it was about ninety feet away and was traveling about 40 or 45 miles per hour; that it was approaching the intersection at about 45 or 50 miles per hour; that after he was in the intersection he observed the Fleming car about 30 or 35 feet away approaching at about thirty miles per hour; that he increased his speed and swerved to his left; that the front of his car was slightly east of the east curb line of Lime street when Fleming drove into the right-hand side of it at about its center.

[3] As we will accept the implied finding of the jury of negligence on the part of Meyers, we need not comment on his testimony except to point out that, if believed, it would have supported a finding of negligence on the part of Fleming that concurred with that of Meyers in causing the accident.

Fleming testified in substance as follows: that he was driving a 1930 Studebaker President Eight sedan north on Lime street; that the headlights were illuminated and he was on his own right-hand side of the street; that he approached and entered the intersection at a speed of between eighteen and nineteen miles an hour; that when he was seventy-five feet south of the intersection he could see Tenth street for a distance of seventy-five feet west from

the intersection; that he looked west on Tenth street and saw nothing; that when he was six feet south of the intersection he again looked west on Tenth street for a distance of at least one hundred feet; that "there was no automobile that I could see, approaching anyways near the intersection"; that he proceeded into the intersection at about the same speed; that he saw the Meyers car "for a very brief moment"; that "it was traveling in a northeasterly direction, coming from my left, and I would say it was at least 15 feet, or maybe 18 feet, from my car when I first saw it"; that at the speed at which he was traveling he could have stopped his car in a distance of ten feet; that the front of his car was 8½ feet south of the center line of Tenth street when he first saw the Meyers car; that the collision occurred about four feet north and four or five feet east of the center of the intersection; that when he first saw the Meyers car he applied his brakes in an endeavor to stop; that on August 24, 1939, he made and signed a written statement which contained the following:

"As I got to the intersection, I glanced both ways, to right and left, and saw no traffic. I then entered the intersection, headed north on Lime. Just then, without any previous intimation or knowledge of any approaching car from any direction whatsoever, I saw a flash of light, and there, right in front of me, was a car."

F. J. Falkenstein, a guest of Mr. Fleming, who was riding beside him on the front seat of the Studebaker, corroborated Fleming's testimony in many particulars.

[4] The evidence of Fleming, if believed, would have supported an implied finding by the jury of negligence on his part that actively concurred with that of Meyers in causing the accident, had such a finding been made. To look and not to see may be as negligent as not to look at all. While it may be true that Fleming did not actually see the Meyers car approaching the intersection due to the wide corner posts used in the 1930 Studebaker President sedans which produced a "blind spot" for the drivers, such a corner post could not have obscured the beams of light from the headlights of the Meyers car shining into the intersection as it approached it from the west. Such beams of light should have been a warning of approaching danger to the driver of another car entering the intersection.

[5] Counsel devote much space in their briefs in arguing the question of which driver had the right of way at the intersection under the provisions of section 550 of the Vehicle Code, St.1935, p. 186, as amended by St.1937, p. 619. This question, while important, may not be controlling. A driver, in enforcing his lawful right of way, may violate the provisions of section 510 of the Vehicle Code and may thus be guilty of negligence for which he may be held to be legally responsible.

Plaintiffs complain of four instructions given to the jury which they urge were incorrect and prejudicial.

[6] Defendant's instruction number thirty told the jury that violation of the basic speed law (quoting § 510 of the Vehicle Code) "is of no consequence unless it is the maximum cause of the injury found by you to have been suffered by the plaintiffs herein". It is true that this instruction was proposed in proper form by counsel for defendant. We are not concerned with how the instruction was proposed. It is how it was given to the jury that is important. Both the reporter and the trial judge have certified that the word maximum was used in reading the instruction instead of the proper word proximate, which was in the instruction as proposed. We are bound by the official record.

[7] Maximum means the greatest possible quantity, amount or degree. It implies the comparison of one thing with another of a lesser degree. We cannot compare the negligence of two automobile drivers in California in order to determine which one was the most negligent and attach liability to him.

[8] Of course the instruction was general in its terms and was not specifically pointed at defendant. However, it could have been pointed to no other because the jury were properly instructed that the negligence of Meyers, the host driver, could not have been imputed to plaintiffs, who were his guests. The instruction was in conflict, with other proper instructions on proximate cause.

[9-11] It has been held many times that incorrect instructions do not always constitute reversible error and that an incorrect instruction may be cured by other correct instructions. The rule that should be applied here is stated in Soda v. Marriott, 118 Cal.App. 635, 5 P.2d 675, 678, as follows:

"If a single instruction omits an essential element of the cause, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission will ordinarily be cured thereby. If, however, an essential principle of law is stated to the jury materially incorrect, this prejudicial error will not ordinarily be cured by a correct declaration of the same principle in another instruction. The giving of instructions which are contradictory in essential elements may warrant the reversal of a judgment, for the reason that it is impossible to determine which charge controlled the determination of the jury. Chidester v. Consolidated People's Ditch Co., 53 Cal. 56; Buttrick v. Pacific Elec. Ry. Co., 86 Cal.App. 136, 260 P. 588; Gaster v. Hinkley, 85 Cal.App. 55, 258 P. 988; Noce v. United Railroads, 53 Cal.App. 512, 200 P. 819." See, also, Akers v. Cowan, 26 Cal.App.2d 694, 80 P.2d 143; Ferguson v. Nakahara, 43 Cal.App.2d 435, 110 P.2d 1091; Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 P. 700; Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599.

While many other correct instructions were given on proximate cause, we are cited to no other instruction given on proximate cause in connection with section 510 of the Vehicle Code.

[12] It is true that defendant's instruction number 39 incorrectly assumed that Meyers was guilty of negligence. This error was harmless, in our opinion, as the jury was instructed that the negligence of Meyers could not have been imputed to the plaintiffs. Further, the negligence of Meyers is seemingly apparent from the record.

[13] Defendant's instruction number eighteen, wherein the jury was told that each party was entitled to the presumption that every person takes ordinary care of his own concerns and that he obeys the law, § 1963, subd. 4, Code Civ.Proc., should not have been given. Such an instruction may be proper under given circumstances in a death case but should not be given in a case where all the parties are alive and testify and all facts are placed before the jury by the testimony of the parties and the witnesses. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590. There are cases holding that the giving of such an instruction under the circumstances of those cases lacks sufficient prejudice to cause a reversal of a judgment. See Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709; Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128; Stroh v. Bauman, 37 Cal.App.2d 241, 99 P.2d 337. Under these authorities, it is rather clear that the instruction should not have been given in this case as the parties were living and they and the witnesses described the accident in detail.

[14, 15] The trial court gave defendant's instruction number 20 on the theory of unavoidable accident. It is now urged that it was error to give this instruction because the accident could have been avoided by the use of ordinary care; that where the accident was caused by negligence there is no room for the doctrine of unavoidable accident. Of course, speaking generally, this is true. D'Avanzo v. Manno, 16 Cal.App.2d 346, 60 P.2d 524; Zaferis v. Bradley, 28 Cal.App.2d 188, 82 P.2d 70. However, the following rule announced in Pearce v. Elbe, 98 Cal.App. 101, 276 P. 389, 391, should be controlling here:

"Here negligence is pleaded in general terms in the complaint. The answer denies it in general terms. The general denial of the general allegation of negligence permits the defendant to rely upon the defense of unavoidable accident. Lehnerts v. Otis Elevator Co., (Mo.Sup.) 256 S.W. 819, 822; 45 C.J. 1141, note 52. The instruction was given by request of defendant, and we cannot see how it could be harmful to the plaintiff, who in any event had the burden of proving that the collision was occasioned solely by the negligence of the plaintiff, which, of course, would exclude unavoidable accident." See, also, Sitkei v. Ralphs Grocery Co., 25 Cal.App. 2d 294, 77 P.2d 311.

Thus we have here defendant's instruction number thirty which incorrectly announced a principle of law and permitted the jury to compare the negligence of Meyers with that of Fleming in so far as a violation of the provisions of section 510 of the Vehicle Code is concerned. If the members of that body concluded that the negligence of Meyers was greater than that of Fleming they were permitted to return a verdict for defendant. The language of the instruction, "the violation of the law is of no consequence unless it is the maximum cause of the injury found by you to have been suffered by the plaintiffs" permitted the jurors to entirely disregard any negligence on the part of Fleming which concurred with greater negligence of Meyers in causing the accident or which prox-

imately contributed to the accident. This is contrary to the California law and may reasonably explain the verdict of the jury, as no one contends that the evidence fails to point to serious negligence on the part of Meyers. This being true, and under the facts of this case, we must regard the instruction as given to the jury as prejudicially erroneous and as requiring a reversal of the judgment so that this case may be again submitted to a jury, if one be had, under proper instructions.

The judgments are reversed.

GRIFFIN, J., and MORTON, J. pro tem., concurred.



47 Cal.App.2d 358

HOUSING AUTHORITY OF CITY OF OAKLAND v. FORBES et al.

Civ. 11936.

District Court of Appeal, First District, Division 1, California.

Oct. 17, 1941.

Hearing Denied Dec. 15, 1941.

Eminent domain ⇐258

Where condemnor in condemnation proceeding complied with all statutory requirements and with the conditions imposed by interlocutory and final judgments and order putting condemnor in possession, the filing of an undertaking on appeal taken from judgments and order did not stay the operation thereof so as to entitle landowners to writ of supersedeas. Code Civ.Proc. §§ 1252–1254.

Condemnation proceeding by the Housing Authority of the City of Oakland against James Walter Forbes and others. From a judgment for the plaintiff, and from an order putting plaintiff in possession, defendants appeal. On application for a writ of supersedeas.

Writ denied.

Hearing denied; CARTER, J., dissenting.

Cross & Brandt, of San Francisco, and Alfred Nelson, of Oakland, for petitioners.

James R. Agee and Bernard J. Abrott, both of Oakland, for respondent.

PER CURIAM.

Application for a writ of supersedeas based upon the contention that the filing of an undertaking on appeals taken from the interlocutory and final judgments entered in a condemnation proceeding and from an order putting plaintiff in possession stays the operation of said judgments and order.

It is our conclusion that where as here it appears that the plaintiff has complied with all the legal requirements of sections 1252, 1253 and 1254 of the Code of Civil Procedure and with the conditions imposed by the terms of said judgments and order, the filing of an undertaking on appeals taken therefrom does not stay the operation thereof.

The application for the writ of supersedeas is therefore denied.



47 Cal.App.2d 188

WOODLEY v. WOODLEY et al.

Civ. 11856.

District Court of Appeal, First District, Division 2, California.

Oct. 7, 1941.

Hearing Denied Dec. 2, 1941.

1. Wills ⇐826(5)

A complaint seeking to enforce lien against realty, alleging that will of former owner created charge against the realty for monthly payments to plaintiff, was sufficient though essential features of an annuity were lacking.

2. Annuities ⇐6

Generally, where an annuity is made a lien upon land, the annuitant may enforce payment by foreclosure.

3. Annuities ⇐6
Receivers ⇐14

The present remedy for nonpayment of annuity is, in general, a personal action of debt or covenant, or civil action upon the same theory, or bill against trustee to compel an account, and an "annuity" which is a charge on land in the form of a rent charge is enforceable by distress or an assize, if these remedies are still available in the ju-

risdiction, or equity may appoint a receiver or raise the arrears by sale or mortgage of the estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Annuity".

4. Pleading ⇐204(2)

If complaint prays for relief to which complainant is not entitled, or fails to seek the proper relief, it is nevertheless a good bill against general demurrer if it pleads facts sufficient to show that pleader is entitled to some equitable relief.

5. Venue ⇐5(2)

A will devising land upon express condition that specified amount be paid monthly from rents thereof to testator's son for life, and that such sum should constitute a lien, irrespective of who should hold legal title, created an "equitable charge" and not a "trust", and hence action to enforce the lien was properly brought in superior court of county where land was located, rather than in superior court of county in which probate proceedings were had under statute applicable only where "trust" is created by will. Probate Code, § 1120; Code Civ.Proc. § 392; Const. art. 6, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Charge" and "Trust".

6. Wills ⇐669

If a testator devises property subject to payment of certain sums of money to third persons, he thereby creates an "equitable charge", not a "trust".

7. Trusts ⇐1

An "equitable charge" is like a "trust" in that in each case the legal title to property is vested in one person and an equitable interest is given to another, but equitable incumbrancer has only a security interest in the property, while beneficiary of a trust is, to the extent of his beneficial interest, the equitable owner of the trust property.

8. Wills ⇐826(1)

If a devisee subject to an equitable charge fails to pay the equitable incumbrancer the sum to which he is entitled, incumbrancer's remedy is suit in equity for sale of the land to pay the charge, but if trustee fails to perform his duties under trust, remedy of beneficiary is suit in equity to compel specific performance or redress of the breach of trust.

9. Trusts ⇐65
Wills ⇐825

If purpose of transfer in trust is fully accomplished without exhausting the trust property, trustee cannot keep the trust property for his own benefit, but holds it upon a resulting trust for settlor or his estate, unless terms of trust manifest contrary intent, but if amount of equitable charge is paid, the person who holds subject to the charge can keep the property for his own benefit.

10. Wills ⇐823

Where property is devised charged with payment of money to a third person, whether devisee becomes personally liable depends upon language of the will, and if testator manifests intention that devisee should become personally liable, devisee by accepting the property impliedly agrees to pay the charge.

11. Trusts ⇐1
Wills ⇐823

Differences between "equitable charge" and "trust" are observable with respect to personal liability, but one taking property subject to equitable charge may come under personal responsibility to pay, and there is a strong similarity between charge and trust.

12. Wills ⇐824

If a devisee subject to an equitable charge transfers the property to a purchaser with notice of the charge, purchaser takes it subject to the charge, and if devisee dies, his devisees or heirs take subject to the charge, even if he predeceases testator but devise does not lapse.

13. Wills ⇐826(1)

Where will made devise subject to equitable charge for monthly payments to testator's son for life, son had an equitable, if not legal, interest which could be enforced in court of chancery. Civ.Code, § 3521.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by George W. Woodley against Thomas F. Woodley and others, for enforcement of a lien on real property for payment of a monthly charge to plaintiff under terms of a decree of distribution by probate court. From a judgment for defendants after demurrer to complaint was sustained without leave to amend, plaintiff appeals.

Reversed, with directions to overrule the demurrer.

Hearing denied; CARTER, J., dissenting.

Henry J. Soldati and Lewis H. Cromwell, both of Petaluma, for appellant.

Vincent W. Hallinan and Carey Van Fleet, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

The plaintiff commenced this action in the superior court of Marin county alleging that the defendant was the owner of certain real property situated in that county subject to a lien in favor of plaintiff for the payment of a monthly charge to plaintiff under the terms of a decree of distribution made in the probate court of the county of Sonoma, approving a devise under the will of the father of the two parties. The defendant filed a general demurrer and a special attack upon the jurisdiction of the subject matter. The demurrer was sustained without leave to amend, and without indication of the grounds upon which the final judgment for defendant was entered.

On this appeal the parties assume that the real point of decision was the want of jurisdiction of the subject matter because of the provisions of section 1120 of the Probate Code, which reserves to the superior court of the county in which a will has been probated jurisdiction to administer a trust created by the will. This is the only question argued by respondent. He makes no attempt to sustain the judgment on the ground that the complaint fails to state a cause of action.

The complaint pleads that George Woodley died testate in Sonoma county, that his will was duly probated therein; that, by the terms of the will, incorporated in the decree of distribution, the real property in Marin county was devised to respondent "upon the express condition that, from the rents thereof, there shall be paid to my said son, George W. Woodley, the sum of fifty dollars ($50.00) per month (payable monthly from the date of my death) so long as he shall live, which said sum of fifty dollars ($50.00) per month shall constitute a lien upon said land so long as my said son, George W. Woodley, shall live". It pleads that the will further provided, after a declaration that the testator made no further provision for appellant, that "it is my purpose, by this instrument, to make and secure a permanent fund for the care and maintenance of my said son, George W. Woodley, during his lifetime"; that the decree of distribution was entered May 31, 1924, and respondent became the owner of the realty, subject to the lien; that since the month of August, 1939, respondent has refused to pay any sum of money to the appellant, and the sum of one hundred and fifty dollars was due when the complaint was filed. In addition to the prayer for payment, the complaint asked that a lien be imposed, a sale of a portion of the realty if necessary, provision for future payments, and general relief.

[1-3] The sufficiency of the complaint is not open to argument. The general rule is that, where an annuity is made a lien upon land the annuitant may enforce payment by foreclosure. The rule is well stated in 2 Am.Jur. p. 833 as follows: "In the event of the nonpayment of an annuity, the old common-law writ of annuity, now obsolete, was a remedy resorted to by an annuitant to obtain redress. At the present day, however, the remedy for nonpayment is, in general, by a personal action of debt or covenant on the instrument creating the annuity (or in jurisdictions in which the old forms of action are abolished, a civil action upon the same theory), or by bill against the trustee to compel an account. An annuity which is a charge on land in the form of a rent charge is enforceable by distress or an assize, if these remedies are still available in the particular jurisdiction involved, or a court of equity may appoint a receiver to collect the rents from such real estate and apply them to the satisfaction of a decree in favor of the annuitant; or the person having the right to the arrears is entitled in equity to have them raised by sale or mortgage of the estate; and the court will decree accordingly, even though the person claiming relief is entitled to the legal remedies of distress and perception of rents."

[4] But respondent argues that essential features of an annuity are lacking. This may be so, but it does not follow that appellant has no cause of action. If the complaint prays for relief to which the appellant is not entitled, or fails to seek the proper relief, it is nevertheless a good bill if it pleads facts sufficient to show that the pleader is entitled to some equitable relief. It is therefore good against the general demurrer. Brown v. Anderson-Cottonwood Irr. Dist., 183 Cal. 186, 190 P. 797; Zellner

v. Wassman, 184 Cal. 80, 193 P. 84; Bank of America, etc., Ass'n v. Gillett, 36 Cal. App.2d 453, 97 P.2d 875.

[5-8] The argument in the briefs is devoted to the point of want of jurisdiction of the subject matter because of section 1120 of the Probate Code. The code section reserves to the superior court of the county in which the probate proceedings were had jurisdiction "for the purpose of determining to whom the property shall pass * * * or settling the accounts and passing upon the acts of the trustee". But this is only in those cases in which "a trust [is] created by a will". If the will here created a trust and this action were one to pass "upon the acts of the trustee", there would be some merit in respondent's contention. If no trust has been created the proper county for the trial is the county in which the real property is situated. Const. art. VI, § 5; § 392, Code Civ.Proc. But we are satisfied that there is no trust involved, but that the rights of the parties rest upon an "equitable charge". The distinction between these relations is clearly drawn in Scott on Trusts, volume 1, section 10, as follows: "If a testator devises or bequeaths property subject to the payment of certain sums of money to third persons, he thereby creates an equitable charge, not a trust. An equitable charge is like a trust in that in each case the legal title to property is vested in one person and an equitable interest in the property is given to another. The interest which the equitable encumbrancer has, however, is different from the interest of a beneficiary of a trust. The equitable encumbrancer has only a security interest in the property; the beneficiary of a trust is, to the extent of his beneficial interest, the equitable owner of the trust property. If a devisee subject to an equitable charge fails to pay the equitable encumbrancer the sum to which he is entitled, the latter's remedy is a suit in equity to obtain a decree for the sale of the land to pay the charge; if a trustee fails to perform his duties under the trust, the remedy of the beneficiary is a suit in equity to compel specific performance or redress of the breach of trust."

[9] The author further illustrates the distinction between these relations as follows: "If property is transferred in trust for a particular purpose and the purpose is fully accomplished without exhausting the trust property, the trustee cannot keep the trust property for his own benefit, but holds it upon a resulting trust for the settlor or his estate, unless by the terms of the trust the settlor manifests an intention that the trustee in such case should keep the property. In the case of an equitable charge, on the other hand, if the amount of the charge is paid, the person who holds subject to the charge can keep the property for his own benefit. * * *"

[10] "Where property is devised charged with the payment of money to a third person, the devisee may become personally liable to pay the amount of the charge. Whether he becomes personally liable depends upon the language of the will. If the testator manifests an intention that the devisee should become personally liable, it is held that by accepting the property devised to him he impliedly agrees to pay the amount of the charge."

[11] Bogert on Trusts and Trustees, 1935 Ed., Vol. 1, p. 158, § 31, draws another distinction in this language: "Differences are also observable when one considers the element of personal liability. A charge may be upon the income alone, or upon the corpus alone; but, if the creator of the charge intends to place a personal liability on the taker of the property subject to the charge and the latter accepts the gift, such taker will come under a personal responsibility to pay the amount charged, either independent of the use of the thing charged as security, or in case of a deficiency after exhaustion of such security." He illustrates his meaning as follows: "It is admitted there is a strong similarity between charge and trust. If A, testator, devises his farm to B in trust for the purpose of paying from its income annually to C $1,000, the result is much like that where the testator devises the farm to B, free of trust, but subject to a charge on the income of the farm of $1,000, to be paid to C. In both cases B takes a legal interest, the fee simple, subject to an equitable property interest in the land in favor of C. In both cases C, if the income were not paid, could bring a bill in equity to enforce his rights and a decree might be made that B pay $1,000 out of the income to C."

[12] But more closely related to the will before us is the statement in Scott, section 10.2, reading: "If a devisee subject to an equitable charge transfers the property to a purchaser with notice of the charge, the purchaser takes it subject to the charge. If the devisee dies, his devisees or heirs take subject to the charge. So also if the de-

visee predeceases the testator but the devise does not lapse and the property goes to his children, they take subject to the charge." It should be noted that the devise to respondent is made subject to the lien "and with the express condition that he shall not at any time sell or encumber said ranch, by deed, mortgage lien, or any other kind or character of encumbrance, or by judgment or execution sale, so long as my son, George W. Woodley, shall live". That, if he should create any other lien upon the property it should all go to Nellie Deevy, absolutely. But that the devise is made to respondent, "or, in case of his forfeiture thereof, to my said daughter, Nellie Deevy, upon the express condition that, from the rents thereof, there shall be paid to my said son, George W. Woodley, the sum of fifty dollars ($50.00) per month (payable monthly from the date of my death) so long as he shall live, which said sum of fifty dollars ($50.00) per month shall constitute a lien upon said land so long as my said son, George W. Woodley, shall live".

There is thus created an equitable charge running with the land which is expressly made a lien upon the land regardless of who may hold the legal title. In the event that respondent should forfeit his interest and the land should go to Nellie Deevy she would take subject to the lien because of the express terms of the will. But if she should transfer title the transferee, with notice, would take subject to the lien, or equitable charge, and thus the essential elements of trust are absent.

[13] Whether respondent's liability rests upon a contractual obligation assumed by him when he accepted the property the authorities are not in accord, but there is general agreement that the appellant has an equitable, if not legal, interest which may be enforced in a court of chancery. This may rest upon the principle that: "He who takes the benefit must bear the burden." Civil Code, § 3521. The general principle, including the doctrine of personal liability, is approved in Keir v. Keir, 155 Cal. 96, 99, 99 P. 487, 488, where it is said: "The acceptance of the property given to him by the will, charged with the payment provided for the plaintiff, imposed upon the defendant a personal liability to the plaintiff for the payment of the money as directed by the will. As soon as the liability accrued, if it was not performed within a reasonable time, the plaintiff was entitled to begin an action to recover the money of the defendant, and to have the claim declared a lien upon the property given to the defendant by the will. Dunne v. Dunne, 66 Cal. 157, 4 P. 441, 1152."

We conclude, therefore, that the complaint states a cause of action and that the proper county for the trial of the issues is the county of Marin.

The judgment is reversed with directions to overrule the demurrer.

SPENCE, J., and DOOLING, J. pro tem., concurred.



47 Cal.App.2d 204

FOSTER v. PETERS.

Civ. 13255.

District Court of Appeal, Second District, Division 1, California.

Oct. 7, 1941.

1. Insurance ⇐84(6)

In insurance solicitor's action against insurance broker for commissions, findings that solicitor and broker did not agree to equal division of commissions, and that solicitor was employed on a salary, were not inconsistent.

2. Trial ⇐404(1)

Findings should be liberally construed, and if possible any ambiguity must be resolved in support of judgment.

3. Injunction ⇐210

In insurance solicitor's action to restrain insurance broker from using solicitor's list of customers and soliciting and attempting to sell insurance to such customers after termination of solicitor's employment with broker, use of word "selling", in injunction restraining broker from soliciting, selling, or canvassing insurance from such customers, was improper as preventing broker from accepting unsolicited business from customers, and should be limited, by striking the word "selling", to sales to solicitor's customers solicited by broker.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by E. Ware Foster, Jr., against G. Fuller Peters for an accounting and an injunction. The defendant filed a cross-complaint. From a judgment for the plaintiff, the defendant appeals.

Affirmed as modified.

Robert A. Eastman, of Los Angeles, for appellant.

Albert E. Wheatcroft, of Los Angeles, for respondent.

SHAW, Justice pro tem.

This appeal by defendant is presented on the judgment roll alone, with no record of the evidence. From the findings, the following facts appear: Plaintiff is an insurance solicitor, and defendant an insurance broker, and plaintiff was employed by defendant for a time to work as solicitor for defendant. Prior to his employment by defendant, plaintiff had acquired a selective and confidential list of customers for the sale of casualty, fire and accident insurance, with whose insurance needs he was familiar, and with whom he had a valuable good-will. Defendant employed plaintiff to solicit and sell "to various persons life and related policies of insurance and while so employed to solicit and sell casualty, fire and accident insurance to plaintiff's said selective list of clientele and customers". While plaintiff was so employed, defendant kept records of the policies sold by plaintiff to these customers and the commissions earned by plaintiff thereon, and became acquainted with their names, addresses and insurance needs. Since plaintiff left defendant's employ, defendant has used plaintiff's list of customers and solicited and attempted to sell insurance to them without plaintiff's permission.

In his complaint plaintiff asked an injunction against such use of his list and also for an accounting and judgment for the amount of commissions due him on policies sold by him to his customers while in defendant's employ. The trial court gave plaintiff judgment for an injunction and for the sum of $1,032.94, from which judgment defendant appeals.

[1, 2] Defendant argues that the findings are inconsistent and hence do not support the judgment. The claimed inconsistency relates only to the nature of the agreement between plaintiff and defendant as to the compensation to be paid by defendant to plaintiff.

Plaintiff's complaint did not allege what this agreement was, except to show that commissions were to be earned by plaintiff on sales of insurance policies to his customers. In his answer defendant alleged the agreement in this respect to be that plaintiff was to have 50 per cent of these commissions and defendant was to retain the other 50 per cent for his services in handling the business. The court found that this part of the answer was not true. In connection with a cross-complaint which alleged that the same agreement was made for equal division of commissions on "life and related policies", the court found this allegation also to be untrue, adding that, in fact, plaintiff was "employed on a salary during the period of his said employment". Another finding was, that defendant "did appropriate to his own use commissions due plaintiff".

It is claimed that there are inconsistencies among these findings. We are unable to see any. The finding as to salary does not state that there were no commissions, nor does it clearly relate to the matter on which plaintiff sued; and the finding as to commissions does not state that there was no salary. One person may work for another on an agreement by which he is to receive both salary and commission. Findings are to be liberally construed and if possible any ambiguity or uncertainty must be resolved in support of the judgment. Middleton v. Parsons, 1937, 22 Cal.App.2d 250, 70 P.2d 515. Under this rule the findings here are sufficient.

[3] Defendant also complains that the injunction granted by the judgment is too broad. Plaintiff concedes this point and we find it well taken. The injunction against the use of plaintiff's list restrains the defendant from "soliciting, selling, canvassing casualty, fire or accident insurance from any of the following persons who were clients and customers of plaintiff prior to March 31, 1936 (naming them)". The word "selling" is improper here, for it would prevent defendant from doing business with any of plaintiff's listed customers even though the business came to him on the customer's own initiative without any act of solicitation or other violation of plaintiff's rights by defendant. New Method Laundry Co. v. MacCann, 1916, 174 Cal. 26, 161 P. 990, Ann.Cas.1918C, 1022. The injunction

should be limited to sales to customers of plaintiff solicited by defendant. Golden State Milk Prod. Co. v. Brown, 1933, 217 Cal. 570, 20 P.2d 657. Plaintiff concedes that this may be accomplished by striking the word "selling" from the injunction.

Defendant also objects to the inclusion of Security-First National Bank of Los Angeles in the list of customers, and while the record shows no reason for excluding it, plaintiff consents in his brief that this may be done.

The judgment is modified by striking the word "selling" from paragraph IV thereof, and by striking from the same paragraph the name "Security-First National Bank of Los Angeles", and as so modified, it is affirmed, each party to bear his own costs of appeal.

YORK, P. J., and WHITE, J., concurred.



47 Cal.App.2d 248

FERNANDES v. PITTA.

Civ. 6567.

District Court of Appeal, Third District, California.

Oct. 9, 1941.

Rehearing Denied Nov. 6, 1941.

1. Bankruptcy ⇐421(5)

Under the Bankruptcy Act, a discharge does not release the bankrupt from a debt for alimony, support or maintenance of a wife which is, or may become due, or for the education and care of his children even though such claims are embodied in an agreement between the parties and have merged in a judgment subsequently recovered therefor. Bankr.Act § 17, 11 U.S.C.A. § 35.

2. Bankruptcy ⇐421(5)

The rule that liability for support of wife or children, even though reduced to judgment, is not provable in a bankruptcy proceeding, so as to release bankrupt from liability, is based on public policy to place obligations for support of wife or children on husband or parents so as to relieve society of those burdens. Bankr.Act § 17, 11 U.S.C.A. § 35.

3. Bankruptcy ⇐421(5)

Where agreement approved in divorce decree provided for transfer to husband of realty, personalty and cash and that husband should give wife certain sum in cash and execute five notes in her favor and that each party should thereafter be released from claims of other for support and from all claims for alimony, costs of suit and attorneys' fees, and agreement gave husband absolute custody of children, agreement could reasonably be construed to be a straight property settlement agreement and an acknowledgment that no valid claim for support of wife existed as consequence of which judgment on unpaid notes was a "debt" provable in bankruptcy and discharge of husband in bankruptcy released him of liability under judgment. Bankr.Act § 17, 11 U.S.C.A. § 35.

See Words and Phrases, Permanent Edition, for all other definitions of "Debt".

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action on certain notes by Mary Fernandes against Antonio Pitta, wherein a judgment was rendered for the plaintiff. Plaintiff procured the issuance of an execution and threatened to levy upon certain wages due the defendant and after hearing court ordered that the execution be recalled and quashed, and plaintiff appeals.

Affirmed.

McGilvray & McGilvray, of Sacramento, and Forrest E. Macomber, of Stockton, for appellant.

O. C. Parkinson, of Stockton, for respondent.

THOMPSON, Justice.

The plaintiff has appealed from an order quashing an execution on the ground that the judgment debtor was relieved from liability by a subsequent adjudication of bankruptcy.

The plaintiff and defendant were formerly husband and wife. There are three children as the issue of that marriage. The spouses were possessed of community real and personal property. The plaintiff commenced a suit for divorce against the defendant, praying for a dissolution of the

marriage and for alimony, maintenance and counsel fees. An order for alimony pendente lite was made. Pending that action the parties executed a written agreement on July 11, 1930, settling their property rights. That agreement does not purport to allow plaintiff alimony, maintenance or costs of suit. It does convey to the husband the real property, household goods, farm machinery and an automobile, together with all their money on hand amounting to $1,879.02. By the terms of the agreement the wife was paid $800 in cash and the husband executed and delivered to her five notes for the additional sums of $360 each, payable, without interest, on the 30th of July of each year from 1932 to 1936, inclusive. The contract then provides that:

"Each party shall hereafter be released and each party does hereby release the other from all claim of either party upon the other for support during their separation and from all claim for alimony, temporary or permanent, costs of suit and attorneys fees, which might otherwise be awarded in the action for divorce now pending between the parties or in any action for divorce or separate maintenance which may occur between the parties."

The agreement then provided that the husband would take absolute custody of the three children and that he would assume and pay all future cost for their support, maintenance and education.

A decree of divorce was subsequently awarded to the wife, in which the terms of the agreement settling property rights were duly approved. That decree became final and the wife subsequently married another man.

The first note was paid but the defendant defaulted in payment of the other four notes. In October, 1935, plaintiff brought suit upon the four unpaid notes and recovered judgment by default for the aggregate sum of $1,440, together with counsel fees in the additional sum of $300. The defendant lost all of his property and subsequently filed a petition in bankruptcy. The four notes were listed in his petition as liabilities. Over opposition of the plaintiff, a final discharge in bankruptcy was awarded to the defendant December 2, 1938. After the discharge in bankruptcy was rendered plaintiff procured the issuance of execution and threatened to levy upon certain wages due to the defendant to satisfy the judgment for the amount of the four unpaid notes. Upon due notice and hearing, based on affidavits, the court found that:

"Said notes were not executed for, and did not represent, either alimony due or to become due, or maintenance or support of wife or child or any other liability not dischargeable in bankruptcy" and upon the contrary that, "the judgment in this action was a provable debt in said bankruptcy proceeding, and the collection thereof is barred by said discharge in bankruptcy."

Thereupon it was ordered that the execution be recalled and quashed. From that order this appeal was perfected.

It is asserted the court erred in quashing the execution because the order is not supported by the evidence since the agreement settling property rights, which furnishes the foundation for the execution of the four notes, indicates that they were given in payment for alimony and maintenance of the wife of the maker thereof and that such obligations are not provable debts in a bankruptcy proceeding but are specifically exempted from release or discharge by the terms of the Bankruptcy Act as amended in 1903. It is claimed the court may go beyond the judgment which was rendered upon the four notes, and construe the agreement settling property rights, to determine whether the notes were given in payment of alimony or maintenance of the wife, and if so that it should determine that payment of the judgment for such notes is not barred by the bankruptcy proceedings.

[1] There appears to be no doubt that under the provisions of section 17 of the Bankruptcy Act as amended in 1903 a discharge does not release the bankrupt from a debt for alimony, support or maintenance of a wife which is, or may become due, or for the education and care of his children, even though such claims are embodied in an agreement between the parties and have merged in a judgment subsequently recovered therefor. 11 U.S.C.A., p. 150, § 35; 2 Remington on Bankruptcy, 4th Ed., p. 217, § 779; 8 C.J.S., Bankruptcy, 1511, § 570; 6 Am.Jur. 816, § 508; 103 A.L.R. 722, note; 2 Schouler on Marriage and Divorce, 6th Ed., 1940, § 1756; Audubon v. Shufeldt, 181 U.S. 575, 21 S.Ct. 735, 45 L.Ed. 1009; Dunbar v. Dunbar, 190 U.S. 340, 23 S.Ct. 757, 47 L.Ed. 1084; Remondino v. Remondino, 41 Cal.App.2d 208, 106 P.2d 437. See, also, numerous

authorities cited under section 17 of the Bankruptcy Act, section 35 found on pages 177 and 178 of Title 11 U.S.C.A. That section provides in part:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except * * * for alimony due or to become due, or for maintenance or support of wife or child."

[2] In the Dunbar case, supra, it was held that liability for the support and maintenance of children, even though reduced to judgment, is not provable in a bankrupt proceeding so as to release the debtor therefrom. This exception to the general rule is adopted on account of public policy to enforce the obligations for maintenance and support of the wife or children upon the husband or parents so as to relieve society of those burdens.

[3] In the present case we are satisfied the order quashing the execution is supported by the evidence. In a critical examination of the agreement settling the property rights of the spouses we are persuaded that it neither promised to pay for maintenance or support of the wife nor recognized a liability on the part of the husband to do so. On the contrary, paragraph 11 of the contract, heretofore quoted, expressly "releases" the husband from all such claims on the part of the wife. The contract does not assert that release from liability to pay maintenance or support of the wife was in consideration of the payment to her of the $800 in cash or for the execution of the five notes. The agreement may reasonably be construed to be an acknowledgment that no such valid claim for maintenance or support existed. The agreement was subsequently approved by the court and the plaintiff withdrew her claim for alimony, maintenance and costs of suit. It is true that incidentally the subject of maintenance and support is mentioned in the contract. It is stated in paragraph 15 that the contract was made "solely for the purpose of settling rights of property and support which arise between the parties on account of their present separation". But there is no acknowledgment of a liability to pay to the wife maintenance or support money. In every respect that document appears to be a straight agreement settling property rights between spouses as distinguished from a promise to pay maintenance or support. This construction is reinforced by the specific agreement therein contained that the husband shall take custody of their three children and become wholly responsible for their maintenance, support and education. We are therefore of the opinion the judgment for the four unpaid notes, executed pursuant to the express terms of the contract in settlement of property rights, was a valid debt which was provable as a liability of the husband in the bankrupt proceeding, and that his final discharge relieved him of future liability therefor.

The case of Tropp v. Tropp, 129 Cal. App. 62, 18 P.2d 385, presented a situation similar to the facts of this case. The syllabus of that case correctly states the principle which was determined, in the following language:

"Where a decree of divorce embodied the provisions of a property settlement agreement whereby the husband was to pay a stated monthly amount and a further amount in ten equal annual installments, and the liability to pay said further amount was a liability incurred in effecting a property settlement, as distinguished from a liability for 'maintenance or support', it was one of the husband's provable debts from which he was released by his discharge in bankruptcy, and there was no error in ordering a perpetual stay of execution, as to that portion of the decree."

The case of Remondino v. Remondino, supra, upon which the appellant relies, is readily distinguishable from the Tropp case, supra, in the essential fact that the agreement in the last-mentioned case contained no acknowledgment of liability for the payment of maintenance or support, while in the Remondino case the contract covenanted that "plaintiff agreed to pay defendant $100 on the first day of every month thereafter 'for the support and maintenance' of defendant." [41 Cal.App. 2d 208, 106 P.2d 439.] The last-mentioned language is a clear recognition of liability for, and an agreement to pay, specified monthly installments for maintenance and support of the wife. No such language exists in the property settlement agreement of the present case.

The order is affirmed.

TUTTLE, J., and PULLEN, P. J., concurred.

SANAN v. SCHOENBORN et al.

Civ. 13252.

District Court of Appeal, Second District, Division 1, California.

Oct. 17, 1941.

Hearing Denied Dec. 15, 1941.

1. Evidence ⇐588

The trial judge may take into account the inherent improbability of a witness' testimony and reject it in its entirety.

2. Lost Instruments ⇐23(3)

Evidence was insufficient to show that by the terms of a lost document plaintiff and the payee of plaintiff's trust deed note agreed, in connection with the execution of the note and trust deed, that in the event of the death of either party the trust deed should become void and no further payments thereon would be required.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action to quiet title by Rosetta Sanan against Veral Schoenborn and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

R. L. Anderson and V. A. Morgan, both of Alhambra, for appellant.

Walter E. Smith, of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal by plaintiff from a judgment against her in an action to quiet title.

Briefly, the facts are as follows: Plaintiff was the owner of certain described property incumbered with a trust deed which had been executed to secure a note in the sum of $5,000 issued by her in favor of one W. D. Van Nostran. The complaint alleged and plaintiff sought to prove that at the time of the transaction between her and Van Nostran, in connection with which the note and trust deed were executed, they entered into an agreement by the terms of which Van Nostran agreed that in the event of the death of either, the trust deed should become null and void and no further payments thereon would be required. It was also alleged and plaintiff sought to prove that the above mentioned agreement was in writing.

The evidence of the terms of the alleged agreement consisted of plaintiff's testimony, the testimony of Mr. and Mrs. Stanton, with whom plaintiff had lived, and a portion of the third page of what plaintiff testified was a letter from Van Nostran to her. This last mentioned exhibit was as follows: "Also I confirm our verbal agreement of last week that, in case of either your or my demise, all further payments are canceled and the mortgage released. I owe you that concession.

"Very truly
(signed) *W. D. Van Nostran.*
W. D. Van Nostran."

Plaintiff further testified that the remainder of the document had been burned in the incinerator, from which the portion in evidence had been later recovered. The edges, the record reveals, showed evidence of fire.

The court found as a fact that, "It is not true that the said Rosetta Sanan and the said W. D. Van Nostran contracted or agreed in writing or otherwise that in the event of the death of either W. D. Van Nostran or Rosetta Sanan before the note should be fully paid, then and in either event the installment payments subsequently accruing should be cancelled and the obligations to that extent, or to any extent, extinguished, with the right of the trustor named in said trust deed or her successor to have the title to said property reconveyed to her."

Appellant contends that the findings are not supported by the evidence.

Plaintiff testified that the above mentioned agreement was in writing and countersigned by two witnesses but that she had lost her copy. On the theory that proof of a lost document had been established she was permitted to testify as to its contents. The portion of the burned letter evidently was intended as concrete and visible evidence in corroboration of plaintiff's testimony.

The defendant introduced carbon copies of numerous letters from Van Nostran to plaintiff, a few of which plaintiff on cross-examination remembered, but none of the correspondence between her and Van Nostran had been preserved by her.

It is argued by appellant that the testimony of plaintiff as to the existence and

contents of the lost agreement having been corroborated and the same being uncontradicted the court was bound to decide the issue in plaintiff's favor.

[1, 2] Such is not the law. The trial judge may take into account the inherent improbability of a witness' testimony and reject it in its entirety; indeed fantastic tales are frequently so treated. A careful reading of plaintiff's testimony on both direct and cross-examination, coupled with a consideration of other evidence of facts and circumstances reveals appellant's contention unsupported by the record. Such conclusion disposes of the minor issues sought to be raised on appeal and which therefore need no mention.

Judgment affirmed.

YORK, P. J., and WHITE, J., concurred.



47 Cal.App.2d 376

LEEPER v. GINSBERG et al.

Civ. 6747.

District Court of Appeal, Third District, California.

Oct. 18, 1941.

1. Appeal and error ⇐790(3)

The District Court of Appeal cannot dismiss an appeal until a valid and final order terminating proceedings in the lower court exists.

2. Appeal and error ⇐78(1)

An order granting a motion to terminate proceedings in the lower court is an "appealable order".

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

3. Appeal and error ⇐302

Where bill of exceptions was prepared by defendants after their motion for new trial was denied, but proposed bill was not presented to trial court to be certified as required by statute, and thereafter trial court granted plaintiff's motion to terminate proceedings for the preparation of a bill of exceptions, and defendants took an appeal from such order, which appeal was still undisposed of, motion to dismiss the appeal from the judgment was denied, without prejudice to a new motion when and if order terminating proceedings in trial court becomes final. Code Civ.Proc. § 650.

Appeal from Superior Court, Sacramento County.

Action by Thomas B. Leeper against Sam Ginsberg and others. From a judgment for plaintiff, the defendants appeal, and the plaintiff moves to dismiss the appeal.

Motion denied, without prejudice to a new motion.

Busick & Busick and O. F. Meldon, all of Sacramento, for appellants.

Ralph H. Lewis and R. L. Shinn, both of Sacramento, for respondent.

ROSS, Justice pro tem.

This case was before the court previously (29 Cal.App.2d 722, 85 P.2d 548). On retrial a judgment was granted to plaintiff. After a motion for a new trial was denied, notice of appeal was duly filed, and in due time a bill of exceptions was prepared and the proposed engrossed bill of exceptions was handed to the clerk of the court on December 7, 1940. It was not presented to the judge who tried the case to be certified, as required by the sixth paragraph of section 650 of the Code of Civil Procedure.

After a lapse of more than seven months notice of motion to terminate proceedings for the preparation of a bill of exceptions was given on July 10, 1941, and on September 5, 1941, the lower court granted this motion. The present motion for dismissal of the appeal herein followed.

Meanwhile an appeal has been taken from the order terminating proceedings and the settling of a new bill of exceptions on that appeal is in progress.

[1, 2] This court cannot dismiss the appeal until a valid and final order terminating proceedings in the lower court exists. An order granting a motion to terminate proceedings is an appealable order. Wood v. Peterson Farms Company, 214 Cal. 94, 3 P.2d 922; Golden Arrow Mines, Inc. v. Hickman, 31 Cal.App.2d 419, 88 P.2d 160.

Respondent's contention that litigation can be prolonged indefinitely by successive appeals from motions terminating proceedings is answered by saying that the time limits set by law must be strictly adhered to if respondent insists, and if matters reach a point where frivolous appeals are taken they can be justly dealt with.

[3] The motion to dismiss the appeal is denied, without prejudice to a new motion when and if the order terminating proceedings in the lower court becomes final.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.



BANK OF AMERICA N. T. & S. A. v. SUPERIOR COURT OF LOS ANGELES COUNTY.

Civ. 13207.

District Court of Appeal, Second District, Division 1, California.

Oct. 3, 1941.

Rehearing Granted Oct. 31, 1941.

1. Appeal and error ⇐870(2)

The trial court's action in granting plaintiffs leave to amend their first two causes of action, after appellate court had upheld sustaining a demurrer without leave to amend as to first two causes of action, but had reversed judgment of dismissal upon ground that other counts of the complaint stated a cause of action, could be reviewed on an appeal from a final judgment in the action, although of itself the order was not an "appealable order" under statute. Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

2. Certiorari ⇐5(1)

Generally, even if an order is not appealable, certiorari will not lie if the effect of the order can be reviewed and nullified by an appeal from the final judgment. Code Civ.Proc. § 963.

3. Certiorari ⇐4, 5(1), 28(1)

The conditions on which a certiorari may be granted are separate and concurrent, and there must be an excess of jurisdiction by an inferior tribunal, no appeal, and no other plain, speedy and adequate remedy in order to afford a remedy by certiorari under statute. Code Civ.Proc. § 1068.

4. Certiorari ⇐5(1)

Where there is a direct appeal from order of an inferior court under statute, certiorari will not lie in any event. Code Civ. Proc. §§ 963, 1068.

5. Certiorari ⇐5(1)

In determining whether certiorari should be granted to review an order of an inferior tribunal from which there is no direct appeal, the question to be determined is whether a review on an appeal from a final judgment would nullify effect of the order. Code Civ.Proc. §§ 963, 1068.

6. Certiorari ⇐5(2)

Although trial court's action in granting plaintiffs leave to amend their first two causes of action, after appellate court had upheld sustaining a demurrer without leave to amend as to first two causes of action, but had reversed judgment of dismissal upon ground that other counts of the complaint stated a cause of action, could be reviewed on an appeal from a final judgment in the action, such roundabout remedy might prevent defendant from interposing defense of statute of limitations, and substantial justice required a review of the matter upon certiorari. Code Civ.Proc. §§ 963, 1068.

7. Appeal and error ⇐1194(3)

Where appellate court upheld sustaining a demurrer without leave to amend as to first two causes of action, but reversed judgment of dismissal upon ground that other counts of the complaint stated a cause of action, effect of the reversal was to place the parties in the same position they had occupied before entry of judgment of dismissal; but order of trial court sustaining demurrer as to first two causes of action remained valid and subsisting.

8. Appeal and error ⇐1195(1)

The determination of an appellate court of the rights of the parties in an appeal from the superior court is a "final adjudication" of those rights, and the questions of law decided by appellate court become the rule for the guidance of trial court if same ques-

tions are again presented in such controversy.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Adjudication".

9. Appeal and error ⇐1201(4)

The decision of appellate court upholding the sustaining a demurrer without leave to amend as to first two causes of action, but reversing judgment of dismissal upon ground that other counts of the complaint stated a cause of action, became the "law of the case" and was thereafter binding upon trial court in all subsequent stages of the action, and, therefore, trial court was without jurisdiction to entertain plaintiffs' motion for leave to amend their first two causes of action.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

Original proceeding in certiorari by the Bank of America N. T. & S. A., to review an order of the Superior Court of Los Angeles County permitting an amendment of a complaint for alleged conversion of bank stock brought against the petitioner.

Order annulled.

Edmund Nelson, G. L. Berrey, Freston & Files, and James A. McLaughlin. all of Los Angeles, for petitioner.

Mitchell, Silberberg, Roth & Knupp, of Los Angeles, for respondent.

DORAN, Justice.

By this proceeding petitioner seeks a review of an order of the superior court permitting an amendment as to the first two causes of action set forth in a first amended complaint in an action entitled Herbert Hellman Aronson et al. v. Bank of America National Trust & Savings Association et al., L. A. Superior Court No. 409371, brought against petitioner for an alleged conversion of certain shares of bank stock. The complaint in question consisted of four counts, each based upon a separate alleged conversion of stock, and the order granting plaintiffs leave to amend their first two counts was made upon motion of plaintiffs therefor after a general demurrer to the entire complaint had been sustained without leave to amend further, the action had been dismissed, an appeal had been taken from the judgment of dismissal, and the appellate court had upheld the sustaining of the demurrer without leave to amend as to the first two counts of the complaint but had reversed the judgment of dismissal upon the ground that the third and fourth counts of the complaint stated a cause of action. See Aronson v. Bank of America Nat. Trust & Sav. Ass'n, 42 Cal.App.2d 710, 109 P.2d 1001, 1007. Petitioner herein contends that under the circumstances the trial court had no jurisdiction to grant plaintiffs leave to amend the first two counts of their complaint after the decision rendered by the appellate court above referred to.

In its opinion the appellate court stated: "It should be mentioned in passing that the complaint is far from a model of pleading and is in no sense concise. It is clear, however, that no attempt has been made to set out more than one cause of action in each count.

"In view of the fact that the allegations of the first and second counts of the complaint reveal a situation wherein no cause of action would lie against respondent bank or its predecessor the trial court did not err in refusing to grant leave to plaintiffs to amend those counts, but for the reasons above given the court erred in sustaining the demurrer to the third and fourth counts and in dismissing the action.

"The judgment of dismissal is therefore reversed with directions to the trial court to grant appellants leave to file an amended complaint if they are so advised."

Respondent contends that the effect of the judgment of reversal was to vacate the order sustaining the demurrer to plaintiffs' complaint and to place the action in exactly the same situation it occupied before there was any ruling on the demurrer. Respondent also contends that certiorari will not lie in the present instance because the question here presented may be reviewed upon an appeal from a final judgment in the action now pending.

[1, 2] It is undoubtedly true that the propriety of the trial court's action in granting plaintiffs leave to amend their first two causes of action, after reversal of the judgment of dismissal, could be reviewed on an appeal from a final judgment in the action; although of itself the order in question is not an appealable order under section 963 of the Code of Civil Procedure. It has been generally held that even if the order in question

is not appealable, certiorari will not lie if the effect of the order can be reviewed and nullified by an appeal from the final judgment. Bryant v. Superior Court 16 Cal.App.2d 556, 562, 61 P.2d 483; Hughson v. Superior Court, 120 Cal.App. 658, 8 P.2d 227. But in Bottoms v. Superior Court, 82 Cal.App. 764, 777, 256 P. 422, the trial court had vacated an order granting a continuance. The continuance had been granted on the ground that one of counsel was a member of the legislature attending a session thereof. Certiorari was sought to review the order vacating the order of continuance. It was held that while such an order would be reviewable on appeal from a final judgment in the action, the circumstances obviously required a more speedy and adequate remedy. It should be noted that the Bottoms case presented a situation where the effect of the order in question could not be nullified on an appeal from the final judgment. The continuance having been vacated and the action having been tried, the party aggrieved could be afforded no real remedy on an appeal from the final judgment. It could hardly be said that justice would be done by reversing the final judgment and remanding the cause to be tried all over again because the trial court had refused a continuance.

Bryant v. Superior Court, supra, was concerned with the review of an order vacating orders allowing claims against an estate. At page 562 of 16 Cal.App.2d, at page 486 of 61 P.2d, in that case the court stated: "The order under review is not an appealable order. [Cases cited.] It has been held that even so, if the effect of an order can be reviewed and nullified by an appeal from the judgment, certiorari will not lie. [Citing Hughson v. Superior Court, supra.] Relying on this principle of law, respondents claim that petitioners have a plain, speedy, and adequate remedy at law, as they can again present their claim to one of the judges of the superior court for allowance; if disallowed in whole or in part, a suit to enforce the claim may be prosecuted, and, if an adverse judgment is had, an appeal lies therefrom. Prior to the order vacating these claims, they stood as acknowledged debts against the estate. The approval of a claim against an estate is prima facie evidence of its validity, and the burden of showing invalidity is cast upon those who contest it. [Citing authority.] It is apparent, therefore, that the effect of the order vacating the orders allowing the claims cannot be reviewed or nullified by the method suggested by respondents."

In Stanton v. Superior Court, 202 Cal. 478, at page 490, 261 P. 1001, at page 1005, a case having to do with the review of a void order setting aside a judgment, it is said: "To require review to be by appeal of every unauthorized order or judgment attacking the proceedings by which the regular judgment was given and made would seriously embarrass, if not destroy, the efficiency of our whole legal system."

[3-5] Section 1068 of the Code of Civil Procedure provides that a writ of review may be granted when jurisdiction has been exceeded "and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy". The conditions on which such a writ may be granted have been held to be separate and concurrent. See Monterey Club v. Superior Court, 44 Cal.App.2d 351, 112 P.2d 321. Accordingly, in order to afford a remedy by certiorari under the code, two requisite elements must be present, aside from that of excess of jurisdiction, namely: (a) No appeal; (b) No other plain, speedy and adequate remedy. Where there is a direct appeal from the order in question under section 963 of the Code of Civil Procedure, certiorari will not lie in any event. Stoddard v. Superior Court, 108 Cal. 303, 41 P. 278; Monterey Club v. Superior Court, supra. Likewise, as already seen from the authorities heretofore cited, certiorari will not lie if the effect of the order can be reviewed and nullified on an appeal from the judgment, even though the order itself is not appealable. In other words, if the effect of the order can be thus reviewed and nullified, an appeal from the judgment will afford a plain, speedy and adequate remedy. It becomes apparent, therefore, that in cases such as Bryant v. Superior Court, Hughson v. Superior Court and Bottoms v. Superior Court, the decision in each case turned upon the question of whether an appeal from the final judgment would afford the petitioner a plain, speedy and adequate remedy; and that the cases where there was no direct appeal available to petitioner have been decided upon a different basis than cases involving an order directly appealable, and are to be distinguished from cases such as Stoddard v. Superior Court, wherein a direct appeal from the order in question was afforded under section 963 of the Code of Civil

Procedure. Briefly, in cases where there is no direct appeal from the order sought to be reviewed, the question to be determined is whether a review on an appeal from a final judgment would nullify the effect of the order. Bottoms v. Superior Court and Bryant v. Superior Court furnish examples of instances in which a subsequent review on appeal would not nullify the effect of the order in question.

The effect of the order in the instant case, permitting an amendment of plaintiffs' first and second counts, is to give plaintiffs another chance to state a cause of action therein and to compel petitioner, the defendant, to further defend against the same, either by way of another demurrer, or by answer and a trial of the issues. Following such a trial, if it were decided on an appeal from the final judgment therein that the trial court had erred in allowing plaintiffs to amend their first two causes of action under the circumstances, and the judgment thus rendered on the said counts were therefore reversed, the parties would then be placed in the position they occupied before the amendment of the complaint and trial on the merits. Plaintiffs could then institute a new action based on the two counts in question.

As the matter stands after reversal of the judgment of dismissal above referred to, plaintiffs are free to institute at once a new action based on the first two counts of their complaint. In such a case, if the statute of limitations had meanwhile run against the two counts in question, the defendant could then interpose the bar of the statute as a defense to the new action. On the other hand, assuming that the pending action were commenced before the expiration of the limitation provided therefor, the defense of the statute of limitations would not be available to defendant after amendment of the first two counts, because such amendment necessarily relates back to the time of the commencement of the action. Therefore, assuming such a situation to exist, if plaintiffs are allowed to amend their first two counts in the action now pending instead of being compelled to bring a new action thereon, the effect thereof is to preclude defendant from interposing a presumably valid defense to the counts in question.

[6] It is true that the matter would be subject to review on an appeal from a final judgment in the action; and if the order allowing the amendment in question were then found to be erroneous and void, on reversal of the judgment plaintiffs could then return to the trial court and institute a new action and defendant could then interpose the defense of the bar of the statute of limitations, if the circumstances warranted such a defense. But the cumbersome and roundabout nature of the remedy thus provided is immediately obvious. Such a remedy is akin to that proposed by respondents in the Bryant case, or that which would have been afforded by a review on appeal in the Bottoms case. Under the circumstances, to say that in the instant case the effect of the order in question would be nullified by a review on an appeal from a final judgment in the pending action, is to indulge in a pure fiction. To require review to be by appeal under the circumstances here presented would, as stated in Stanton v. Superior Court, supra, seriously embarrass, if not destroy, the efficiency of our whole legal system. Substantial justice requires a review of the matter upon certiorari.

[7-9] With regard to respondent's contention that the reversal of the judgment of dismissal placed the action in the same position it occupied before the ruling on demurrer, it should be pointed out that the appeal was from the judgment of dismissal only and not from the order sustaining the demurrer. It must be borne in mind that the complaint contained four separate and independent causes of action. If any one of the counts of the complaint stated a cause of action against defendant a reversal of the judgment dismissing the action would be required. In reviewing the matter the appellate court found that two of the counts stated valid causes of action and the judgment of dismissal was accordingly reversed. The effect of this reversal was to place the parties in the same position they had occupied before the entry of the judgment of dismissal. See 2 Cal.Jur. 996, Appeal and Error, § 590. Necessarily, however, the reversal also had the effect of nullifying the order sustaining the demurrer as to the third and fourth counts of the complaint, since the reversal of the judgment was based upon the error of the court in sustaining the demurrer as to these counts. But the appellate court expressly held that the demurrer as to the first and second counts of the complaint was properly sustained without leave to amend further. It is apparent, therefore, that in holding the

order sustaining the demurrer to be error, the appellate court restricted its opinion to the application of such order to the third and fourth counts of the complaint only. The effect of the trial court's order on demurrer was therefore nullified by the reversal on appeal only so far as it applied to the latter counts; and as to the first and second counts of the complaint the order sustaining the demurrer without leave to amend remained valid and subsisting. It appears, therefore, that at the time plaintiffs made their motion for leave to amend the first and second counts of their complaint in the action now pending there was upon the records of the trial court a valid and subsisting order sustaining a general demurrer without leave to amend as to those two counts. Moreover, "the determination of an appellate court of the rights of the parties in an appeal from the Superior Court is a final adjudication of those rights, and the questions of law decided by such court become the rule for the guidance of the trial court if the same questions are again presented in that controversy * * *". 2 Cal.Jur. 1042. The decision of the appellate court that the first and second counts did not state a cause of action became the law of the case and was thereafter binding upon the trial court in all subsequent stages of the pending action. Id. 1043, and cases there cited. Under the circumstances, the trial court was without jurisdiction to entertain the motion of plaintiffs for leave to amend their first two causes of action, and to grant such leave to amend after the decision of the appellate court reversing the judgment of dismissal but upholding the previous ruling of the trial court sustaining the general demurrer as to the said counts. As to a similar situation, involving an order denying attorney's fees, where the court subsequently granted the attorney leave to sue for the said fees and the court was held without power so to do, see Anderson v. Great Republic Life Insurance Co., 41 Cal.App.2d 181, 106 P.2d 75.

It follows that the order of the trial court granting permission to amend the first two counts of the complaint in the pending action, after the sustaining of a demurrer thereto had been upheld on appeal, was void.

It should be noted that, in the light of the opinion rendered, when the appellate court directed the trial court to grant plaintiffs leave to file an amended complaint, if so advised, such a direction could only be applied to the third and fourth counts of the complaint; and it is apparent that such a direction was given because the appellate court found "that the complaint is far from a model of pleading and is in no sense concise".

For the foregoing reasons the order of the trial court purporting to grant plaintiffs leave to amend the first two counts of plaintiffs' complaint should be and the same therefore is annulled.

YORK, P. J., and WHITE, J., concurred.



47 Cal.App.2d 171

BREWER v. FEIGENBAUM et al.

Civ. 11848.

District Court of Appeal, First District, Division 2, California.

Oct. 6, 1941.

Rehearing Denied Nov. 5, 1941.

1. Municipal corporations ⇐73

Taxation for municipal purposes is, generally speaking, a municipal affair. Const. art. 11, § 6.

2. Municipal corporations ⇐79

The facts that a city charter empowers the governing body to provide a municipal tax system, and that the city passes ordinances providing for such system do not render inapplicable all general laws which bear any relation whatever to the subject of municipal taxation.

3. Municipal corporations ⇐64

The phrase "municipal affairs" within the meaning of the constitution is very difficult of precise and accurate definition, although some authorities have limited the phrase to matters which may be said to be "purely" municipal affairs, and the first inquiry which must be made in each case where the question arises is what is the "affair" under consideration. Const. art. 11, § 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

4. Taxation ⇐733

The purpose of the legislature in amending section of the Political Code after decision that the liens for county taxes and for irrigation district assessments were of equal rank, so as to provide that title from state to land taken for taxes should be free of other taxes, etc., was to attempt a solution of the problem presented by so-called "overlapping tax liens" and to provide a practical, reasonable and expeditious method of returning to private ownership the lands covered by such liens for the benefit of all political subdivisions and taxing agencies which had the right to levy taxes thereon. Pd.Code, § 3897(7).

5. Municipal corporations ⇐73
Taxation ⇐733

The amendment of section of the Political Code so as to provide that the title conveyed to the purchaser of land deeded to the state for delinquent taxes should be free and clear of all liens, taxes, assessments or encumbrances of any kind or character due at time of such sale was not a "municipal affair" within the constitution and applied to land located within a chartered city having tax liens against such property and due at time of such sale. Pol.Code, § 3897(7); Const. art. 11, § 6.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by H. W. Brewer against Adele Feigenbaum and others to quiet title. From a judgment for plaintiff, the defendant City of Albany appeals.

Judgment affirmed.

Joseph J. Yovino-Young, City Atty., of Albany, Sheldon Attix, Jr., of Portland, Or., and Robt. C. Burnstein, of Oakland (Young & Ryan, of Oakland, of counsel), for appellant.

Crozier C. Culp, of Oakland, Irving M. Smith, City Atty., Nowland M. Reid, Assistant Atty., and Jos. B. Lamb, Deputy City Atty., all of Long Beach, Harold P. Huls, City Atty., of Pasadena, Glenn D. Newton, City Atty., of Redding, Fred C. Hutchinson, City Atty., of Berkeley, E. S. Mitchell, City Atty., of Eureka, Arnold Rumwell, City Atty., of Palo Alto, F. Bert Fernhoff, City Atty., of Oakland, Albert Mansfield, City Atty., of Redwood City, and Albert Mansfield, City Atty., of San Carlos, for respondent.

SPENCE, Justice.

Plaintiff sued to quiet title to certain real property situated in the City of Albany. Plaintiff had judgment against all defendants but this appeal is prosecuted solely by defendant, City of Albany.

Plaintiff deraigned title through a purchaser who had purchased the property at a tax sale held on September 1, 1938, under the provisions of section 3897 of the Political Code. The essential facts were not in dispute and a written stipulation was filed at the trial covering most of these facts and also setting forth the contentions of the parties and the issue to be determined by the trial court.

It appears that said real property had been deeded to the state for delinquent taxes; that the tax sale was thereafter held and that plaintiff's grantor became the purchaser. It further appears that the City of Albany had a lien or liens upon said real property at the time of said sale for delinquent city taxes levied prior to said sale. The regularity of the proceedings for the assessment and levy of all said delinquent taxes is conceded. It is also conceded that the tax sale held on September 1, 1938, was conducted in all respects in accordance with the provisions of said section 3897; that plaintiff's grantor paid to the tax collector of Alameda County the amount bid, which was in excess of $200, and that said tax collector duly conveyed said real property to plaintiff's grantor.

The stipulation of the parties set forth their respective contentions as follows: "(1) That defendant City of Albany claims that said tax sale had no effect upon the aforesaid lien or liens for taxes and assessments of said city existing at the time of said sale. (2) That plaintiff claims that upon said sale plaintiff's grantor became the owner in fee of said property, free and clear of all liens for taxes and assessments claimed by the City of Albany as aforesaid existing at the time of said sale."

The issue before the trial court was stated in said stipulation in the following language: "That the sole issue in this case is whether said sale, under section 3897 of the Political Code, had or has the effect of wiping out and eliminating all liens on said property existing in favor of the City of Albany at the time of said sale, in view of the constitution, and all laws of the State of Cali-

fornia, and of the charter and ordinances of the City of Albany introduced in evidence, as the same existed on September 1, 1938."

The trial court sustained plaintiff's contentions and quieted plaintiff's title against all defendants, except as to the lien of taxes levied after the date of the tax sale. The propriety of the trial court's judgment is not questioned on this appeal except in so far as it has the effect of quieting plaintiff's title against tax liens existing in favor of the City of Albany at the time of the sale for taxes levied by said city prior thereto.

It appears unnecessary to set forth in this opinion the lengthy provisions of said section 3897 of the Political Code as they existed on September 1, 1938. See Deerings 1937 Pol.Code, § 3897. That section had been amended following the decision in La Mesa, etc., Irr. Dist. v. Hornbeck, 216 Cal. 730, 17 P.2d 143, and other related sections had been amended or added to the Political Code, including section 3897d. The last mentioned section was before the court in South San Joaquin Irr. Dist. v. Neumiller, 2 Cal.2d 485, on page 490, 42 P.2d 64, on page 66, and the court said: "The legislation was doubtless deemed expedient following our decision in La Mesa, etc., Irrigation District v. Hornbeck, 216 Cal. 730, 17 P.2d 143, wherein it was held that the liens for county taxes and for irrigation district assessments were of equal rank and the Legislature found it necessary to provide some expeditious way to return to private ownership, and consequently to local tax rolls, lands covered by overlapping tax deeds. That the necessity existed is apparent for the reason that sales of tax titles would be complicated when purchasers could not be assured of a title free from liens possessed by other governmental agencies."

Nor is a detailed discussion of the provisions of said section 3897 required as there is no dispute concerning the construction to be placed upon any of said provisions and, as above indicated, it is conceded that the tax sale in question was conducted in all respects in accordance with said provisions. Suffice it to state that said section provides the procedure for the sale of real property which has been deeded to the state for delinquent taxes; provides for notice of the sale to other political subdivisions and taxing agencies having the right to levy taxes and assessments on the property; provides for certain rights which are granted to such political subdivisions and taxing agencies with respect to such sale, including the right to file claims for the amount of delinquent taxes and assessments and to share proportionately in the proceeds of such sale; and provides that the title conveyed to the purchaser is a title "* * * free and clear of all liens, taxes, assessments or encumbrances of any kind or character whatsoever levied or assessed or liened on the property which are due at the time of such sale * * *". Sub. 7. The only question raised by defendant City of Albany relates to the applicability of said section 3897 to cases where the property involved is located within chartered cities.

Said defendant contends that "The tax system of the City is a municipal affair to the extent that section 3897 will not apply to the City of Albany". It is argued that "taxation for municipal purposes is a municipal affair" and that "where a city charter empowers city officials to lay down a general taxation scheme for the levy and collection of municipal taxes; and where the city ordinances provide in detail such an entire tax scheme; any general laws which relate to or attempt to control the same matters covered by such an entire tax scheme must be held inapplicable."

[1, 2] It appears well settled, speaking generally, that "taxation for municipal purposes is a municipal affair". Such language was used in Keyes v. San Francisco, 177 Cal. 313, at page 32, 173 P. 475, at page 478, and substantially the same language has been used in other cases. See West Coast Adver. Co. v. San Francisco, 14 Cal.2d 516, 95 P.2d 138; Ex parte Jackson, 143 Cal. 564, 77 P. 457; Ex parte Braun, 141 Cal. 204, 74 P. 780; Storke v. City of Santa Barbara, 76 Cal.App. 40, 244 P. 158. But it does not necessarily follow that when a city charter empowers the governing body of said city to provide a municipal tax system and said governing body passes ordinances providing for such system, that all general laws, which bear any relation whatever to the subject of municipal taxation, are inapplicable to such city.

[3] The question of what constitute "municipal affairs" within the meaning of article XI, section 6 of the Constitution

has been before the courts on frequent occasions and reference has been frequently made to the difficulty encountered in attempting to give to that term a precise and accurate definition. In certain authorities cited by defendant and in other authorities, it is indicated that said term "municipal affairs", as so used, is limited to those matters which may be said to be "purely" municipal affairs. See Ex parte Braun, supra, 141 Cal. page 210, 74 P. 780; Storke v. City of Santa Barbara, supra, 76 Cal.App. page 48, 244 P. 158; Gadd v. McGuire, 69 Cal.App. 347, 355, 231 P. 754; or "strictly" municipal affairs. See West Coast Adv. v. San Francisco, supra, 14 Cal.2d pages 521, 522, 95 P.2d 138; Pasadena Park Impr. Co. v. Lelande, 175 Cal. 511, 515, 166 P. 341; or "essentially" municipal affairs. See Gadd v. McGuire, supra, 69 Cal.App. page 355, 231 P. 754; Pasadena Park Impr. Co. v. Lelande, supra, 175 Cal. page 515, 166 P. 341. Thus in Pasadena Park Impr. Co. v. Lelande, supra, the court said at page 515 of 175 Cal., page 343 of 166 P., "Respondents' position here is unassailable whenever it is made to appear in any given instance that the affair is strictly municipal. But in this, as in many divers things, cases may arise where the matter is not simply and without complication a municipal affair, but where partaking of the characteristics of a municipal affair in that the municipality is interested therein it may essentially be much more than merely a municipal affair." The first inquiry which must be made in each case where the question arises, is what is the "affair" under consideration.

[4, 5] In the instant case, the "affair" or matter under consideration is to be found in said section 3897 of the Political Code. That section did not purport to invade the field of general municipal taxation law which the governing bodies of chartered cities had the power to enact for their respective cities. It purported to deal only with a subject with respect to which the governing bodies of chartered cities and of other political subdivisions and taxing agencies had no power to legislate. The evident purpose of the legislature in amending said section was to attempt a solution of the problems presented by so-called overlapping tax liens and to provide a practical, reasonable and expeditious method of returning to private ownership the lands covered by such liens for the benefit of all political subdivisions and taxing agencies which had the right to levy taxes thereon. The "affair" or matter contained in said amendment could not be said to be purely, strictly or essentially a municipal affair but was one which was at once a state, county and municipal affair. It was a municipal affair only in the limited sense that municipalities had the same interest therein as had the other political subdivisions and taxing agencies. The matter contained in said amendments to the section merely supplemented the general municipal taxation laws enacted by chartered cities and dealt with a matter which was beyond the reach of such laws. This being the case, we must conclude that the "affair" or matter covered by said amendments to said section was not a "municipal affair" within the meaning of article XI, section 6 of the Constitution and that the said section 3897 was applicable to all tax deeded lands within the state, including lands within chartered cities. It follows that the trial court properly quieted plaintiff's title against the claimed liens of the defendant City of Albany for taxes levied prior to said tax sale.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J. pro tem., concurred.

ANGELES SECURITIES CORPORATION v. LUTON et al.

Civ. 2789.

District Court of Appeal, Fourth District, California.

Oct. 9, 1941.

Rehearing Denied Oct. 31, 1941.

Hearing Denied Dec. 5, 1941.

1. Corporations ⇐408

A vice-president of corporation did not have authority to transfer corporation's securities in exchange for corporation's capital stock in absence of statutory or charter authority, or authorization of board of directors.

2. Corporations ⇐316(1)

President and treasurer of corporation were not "innocent and bona fide holders in due course" of corporation's securities received by them in exchange for capital stock of the corporation where the exchange resulted in impairment of capital of corporation.

See Words and Phrases, Permanent Edition, for all other definitions of "Innocent and Bona Fide Holders in Due Course".

3. Corporations ⇐319(7)

In suit by corporation to recover securities which had been given to defendant directors in exchange for their capital stock in corporation, evidence sustained finding that the capital of plaintiff corporation had been impaired by reason of the transaction.

4. Principal and agent ⇐177(1)

In suit by corporation to recover its securities which had been given in exchange for its capital stock in transaction which impaired capital of corporation, defendant directors who participated in the exchange were charged with knowledge of their agents.

5. Corporations ⇐316(4)

Where exchange of securities of corporation for its capital stock resulted in impairment of capital of corporation, the board of directors approving the unauthorized exchange could not ratify the exchange.

6. Appeal and error ⇐1010(1)

In suit to recover securities of corporation which had been given in exchange for corporation's capital stock resulting in impairment of capital, trial court's findings in favor of the corporation were final on appeal where supported by substantial evidence.

7. Corporations ⇐319(3)

Where securities of corporation were unauthorizedly exchanged for its capital stock resulting in impairment of capital, the fact that the identical certificates of stock received from defendant directors were not available for plaintiff corporation to return to the defendants did not preclude recovery of securities in view of fact that the required number of shares were available.

8. Appeal and error ⇐1010(1)

Where corporation, suing to recover securities which had been given in unauthorized exchange for capital stock resulting in impairment of capital, alleged filing of proper claim against deceased who had exchanged his stock, the allegation was not denied, and trial court found in accordance with allegations of complaint, the sufficiency of the claim could not be attacked on appeal.

9. Corporations ⇐319(4)
Limitation of actions ⇐100(13)

Where suspicion of stockholder was aroused at annual meeting in February, 1933, investigation gradually brought to light the details of illegal transaction of April, 1931, whereby securities of corporation were exchanged for its capital stock resulting in impairment of capital, notice of rescission was passed by new board of directors on May 15, 1933, and served on defendants the same day, suit filed December 7, 1933, against defendants to recover securities they had received in the transaction, was not barred by statute of limitations, or "laches", since action was filed within one year after discovery of the fraud. Code Civ.Proc. §§ 338, 339.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

10. Trusts ⇐95, 102(1)

Where one gains property by violation of a trust or through wrongful act, he becomes an involuntary "trustee" of the thing gained for the benefit of the persons who otherwise would have possessed it. Civ. Code, § 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee".

11. Executors and administrators ⇐423

Where securities of corporation were unauthorizedly exchanged for its capital stock resulting in impairment of capital, estate of deceased who had received securities in exchange for his stock was liable for property disposed of by deceased which belonged to the corporation.

12. Trusts ⇐374

Where trust property has been improperly disposed of and is capable of being followed in specie, court of equity will compel trustee or party in possession, with notice, to reconvey it, but if property cannot be followed or person in possession cannot be made liable to the trust, the trustee will be decreed to compensate the cestui que trust, by payment of value of the property so lost.

13. Appeal and error ⇐1011(1)

Conflict of evidence, is for the trial court to determine.

14. Appeal and error ⇐1071(5, 6)

Where there are sufficient findings on issues made to support judgment, it is immaterial that there is no finding, or an erroneous finding, on some other issue, which, if made, or differently made, would not compel any different conclusion from that reached by the findings which were actually made.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the Angeles Securities Corporation against Eva M. Luton, etc., and others, to recover securities belonging to plaintiff corporation.

From adverse judgments defendants appeal.

Affirmed.

Walker, Adams, Duque & Smith, of Los Angeles (Earl C. Adams and Mark E. True, both of Los Angeles, of counsel), for appellants.

John Perry Wood and Stanley Arndt, both of Los Angeles, for respondent.

MORTON, Justice pro tem.

This action involves four financial transactions between directors of plaintiff corporation, all alleged to be part of a plan or scheme whereby one group would sell their stock and the other secure control of the company because of dissension between the two factions thereof. The retrial under the first count of the complaint involved defendants Luton, Cruickshank, Ferguson, Lyon and Woodward. Only the portion of the judgment as it affects Eva M. Luton, administratrix of the estate of C. R. Luton, deceased, Jean L. Ferguson and Catherine Lyon, defendants, is before this court for review. An able statement of the complicated facts concerning the purchase by the corporation of the stock of directors Luton and Cruickshank and the transactions relating thereto appears in the opinion of the Second Appellate District Court. Angelus Securities Corp. v. Ball, 20 Cal.App.2d 423, 67 P.2d 152. That the Luton stock was purchased with assets of the corporation further appears in that opinion was found by the trial court in this case, and is evident from the record before us. Issues involved in this litigation were also before the Second Appellate District Court in Angelus Securities Corporation v. Ball, 20 Cal.App.2d 436, 67 P.2d 158. Hearings in the Supreme Court were denied on each of the aforementioned decisions. Through financial adjustments defendants Ball and Harriss secured covenants not to prosecute this action further as to them unless demanded by their co-defendants prior to the retrial. The action was dismissed as to defendant T. P. Breslin prior to the second trial.

It was stipulated by all the parties and such stipulation was accepted by the court, that "on an appeal from an order granting a nonsuit at a previous trial of this case (Angelus Securities Corp. v. Ball, 20 Cal. App.2d 423, 67 P.2d 152), the judgment of the trial court in granting a nonsuit as to the first cause of action was reversed; the judgment of the trial court in granting a nonsuit as to Ball, Woodward and Harriss as to the second cause of action was reversed and such judgment affirmed as to Luton, Lyon, Ferguson and Cruickshank; the judgment of the trial court in granting a nonsuit as to Luton and Cruickshank as to the fourth and fifth causes of action was affirmed; that Luton, Lyon, Ferguson and Cruickshank were and are not [sic] defendants with respect to the third cause of action; and that the trial of this case would be with respect only to the matters contained in said first cause of action."

After the second trial defendant Cruickshank returned to plaintiff everything he

had obtained in the transaction, received back what he had given up in the transaction and no final judgment was entered against him. At the second trial the evidence of the first trial was read into the evidence and some additional evidence was introduced. As to the issues here, this evidence, some verbal and some written, had to do mainly with alleged lack of knowledge on the part of Dr. Luton as to the details of the transactions and his knowledge concerning plaintiff's ownership of the securities received by him for his stock, the financial condition of the plaintiff corporation at the time of the transactions, and defendants' right to a credit by reason of the Ball and Harriss adjustments with plaintiff as to this cause of action and other claims and obligations.

After wending one's way through a maze of high finance and technicalities, the words of Justice Cardozo in McCandless v. Furlaud, 296 U.S. 140, at page 154, 56 S. Ct. 41, at page 44, 80 L.Ed. 121, are apropos, wherein he stated:

"Checks and credits have now been traced through their bewildering entanglements. None the less, when the process of analysis is over, it is legitimate to forget the details and fix our minds on the results. The situation can be simplified without obscuring its essential features. Indeed, only in that way will the realities of what was done be manifest." See, also, Kahle v. Stephens, 214 Cal. 89, 4 P.2d 145; Mannion v. Baldwin, 217 Cal. 600, 20 P.2d 678.

After a careful consideration of all the evidence and the law presented, it appears clear that the following questions have been definitely determined:

(1). "That plaintiff is a Delaware corporation with an authorized capital stock of 10,000 shares of preferred stock of a par value of $100 per share, and 10,000 shares of common stock of no par value. By its charter the corporation was authorized to 'purchase, hold, sell and transfer the shares of its capital stock; provided it shall not use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of its capital. * * *' On the date here in question, April 15, 1931, there were actually issued and outstanding 3,500 shares of plaintiff corporation's preferred stock and 4,282 shares of its common stock." Angelus Securities Corporation v. Ball, 20 Cal. App.2d 423, at page 427, 67 P.2d 152, at page 154.

(2). "Defendant C. R. Luton, who died prior to the commencement of this action, was a shareholder, president, and director of plaintiff corporation from its inception until April 15, 1931. Defendants Jean L. Ferguson and Catherine Lyon are the daughter and mother, respectively, of the deceased director, Luton. Defendants Cruickshank, Ball, Harriss, Woodward and Crowe were officers and directors of plaintiff corporation." Angelus Securities Corporation v. Ball, 20 Cal.App.2d 423, at pages 427, 428, 67 P.2d 152, at page 154.

(3). That the four transactions involving Luton, Cruickshank and Ball were in fact one complicated financial transaction.

[1] (4). By reason of the absence of statutory and charter authority and action of the board of directors, the defendant Harriss, as vice-president, did not have the authority to transfer the corporation's securities in a transaction to buy the corporation's own capital stock.

[2] (5). The position of Dr. Luton, as president and in general and active management of the corporation, and Cruickshank, as the treasurer, the custodian of the securities, placed them without the pale of innocent and bona fide holders of such securities in due course.

[3] (6). That the evidence is amply sufficient and clearly shows that the capital of the plaintiff corporation was impaired by reason of the Luton, Cruickshank and Ball transactions herein involved.

[4] (7). That defendants Lyon and Ferguson are charged with knowledge of their agent, Luton.

[5] (8). That there was no valid ratification of the wrongful transactions. "In the instant case the board of directors, approving an unauthorized act, cannot later ratify the same." Angelus Securities Corporation v. Ball et al., 20 Cal.App.2d 423, 431, 67 P.2d 152, at page 156.

[6] Here, too, after completion of the second trial, the trial judge resolved all conflicts of the evidence in favor of plaintiff and found in accordance with the conclusions reached by the appellate court in Angelus Securities Corp. v. Ball, 20 Cal. App.2d 423, 67 P.2d 152. These findings are supported by substantial evidence and are final here.

[7] Appellants contend that the identical certificates of stock are not available for plaintiff corporation to return to the defendants. The required number of shares are available. The court in Atkins v. Gamble, 42 Cal. 86, at page 101, 10 Am. Rep. 282, points out that although certain personal property has individual characteristics which justify the requirement of returning specific property, yet as to certificates of stock states:

"But we think the reason of the rule ceases when applied to stocks. It is impossible that any sane person should have centered his affections upon a particular stock certificate, or that any violence could be done to his feelings by requiring him to accept another certificate of precisely similar character, in lieu of it. His own certificate was only the evidence that he owned an undivided interest in the capital and business of the corporation. Another certificate of the same kind, for the same amount of stock, would entitle him to precisely the same rights as the former certificate. Each would be a precise equivalent of the other, and it is certain he could suffer no pecuniary loss by the transaction * * *."

[8] Regarding the claim filed by plaintiff corporation against the estate of Dr. Luton, it appears that he had disposed of part of the assets to defendants Lyon and Ferguson and to others prior to his death; the remainder, however, came into the hands of his administratrix. Under such circumstances the claim was proper. The complaint alleged the filing of a proper claim. This allegation was not denied. The answer of the administratrix alleged the filing of a claim and the trial court found in accordance with the allegation of the complaint. Under this state of the record defendants on appeal cannot attack the sufficiency of the claim.

[9] The circumstances here show no laches. The suspicion of stockholder Hatch was aroused at the annual meeting of February 13, 1933. Investigation gradually brought to light the details of this illegal transaction of April 15, 1931. The notice of rescission was passed by the new board of directors on May 15, 1933, and served on defendants the same day. Suit was filed December 7, 1933. Consequently, neither of the defenses of the statute of limitations, Code Civ.Proc. § 338, and Code Civ. Proc. § 339, apply here. The action was filed within one year after discovery of the fraud.

[10, 11] Concerning the question of holding in trust the property wrongfully received, the law is clear that where one gains property by violation of a trust or through wrongful act, he becomes an involuntary trustee of the thing gained for the benefit of the person who otherwise would have possessed it. Clark v. Millsap, 197 Cal. 765, at page 782, 242 P. 918; Civ. Code, § 2224. Here, too, for the property disposed of by Dr. Luton belonging to plaintiff corporation, whether to his relatives or others, his estate becomes properly liable.

[12] "In giving relief for a breach of trust, a Court of Equity endeavors in the first place, as far as possible, to replace the parties in the situation they would have been in, if no breach of trust had taken place. And for this purpose, when the trust property has been improperly disposed of, and is capable of being followed in specie, it will compel the trustee, or the party in possession, with notice, to reconvey it. If it cannot be followed, or the person in possession cannot be made liable to the trust, the trustee will be decreed to compensate the cestui que trust, by payment of the value of the property so lost." Freeman v. Cook, 6 Ired.Eq. 373, 41 N.C. 373.

This rule is also stated in Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243, at page 238.

[13] Questions raised as to other findings do not affect the vital issues of this action. Sufficient evidence appears in the record to support the trial court's findings and conclusions, and where there is a conflict of evidence, it is for the trial court to determine.

[14] "The other findings made, * * * support the judgment, and the rule is that, when there are sufficient findings on issues made in the case to support a judgment, it is immaterial that there is no finding, or an erroneous finding, on some other issue which, if made, or differently made, would not compel any different conclusion from that reached by the findings which were actually made." Wolfsen v. Smyer, 178 Cal. 775, at page 785, 175 P. 10, at page 13.

The litigation between these parties has involved many issues, and all pertinent evi-

dence and legal technicalities have been carefully reviewed. It is clear that plaintiff corporation is entitled to the relief granted.

The judgments of the trial court are therefore affirmed.

MARKS, Acting P. J., and GRIFFIN, J., concurred.



47 Cal.App.2d 183

HENNESSY et al. v. SAN BERNARDINO COUNTY et al.

Civ. 2910.

District Court of Appeal, Fourth District, California.

Oct. 6, 1941.

Hearing Denied Dec. 2, 1941.

1. Highways ⇐198

Prior to 1923 an action for injuries allegedly sustained from a dangerous and defective condition of a highway could not be maintained against a county.

2. Counties ⇐216

Section 4078 of the Political Code is in harmony with section 342 of the Code of Civil Procedure, and both are general statutes fixing a limitation of six months within which actions upon claims against a county may be brought. Code Civ.Proc. § 342; Pol.Code, § 4078.

3. Limitation of actions ⇐72(1)

Section 352 of the Code of Civil Procedure is a particular statute which specifically makes an exception in favor of minors so far as section 342 is concerned which provides that actions on claims against a county must be commenced within six months after their rejection by the board of supervisors, and section 352 also applies to and has the same effect upon section 4078 of the Political Code, which also fixes a limitation of six months within which actions on claims against county may be brought. Code Civ.Proc. §§ 342, 352; Pol.Code, § 4078.

4. Limitation of actions ⇐72(1)

In such actions upon rejected claims as might be brought against a county prior to 1923, the statutes then and now existing provide an exception in favor of minors who are relieved from the requirement that an action must be brought within six months after rejection of a claim. Code Civ.Proc. §§ 342, 352; Pol.Code, § 4078.

5. Highways ⇐203

The statute permitting the filing of actions against counties upon claims arising from defective or dangerous condition of public streets or highways and providing that verified claim must be filed within 90 days after the accident is applicable to minors as well as to adults. Gen.Laws 1937, Acts 5149, 5619.

6. Highways ⇐203
Statutes ⇐225½

Where statutes permitting the filing of actions against counties upon claims arising from defective or dangerous condition of public streets and highways and providing for filing of a verified claim within 90 days after the accident contained no provision relating to the time within which an action upon such claims may be filed, time within which such actions must be filed is governed by general statutes which must be construed with statutes authorizing filing of such actions. Code Civ.Proc. §§ 342, 352; Pol.Code, § 4078; Gen.Laws 1937, Acts 5149, 5619.

7. Limitation of actions ⇐72(2)

An action by minors against county for injuries, allegedly resulting from dangerous and defective condition of highway, was timely brought where filed after more than six months but in less than a year after the happening of the accident. Code Civ.Proc. §§ 342, 352; Pol.Code, § 4078; Gen.Laws 1937, Acts 5149, 5619.

8. Highways ⇐203

Where claims for personal injuries resulting from dangerous and defective highway contained a statement of all the facts required by statute and stated that demand was made by claimants for reimbursement for loss sustained as result of the particular accident, and that proximate cause of the accident was the negligence of two persons who were acting as highway commissioners, and claims were verified and filed, and copies of such claims were served on such persons individually, claims were sufficient to notify the officers that the claims were being presented against them, notwithstanding the claims were headed "claim for damages against County of San Bernardino"

which was also joined as a defendant. St. 1931, p. 2476.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Ruth Hennessy, a minor, etc., and another against County of San Bernardino and others for personal injuries allegedly sustained by reason of dangerous and defective condition of a highway. From a judgment for defendants, the plaintiffs appeal.

Judgment reversed with instructions.

Fred O. Reed and Richard L. Kirtland, both of Los Angeles, and Ralph E. Swing, of San Bernardino (Henry E. Kappler, of Los Angeles, of counsel), for appellants.

Jerome B. Kavanaugh, Dist. Atty., and Duckworth, Mussell & King, all of San Bernardino, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries alleged to have been suffered by three minor plaintiffs by reason of the dangerous and defective condition of a highway. A demurrer was sustained without leave to amend and the plaintiffs have appealed from the judgment which followed.

The accident happened on March 30, 1939. Verified claims for damages were filed on June 6, 1939, which were rejected by the board of supervisors of the respondent county on June 14, 1939. This action was begun on March 8, 1940, less than a year after the happening of the accident but more than six months after the rejection of the claims by the board of supervisors.

The main question presented is whether the appellant minors are bound by the six months' limitation provided for in section 342 of the Code of Civil Procedure or provided for in section 4078 of the Political Code. The appellants contend that they come within the exception provided for in section 352 of the Code of Civil Procedure.

[1, 2] Prior to 1923 an action of this nature could not be maintained against a county. Then, as now, section 342 of the Code of Civil Procedure provided that actions on claims against a county must be commenced within six months after their rejection by the board of supervisors. Also, sections 4075 and 4078 of the Political Code provided, and still provide, that a claim shall be presented before suit may be brought, and that a suit may be brought within six months after the final rejection of the claim by the board but not afterward. So far as material here, the first of these sections merely provided for the filing of a claim without limiting the time within which that should be done, and the other section fixed a time when a claim should be deemed to be rejected if the board failed to act upon it. In other words, the latter section was concerned with fixing the time when the six months' period of limitation should begin to run, but not with any exception to or extension of that six months' period. Section 4078 is in harmony with section 342 of the Code of Civil Procedure (Harvey v. County of Kern, 107 Cal.App. 590, 290 P. 648) and both are general statutes fixing a limitation of six months within which actions upon claims against a county may be brought.

[3, 4] During the entire existence of the statutes referred to section 352 of the Code of Civil Procedure has provided an exception, specifically made applicable to the limitation provided for in section 342 of the Code of Civil Procedure, which extends the period in favor of minors. Since section 4078 of the Political Code is in harmony with section 342 of the Code of Civil Procedure and since it relates entirely to the time at which the six months' period shall begin to run and not to any extension of that six months' period, and since both those sections are general statutes, it must be held that section 352 of the Code of Civil Procedure, being the particular statute which specifically makes an exception in favor of minors in so far as section 342 of the Code of Civil Procedure is concerned, also applies to and has the same effect upon the provisions of section 4078 of the Political Code. It follows that in such actions upon rejected claims as might have been brought against a county prior to 1923, the statutes then and now existing provide an exception in favor of minors relieving them from the requirement that an action must be brought within six months after the rejection of the claim.

[5] In 1923 the law was so changed as to permit the filing of actions upon claims arising from the defective or dangerous condition of public streets and highways, among other things. Stats. 1923, p. 675, Deering's General Laws, Act 5619. In 1931, a provision was added requiring, in

such actions, the presenting and filing of a verified claim within ninety days after the occurrence of the accident. Stats.1931, p. 2475, Deering's General Laws, Act 5149. This latter provision has been held applicable to minors as well as to adults (Phillips v. County of Los Angeles, 140 Cal.App. 78, 35 P.2d 187; Myers v. Hopland U. E. School Dist., 6 Cal.App.2d 590, 44 P.2d 654), and it is conceded that it was complied with in the instant case in so far as the claim against the respondent county is concerned.

[6, 7] The two acts to which we have just referred permit actions on a class of claims which were not previously allowed and require the presentation of verified claims within ninety days of the accident involved, but they contain no provision relating to the time within which an action upon such a claim may be filed. Since these acts do not purport to cover that subject that matter must be governed by other existing statutes which are in no way changed or affected by the provisions of the 1923 and 1931 acts. In Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.2d 185, it was held that the 1931 act should be construed and applied in connection with the existing law as set out in sections 4075 to 4078 of the Political Code, which also deal with the subject of claims against a county. Similarly, that act and the act of 1923 must be construed and applied in connection with the provisions of sections 342 and 352 of the Code of Civil Procedure, which relate to the same subject. The provisions of the latter sections furnish a part of the procedure which governs the prosecution of claims against a county, including claims of the nature here involved. Since the acts of 1923 and 1931 make no change in the time limits within which such an action may be brought, sections 342 and 352 of the Code of Civil Procedure apply and govern. Since section 352 of the Code of Civil Procedure establishes an exception in favor of minors with respect to the provisions of section 342 of the Code of Civil Procedure, and since there is nothing in the later acts to change its effect, we conclude that as to these minor appellants this action was not barred by the provisions of section 342 of the Code of Civil Procedure or by section 4078 of the Political Code.

[8] The complaint in this action also attempted to set up a cause of action against two individuals who were Highway Commissioners of the County of San Bernardino, it being alleged that their negligence led to the accident in question. The only other point raised is that the complaint failed to state a cause of action against these officers because it failed to allege a compliance with the provisions of Act 5150 of Deering's General Laws, St.1931, p. 2476, relating to the filing of claims. It is conceded that verified claims were served and filed which were sufficient as against the respondent county and that copies of these claims were served on the individual respondents. The respondents contend, however, that the serving of copies of these claims on these officers was merely a part of the presentation of the claims as against the county. It is further argued that the claims served on the officers were exact copies of the claims filed with the clerk of the board of supervisors, that they were all headed "Claim For Damages against County of San Bernardino", and that there was nothing therein which was sufficient to notify the officers that claims were being presented against them. While the claims were all headed as above stated the body of each claim contained a statement of all of the facts required by Act 5150 and stated that demand was made by the undersigned for reimbursement for the loss sustained as a result of this particular accident and that the proximate cause of this accident was the negligence of these two persons who were acting as highway commissioners. The claim presented to each officer was sufficient to indicate that he was accused of negligence in connection with this accident and that a claim was being made against him. It must be held that there was a substantial compliance with the requirement of the statute in the respects here in question. Kelso v. Board of Education, 42 Cal.App. 2d 415, 109 P.2d 29; Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 82 P.2d 216. In so far as the matter is here presented or argued the complaint states a cause of action against these two officers.

Other than as considered above, no question relating to the cause of action of Clement J. Hennessy personally has been presented, and nothing in this opinion is intended to cover or decide any question concerning his cause of action except the sufficiency of the claims filed by him.

For the reasons given the judgment is reversed and the trial court is instructed to overrule the demurrer and to permit the defendants to answer.

MARKS and GRIFFIN, JJ., concurred.

47 Cal.App.2d Supp. 863

PEOPLE v. DON CARLOS.

Cr. 1811.

Appellate Department, Superior Court, Los Angeles County, California.

Oct. 3, 1941.

Rehearing Denied Oct. 14, 1941.

1. Criminal law ⇐260(11)

In prosecution for driving a vehicle on a public highway at a rate of speed prohibited by the basic speed law, where trier of facts accepted officers' testimony that defendant was traveling at 73 miles an hour, defendant's argument on appeal that the evidence did not support conclusion that defendant had violated the basic speed was burdened with the proved fact that defendant was driving at the rate of 73 miles per hour. Vehicle Code, § 510, St.1937, p. 176.

2. Automobiles ⇐331

Mere speed constitutes a violation of the basic speed law, and the absence of an accident, actual or near, does not tend to prove that an excessive rate of speed was reasonable or prudent or that it did not of itself endanger the safety of persons and property. Vehicle Code, § 510, St.1937, p. 176.

3. Automobiles ⇐355(5)

Proof that defendant drove down the center lane of a public highway at the rate of 73 miles an hour past 100 other vehicles that were going in the same direction, and some 40 that were going in the opposite direction, sustained conviction of driving at a rate of speed prohibited by the basic speed law. Vehicle Code, § 510, St.1937, p. 176.

4. Criminal law ⇐711

Where record showed that counsel for the defendant asserted that evidence failed to sustain the charge of violating the basic speed law, and court decided he did not believe argument was necessary and stated that a finding would be made that the speed of 73 miles per hour under the circumstances disclosed by the evidence constituted a violation of such law, there was no unlawful restriction of argument of counsel, since court merely dissuaded counsel from making further argument and did not prevent counsel. Vehicle Code, § 510, St.1937, p. 176; Const. art. 1, § 13.

5. Criminal law ⇐711

The constitution confers the right to have the benefit of appropriate argument by counsel, and the duty of court not only to administer justice, but also to appear to do so is best discharged by allowing argument. Const. art. 1, § 13.

6. Criminal law ⇐711

It is within the power and the duty of the court to determine what are the reasonable limits of argument and where the trial is had before a court without a jury, the argument of counsel is directed to the court alone, and the court is in a far better position than counsel to decide when it is sufficiently informed as to the subject under consideration. Const. art. 1, § 13.

7. Criminal law ⇐711

When the court reaches the point that it feels that it is fully advised as to the question under discussion and is ready to rule upon it, and therefore requires no further enlightenment from counsel, court is clothed with adequate power and authority to order the argument at an end. Const. art. 1, § 13.

8. Criminal law ⇐711

Where trial was had without a jury before a veteran jurist in traffic cases, and the question was the simple one whether defendant had violated the basic speed law, and there were only five witnesses who testified and the record of their testimony was encompassed in four typewritten pages, it was within the discretion of the court to dispense with argument. Vehicle Code, § 510, St.1937, p. 176; Const. art. 1, § 13.

9. Criminal law ⇐1186(4)

Where there was ample proof that defendant was driving on a public highway at the rate of 73 miles per hour, fact that court dispensed with argument and found defendant guilty did not result in a "miscarriage of justice" so as to necessitate a reversal of the conviction. Vehicle Code, § 510, St.1937, p. 176; Const. art. 1, § 13; art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

10. Automobiles ⇐9

A state's regulations of traffic with respect to speed do not unduly interfere with the dispatch of the United States mail, and the basic speed law is valid. Vehicle Code, § 510, St.1937, p. 176.

11. Automobiles ⇐320

One transporting United States mails by motor vehicle was not relieved from duty of

observing the state speed law, and the fact that he was late in the discharge of his duty and was trying to make up time, did not constitute a defense. Vehicle Code, § 510, St.1937, p. 176.

12. Automobiles ⇐359

Imprisonment for five days for violation of basic speed law was not an abuse of discretion. Vehicle Code, § 510, St.1937, p. 176; § 762, St.1935, p. 243.

Appeal from Municipal Court of City of Los Angeles; LeRoy Dawson, Judge.

R. C. Don Carlos was convicted of driving a vehicle upon a public highway at a rate of speed prohibited by the basic speed law, and he appeals.

Judgment affirmed.

John H. Gordon, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

BISHOP, Judge.

The defendant was convicted and sentenced to five days' imprisonment for driving a vehicle upon San Fernando Road, north of the Lankershim Boulevard intersection, at a rate of speed prohibited by the basic speed law. The basic speed law is set forth in section 510, Vehicle Code, St. 1935, p. 176, in these words: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." We have concluded that the evidence supports the conviction and that no prejudicial errors were committed during the course of the trial. It follows that the final judgment of conviction, from which the appeal was taken, should be affirmed.

[1] The People's two witnesses were police officers. One testified (and it was stipulated that the other's testimony would be substantially the same) that he saw the defendant drive a motor bus, just before the noon hour, down the center lane of San Fernando Road, past about one hundred other vehicles that were going in the same direction as the defendant and some forty that were going in the opposite direction, and that during the two and one-half miles that the officers paced him the defendant's rate of speed was seventy-three miles per hour. The defendant, as a witness, testified that his speed was not over fifty miles per hour, but when stopped by the officers and told that he had been traveling approximately seventy-three, his statement was not a denial of their statement, but the assertion that he was late and attempting to make up time. The conflict between the defendant's version of the facts, as related by himself and his witnesses, and that of the officers, was resolved by the trier of fact against the defendant. Defendant's argument that the evidence does not support the conclusion that he violated the basic speed law is therefore burdened with the fact proven that he was driving at the rate of seventy-three miles per hour.

[2, 3] The defendant concedes that a speed in excess of forty-five miles per hour was (at the time involved) presumably unlawful, citing People v. Banat, 1940, 39 Cal. App.2d Supp. 765, 100 P.2d 374, which so construes section 511, Vehicle Code. But, defendant argues, no accident or near accident resulted from his excessive speed, so that the presumption is rebutted. Furthermore, he notes, no act of his was proven other than that he drove at seventy-three miles per hour. Whatever may be argued about the more serious crime of reckless driving (Section 505, Vehicle Code, considered on this point in People v. Nowell, 1941, 45 Cal.App.2d Supp. —, 114 P.2d 81), it is clear that mere speed constitutes a violation of section 510, and the absence of an accident, actual or near, neither in law nor logic tends to prove that an excessive rate of speed was reasonable or prudent or that it did not of itself endanger the safety of persons and property. We have no hesitancy in holding that the conviction finds ample support in the evidence.

[4] One of the defendant's grounds of appeal is that "The court erred in restricting the argument of counsel." The record before us does not reveal how much argument was allowed, but counsel made at least a beginning of his argument by stating that the evidence failed to sustain the charge of violating the basic speed law. The record before us then recites that "The Court replied that he did not believe argument was necessary, and stated that

he would make a finding that the speed of 73 miles per hour under the circumstances disclosed by the evidence constituted a violation of section 510 of the Vehicle Code." These words are reasonably susceptible of interpretation as a statement of the trial court, not that the defendant's counsel would not be permitted to argue, but that the trial court saw no good to come from argument, especially argument in support of the contention that a speed of seventy-three miles per hour, under the conditions revealed in this case, was reasonable, prudent and endangered neither person nor property. Under this interpretation, counsel was dissuaded, not prevented, from making further argument, a fact of which he may not complain.

[5–9] But if we take the view that counsel may with reason have taken, and regard the statement of the trial judge as an indication that there could be no argument, even so we are of the opinion that in this case a reversal of the judgment is not justified. The constitutional right "to appear and defend, in person and with counsel" Calif.Const. Art I, § 13, when taken out of the abstract and given concrete application, undoubtedly confers a right to have the benefit of appropriate argument by counsel. Moreover, the duty of courts not only to administer justice but also to appear to do so, is best discharged by allowing argument. However, it is within the power and the duty of the court to determine what are the reasonable limits of argument (fifteen minutes was upheld as a reasonable limitation in People v. Mendosa, 1918, 178 Cal. 509, 510, 173 P. 998; twenty minutes, in People v. Shayer, 1933, 135 Cal. App. 755, 758, 28 P.2d 48) and where, as in the case before us, the trial was had before the court without a jury, "the argument of counsel is directed to the court alone, [and] the court is in far better position than counsel to decide when it is sufficiently informed as to the subject under consideration. When the court reaches the point that it feels that it is fully advised as to the question under discussion and ready to rule upon the same, and therefore requires no further enlightenment from counsel, it is surely clothed with adequate power and authority to order the argument at an end." These remarks appearing in Hallinan v. Superior Court, 1925, 74 Cal. App. 420, 426, 240 P. 788, 790, respecting argument in support of an objection made during the course of trial, are not inapposite in the situation under review. The trial had occupied less than the afternoon session. There were only five witnesses who testified and the record of their testimony is encompassed in four typewritten pages. The question at issue was simple. The trial judge, who sat without a jury, was a veteran jurist in traffic cases. In view of these facts, it was within his discretion, as indicated in Hallinan v. Superior Court, to restrict the argument as he did. But, if it should be considered error not to have permitted defendant's counsel to have argued further, the error was one not resulting in a miscarriage of justice and so is not a ground for a reversal of the judgment. Const. Art VI, § 4½.

[10] The defendant was transporting twelve sacks of United States mail when he was observed speeding and on the basis of this fact he further contends that the trial court erred in not permitting him to testify as to the hour that the mail was due in Los Angeles. In order to determine the validity of defendant's contention, we have considered this question: Is one engaged in transporting United States mail subject to state regulations respecting the speed (in particular) at which a motor vehicle may be operated? We are of the opinion that this question, being one wherein the field of force of a state statute is found to fall partly within the orbit of a federal agency, is not to be answered by looking to see whether there is a conflict between the rights of two sovereigns, but rather by discovering whether the attempt of the state to discharge its responsibilities unduly interferes with the endeavor of the federal government to perform its functions. Both reason and authority agree that the state's regulations of traffic with respect to speed do not unduly interfere with the dispatch of the United States mail, and the regulations are therefore valid.

The earliest case on the subject is itself of no great authority, but it is important because it blazed the trail. It arose in the city of Philadelphia where a city ordinance made it unlawful to drive at an immoderate rate of speed, so as to endanger the citizens of the city. The driver of a stage coach carrying mail was stopped by Hart, one of the high constables of the city, because the stage was going at an immoderate rate, so as to endanger the lives and safety of the citizens, "some of the witnesses supposed it to be at the rate of eight or nine miles an hour." Hart, who stopped the stage,

was indicted for knowingly and wilfully retarding the passage of the mail, under section 7 of an act regulating the Post Office Establishment, passed by the Congress in 1810 (2 Stats. 595), which made it a public offense for any person to "knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same." Section 201 of the Criminal Code, 18 U.S. C.A. § 324 now provides: "Whoever shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier, or car, steamboat, or other conveyance or vessel carrying the same, shall be fined not more than $100, or imprisoned not more than six months, or both." At some point in the proceedings before the matter was submitted to the jury, the trial judge (Mr. Justice Washington, on circuit) stated (United States v. Hart, 1817, 26 Fed.Cas. 193, 194, No. 15, 316): "there is in truth no collision between this ordinance and the act of congress on which this indictment is founded. If the mail carrier should violate the ordinance, the act of congress does not shelter him from the penalty imposed by the ordinance." Then the learned judge pointed out that the ordinance did not authorize the constable to stop the stage, but concluded that if the stage was being driven as contended (a question for the jury), then it constituted a common law breach of the peace which it was the defendant constable's duty to bring to an end, and that in stopping the stage to stop the breach of the peace he did not violate the federal statute although "a temporary stoppage of the mail may be the consequence."

Under date of June 1, 1852, United States Attorney General Crittenden rendered an opinion to the Postmaster General (5 Op. Atty.Gen. 554), in response to a query, "whether * * * municipal corporations have * * * the right to impede the progress of trains carrying the United States mail, or to make the running of such trains, at a speed greater than that prescribed by the corporation [six miles per hour], subject the rail-road company or its officers to a pecuniary penalty." Basing his conclusion largely on the opinion in the Hart case, the Attorney General replied (in part): "these municipal corporations have a right to make ordinances for regulating the speed of rail-road cars and their trains within the corporate limits, as well of those carrying the mail of the United States, as of those which do not; the fact of conveying the mail does not exempt the officers of the rail-road company from the fine for a breach of such regulations; they do not conflict with the act of Congress." The 9th section of the Act of Congress, 4 Stat. 104, referred to was "in the precise words" of the statute involved in the Hart case.

The opinion in the Hart case and the opinion of the attorney general were given recognition in Johnson v. Maryland, 1920, 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed. 126, in these words: "Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in United States v. Hart, Fed.Cas.No. 15,316, Pet.C.C. 390; 5 Op.Atty.Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. Com. v. Closson [infra]." The case of Commonwealth v. Closson, 1918, 229 Mass. 329, 118 N.E. 653, L.R.A.1918C, 939, cited in the conclusion of the quotation just made, dealt with the conviction of a mail carrier, who, acting under instructions from his superiors, had driven on the left side of a highway and had made a left turn without passing to the right of and beyond the center of an intersecting street, as required by the local traffic regulations. The Supreme Judicial Court of Massachusetts recognized that the roads, upon which the defendant was officially engaged when he disobeyed the local traffic rules, were undoubtedly post roads, but concluded (229 Mass. at page 334, 118 N.E. at page 653): "Yet the ways remain public ways laid out and maintained by the commonwealth, which has the exclusive power not only of alteration, and of discontinuance, but to make and enforce reasonable regulations for their use. Nor do the facilities thereby afforded for transportation of the mails confer extraordinary rights upon mail carriers to use the ways as they please, or necessarily, or impliedly do away with the power of supervision and control inherent in the state."

The ultimate answer to our question will, of course, come when the United States Supreme Court speaks on the subject; so far as our research has uncovered there

is no decision of that court, or of any federal court, that speaks with authority. However, what expression we find in the federal cases supports that which we believe to be the rational answer; and such state decisions as there are are unanimous in upholding the validity of state regulations of speed even when applied to carriers of the mail. A city ordinance making it unlawful for trains to exceed four miles per hour was held applicable to a train carrying mail in Whitson v. City of Franklin, 1870, 34 Ind. 392. A similar ordinance, with a ten mile speed limit, was held to be valid as against the claim that it interfered with interstate commerce and the United States mail, in Chicago & A. Ry. Co. v. City of Carlinville, 1902, 200 Ill. 314, 65 N.E. 730, 60 L.R.A. 391, 93 Am.St.Rep. 190. A speed limit of fifteen miles an hour, established by the state of Virginia, had been violated by one Hall, the operator of a government mail truck carrying United States mail. The evidence revealed that he was seventeen minutes late, when the excess speed was indulged in, but, the court pointed out (Hall v. Commonwealth, 1921, 129 Va. 738, 105 S.E. 551, 552), there was no evidence that the mail schedule officially established could not be complied with if the state speed limits were observed, and so continued: "Such being the situation, we have no hesitancy in holding that the state statute in question is a valid exercise of the police power of the state in so far as its speed limit provisions are involved in this case, and should have been obeyed by the accused."

[11] We conclude, therefore, that the defendant was not relieved from the duty of observing the state speed law by the fact that he was discharging the duty of transporting the United States mail, and if it was a fact that he was late in the discharge of the latter duty, that fact did not relieve him of his obligation under the former.

[12] The judgment that he be imprisoned five days was authorized by section 762, Vehicle Code, and the exercise of the authority does not appear to us to have been an abuse of discretion.

The judgment appealed from is affirmed.

SHAW, P. J., and FOX, J. pro tem., concur.

HATFIELD et al. v. LEVY BROS. et al.

S. F. 16620.

Supreme Court of California.

Oct. 20, 1941.

Rehearing Denied Nov. 17, 1941.

1. Negligence ⇐136(22)

Negligence of store owners and employees, as ground for recovery for injuries to customer who fell on floor which was slippery from excessive wax, was for jury.

2. Appeal and error ⇐1002

It is beyond power of reviewing court to disturb a verdict based upon conflicting evidence.

3. Negligence ⇐134(2)

In actions for injuries to customer falling on floor of store, negligence may be established by circumstantial evidence.

4. Evidence ⇐100

"Circumstantial evidence" is nothing more than one or more inferences which may be said to arise reasonably from a series of proven facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Circumstantial Evidence".

5. Negligence ⇐134(7)

In action against store owners and employees for injuries to customer in fall on floor caused by excess of wax, evidence *held* to warrant finding of defendants' knowledge of dangerous condition.

6. Negligence ⇐48

Where dangerous or defective condition of property which causes injury to invitee has been created by negligence of the owner or his employee acting within scope of the employment, owner cannot assert that he had no notice or knowledge of such condition, but knowledge is imputed to him.

7. Negligence ⇐48

Where dangerous condition in premises is brought about by natural wear and tear, third persons, acts of God or other causes not due to negligence of owner or his employees, owner must have actual or constructive knowledge of the dangerous condition, and have been able by exercise of ordinary care to discover the condition in order to be liable for resulting injuries to invitees on ground of failure to exercise ordinary care in remedying defect.

8. Negligence ⇐127

In action for injuries to customer in fall on floor in store, testimony about conditions previous to the accident, by persons who had slipped on the same floor, is evidence tending to show knowledge by owner of the dangerous condition.

9. Negligence ⇐136(16)

In action for injuries to customer who fell on floor in store, whether condition causing the injury had existed so long as to be discoverable by the store owner within a reasonable time is for jury.

10. Pleading ⇐129(2)

In action against store owners and employees for injuries to customer in fall on floor, allegation that all of the defendants "owned, operated, maintained and controlled" the store was admitted by failure to deny, and hence it must be assumed that defendants were jointly in control of the store, and accordingly jointly liable, though evidence showed that one employee worked at cashier's desk and was not on duty when accident occurred.

11. Appeal and error ⇐457

Where defendant moved for new trial before filing notice of appeal, and such motion was granted on the day after perfection of the appeal, judgment appealed from was thereby vacated, and hence appeal must be dismissed.

12. Appeal and error ⇐438

A trial court retains jurisdiction to hear and determine a motion for new trial after an appeal has been taken from the judgment.

13. Appeal and error ⇐113(2)

Appeal does not lie from a judgment which has been vacated.

14. Appeal and error ⇐233(2)

In action for injuries to customer falling on floor in store, wherein defendants properly objected to question about orders not to wax the floor, given after the accident, as being incompetent, irrelevant and immaterial, and made the same objection to next question on whether orders to cease waxing were given because of other accidents, but when corrected answer contained statements concerning precautions taken after the accident, moved only to strike unresponsive portions, they could not complain on appeal that such portions were irrelevant because dealing with repair or precautions taken after the accident.

15. Appeal and error ⇐231(3)

Objections to evidence must be specific and state the correct grounds of inadmissibility before the trial court's ruling can be complained of on appeal.

16. Appeal and error ⇐1050(1)

In action for injuries to customer falling on floor in store, wherein evidence of orders to cease waxing floors given after the accident, was admitted without proper objection, judgment would not be reversed because of admission of similar evidence to which proper objection was made, since defendants were not prejudiced.

17. Trial ⇐48

If evidence is admissible for any purpose, it must be received, even though it may be highly improper for another purpose.

18. Witnesses ⇐347

In action for injuries to customer falling on floor in store which was allegedly excessively waxed, wherein store employee testified that he had looked at floor immediately after accident and did not notice anything unusual, the word "unusual" might be interpreted to mean "wrong", so that evidence that such employee later ordered that floor not be waxed was admissible to impeach his testimony, though it might not be admissible to prove negligence at time of accident.

See Words and Phrases, Permanent Edition, for all other definitions of "Unusual".

19. Trial ⇐207

In action for injuries to customer falling on floor in store, wherein evidence of orders given after the accident to stop waxing the floor was admitted, defendants were entitled to instruction that such evidence be considered only as impeaching witness who testified that he did not notice anything unusual about the floor, and not to prove negligence.

20. Trial ⇐255(4)

Where defendants did not request an instruction limiting the consideration to be given to impeaching evidence, they "waived" their right thereto.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

21. Appeal and error ⇐1033(3)

In action for injuries to customer falling on floor of store which was allegedly excessively waxed, alleged error in admitting testimony that after the accident orders were given to stop waxing the floor, but people continued to slip on it, was favorable to defendants and not prejudicial, especially where negligence could have been found in excessive waxing rather than mere fact of waxing alone.

22. Trial ⇐133(6)

In action for injuries to customer falling on floor in store, alleged error in admitting testimony on cross-examination of store employee, concerning employee's conversation with customer after the accident wherein employee told customer that store was insured, was not prejudicial where jury was instructed to disregard reference to insurance, and affidavits were conflicting on whether plaintiffs' counsel deliberately injected the issue. Code Civ.Proc. §§ 1854, 2048.

23. Appeal and error ⇐1060(1)

Subject to well-recognized qualifications, admission of evidence that defendant is insured is prejudicial error in personal injury actions. Code Civ.Proc. §§ 1854, 2048.

24. Witnesses ⇐268(3)

Where defendant brings out on direct examination part of a conversation relevant to accident, plaintiff may inquire fully into the entire conversation on cross-examination though fact that defendant is insured is incidentally disclosed. Code Civ.Proc. §§ 1854, 2048.

25. Witnesses ⇐268(3)

The whole of a conversation first touched upon in direct examination may be inquired into on cross-examination. Code Civ.Proc. §§ 1854, 2048.

26. Appeal and error ⇐925(3)

Where testimony of defendants' witness on cross-examination, rather than of plaintiffs' witness, about conversation with plaintiff contained reference to defendant's liability insurance, it could not be presumed that plaintiffs' counsel knew what the answer would be, especially where trial court, in denying defendants' motion for new trial, passed adversely on conflicting affidavits concerning intent of plaintiffs' counsel.

27. New trial ⇐144

Affidavit of plaintiffs' counsel, in resistance to defendants' motion for new trial, concerning affiant's interview with defendants' witness, *held* insufficient to show im-

proper design of plaintiffs' counsel to inject insurance into the case in cross-examining such witness.

28. Appeal and error ⇐925(3)

The trial court's denial of motion for new trial on ground of misconduct of counsel in improperly injecting insurance into the case will be deemed on appeal a determination of counsel's good faith and of absence of prejudice to defendants.

29. Appeal and error ⇐977(5)

A denial of motion for new trial on ground of misconduct of counsel, although not binding on reviewing court, is entitled to great weight upon an appeal in which the misconduct is complained of.

30. Trial ⇐191(7)

In action for injuries to customer falling on floor in store, instruction referring to "the dangerous condition of said floor" and to "said danger, if any", did not necessarily assume that floor was in dangerous condition nor lead jury to believe that such was an undisputed fact.

31. Trial ⇐296(9)

In action for injuries to customer falling on floor of store, any error in instruction assuming that floor was in a dangerous condition was cured by giving of several other full, complete and proper instructions that plaintiffs must establish that floor was in a dangerous condition because of defendants' failure to exercise due care.

32. Appeal and error ⇐1026

In action for injuries to customer falling on floor in store, evidence on negligence in waxing floor excessively *held* not to make the case so close that errors which ordinarily might not be prejudicial became prejudicial.

33. Appeal and error ⇐1026

The greater number of witnesses or quantity of evidence on one side, or sharp conflict in the evidence, does not mean that a case is "close" so that errors which ordinarily might not be prejudicial would become prejudicial.

See Words and Phrases, Permanent Edition, for all other definitions of "Close".

In Bank.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Frank R. Hatfield and another against Levy Brothers and others for injuries sustained by plaintiff Pearl Hatfield when she fell on polished waxed floor in defendants' store. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Prior opinion, 112 P.2d 277.

Edmund Scott, of Redwood City, and Myrick & Deering and Scott, of San Francisco, for appellants.

Francis N. Foley, of San Mateo, for respondents.

CARTER, Justice.

Plaintiffs, husband and wife, commenced this action against defendants for damages for injuries sustained by plaintiff, Pearl Hatfield, from a fall in defendants' mercantile store, alleged to have been caused by the negligent maintenance of the floor. Defendants denied that they were negligent and pleaded the defense of contributory negligence. A jury trial was had resulting in a verdict for plaintiffs of $10,000, and defendants appeal from the judgment entered thereon. All four defendants made a motion for a new trial. The motion was denied as to all except defendant Maebel Morris; as to her it was granted on the ground of insufficiency of the evidence one day after all of the defendants had perfected their appeal from the judgment.

Plaintiffs allege and defendants did not deny that all of the defendants owned, controlled and maintained the mercantile store in San Mateo, in which the accident occurred, although it appears from the evidence that defendants Bromfield, Morris and Scott were employees of defendant Levy Brothers, a corporation.

Inasmuch as one of defendants' contentions on this appeal is that the evidence is insufficient to support the verdict, we will first direct our attention to the facts. On March 15, 1939, between 4:30 and 5 o'clock in the afternoon, plaintiff Pearl Hatfield, who was six or seven months pregnant, was a customer in said store; she was therefore on the premises as an invitee. She had visited the dry goods department of the store to exchange an article of merchandise. She then left that department, went to another part of the store, and purchased refreshment at a soda fountain counter. She left that counter to cross that part of the store and pay for her purchase at the

cashier's desk. While so walking across, and after taking four or five steps, she slipped and fell; as stated in her language: "Why, I slipped on some wax on the floor, and * * * I really fell." The fall occurred when she put her right foot down for a forward step, her right foot skidding forward and left foot backward. As a result of the fall she sustained severe and serious injuries. At the point where she fell there was a skid mark from her shoe. The floor of the store is a hardwood floor with boards of varying width and running lengthwise. Where the boards join laterally there are "V" shaped grooves about 3/16 inch wide at the top and 9/16 inch deep. There is an incline of 4¾ inches in 28 feet back from the street entrance door. The floor, where the accident occurred, had been waxed by defendant Scott, an employee of Levy Brothers, the morning of the day of the accident with an electrically-powered waxing machine which melted the wax, spread it, and polished the floor, all in one operation; it was manually propelled over the surface. The operator of the machine had control of the amount of wax deposited on the floor, and if an excessive quantity were deposited thereon the machine would spread rather than remove it; an excessive amount of wax would make the floor slippery. The evidence shows that a waxed floor is ordinarily not slippery unless an excess quantity of wax is applied which does not occur unless the one applying the wax is "very careless". Defendants' witness Adams testified on direct examination: "Q. As far as causing a slippery surface, Mr. Adams, is a wax applied hot like this with a cornuba base and a machine that revolves as fast as this machine does, would it leave a slippery surface? A. No, it does not ordinarily. Ordinarily the cause of slipperiness is what they call 'piled up' too much wax on the surface in the application of the machine, but unless the operator is very careless it is almost impossible to get it piled up, and get too much and be slippery." The floor was "extremely slippery" as evidenced by the testimony of one of the plaintiffs' witnesses who slipped and nearly fell on the day of the accident. That witness, Mrs. Robe, testified that she arrived at the store sometime between 10 o'clock in the morning and noon the day of the accident and slipped after taking a few steps from the street entrance into the food and restaurant department of the store which was near the place where plaintiff, Pearl Hatfield thereafter fell, and that the floor was being waxed when she was there. Defendant Scott testified that he commenced waxing the floor at 8 a. m. and started at the street entrance door where Mrs. Robe entered; that it usually took about 1½ hours to do the waxing. It may be inferred therefore that he had waxed the portion of the floor where Mrs. Robe slipped near the entrance door as she did not arrive until after 10 a. m., and the waxing was commenced by Scott at 8 a. m., at the entrance door. There were spots on Mrs. Hatfield's topcoat which she was wearing at the time of the fall which "had some floor marks that looked like wax, a greasy substance". Defendant Scott, who applied the wax, admitted that the floor was slippery where the wax had been applied that morning. He testified: "Q. No. Just answer my question now. There isn't any question at all after you got through waxing the floor that morning, that wherever you applied wax and polished it with the buffer, it was slippery, wasn't it? A. Yes." He testified to the contrary in other portions of his testimony, but that would do nothing more than create a conflict in the evidence which has been resolved against defendants by the jury. Defendant Bromfield, the president and manager of defendant, Levy Brothers, testified at the taking of his deposition prior to trial (it was read at the trial) that he issued orders after the accident "that the floor not be waxed", and that other people had slipped on the floor prior to the accident. He qualified that by a corection of his deposition to the effect that a number of women had fallen in both of defendants' stores from time to time with the floor both waxed and not waxed.

[1, 2] On the score of sufficiency of the evidence establishing defendants' negligence we cannot say as a matter of law that plaintiffs failed to prove that issue. The facts as hereinabove recited manifestly established sufficient facts to require submission of the issue of negligence to the jury. Defendants produced evidence to the effect that there was no excess wax on the floor; that the floor was not slippery; that the best quality of wax was used; that the wax application machine was efficient and of a kind commonly used; that the floors were of a kind commonly used and that waxing is a common and customary

treatment for hardwood floors. This evidence merely creates a conflict. The duty of resolving that conflict rested with the jury, and it is beyond the power of this court to disturb a verdict based upon conflicting evidence. The jury may well have inferred from the evidence establishing the facts above recited that the floor would not ordinarily be slippery from waxing unless an excess quantity of wax was applied, which does not occur unless the operator is "very careless"; that such fact taken with the facts that the wax was applied just prior to the accident, that the amount of wax applied was controlled by the one operating the application machine, that the floor was very slippery after the application, that plaintiff, Pearl Hatfield, did slip and fall, and that there was wax on her coat, would amply justify the inference that there was negligence in applying an excess quantity of wax which was the proximate cause of the injury. That inference is fortified when we consider that the evidence shows that Pearl Hatfield was wearing low-heeled shoes and, at the time she fell, was walking carefully and deliberately; that she testified she slipped on wax on the floor and there were spots on her coat that had the appearance of wax.

[3, 4] In cases of this character negligence may be established by circumstantial evidence which is nothing more than one or more inferences which may be said to arise reasonably from a series of proven facts. Morton v. Manhattan Lunch Company, 41 Cal.App.2d 70, 106 P.2d 212; Lamb v. Purity Store, Inc., 119 Cal.App. 690, 7 P.2d 197; Brown v. Holzwasser, Inc., 108 Cal.App. 483, 291 P. 661; Rothschild v. Fourth and Market St. R. Co., 139 Cal.App. 625, 34 P.2d 734.

Defendants cite numerous authorities from other jurisdictions which in the main are to the effect that the maintenance of polished waxed floors standing alone, although they are slippery, is not in itself negligence. There apparently is a conflict of authority on that subject, and from what facts an inference of negligence flows. See cases collected: 33 A.L.R. 181; 43 A.L.R. 866; 46 A.L.R. 1111; 58 A.L.R. 136; 100 A.L.R. 710. We are not bound by what the rule may or may not be elsewhere. However, in any event, it is not necessary in the instant case to determine which view of that proposition is most consonant with justice because there are, as we have seen, sufficient facts proven here from which it may be inferred that defendants were negligent in applying an excessive quantity of wax to the floor.

[5-7] Defendants urge that there is not sufficient evidence to establish that defendants had notice, actual or constructive, of the dangerous condition of the floor and that therefore the judgment must be reversed. There are several reasons why that contention cannot prevail. There is evidence heretofore referred to by defendant Scott, the employee who spread the wax on the floor, that after it was applied on the morning of the accident, the floor was slippery. He thus knew it was slippery and therefore dangerous; his negligence had brought about that condition. Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. Under such circumstances knowledge thereof is imputed to him. Saunders v. A. M. Williams & Co., 155 Or. 1, 62 P.2d 260. Where the dangerous condition is brought about by natural wear and tear, or third persons, or acts of God or by other causes which are not due to the negligence of the owner, or his employees, then to impose liability the owner must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it or as a man of ordinary prudence should have discovered it.

[8, 9] In any event there is other evidence here from which the jury may have reasonably concluded that defendants had knowledge of the slippery condition of the floor. As we have seen, witness, Mrs. Robe, testified that the floor was slippery and that during the morning of the day on which the accident occurred, she slipped on the floor in approximately the same area where Mrs. Hatfield thereafter fell. Although it does not appear that anyone in

authority had actual knowledge of that occurrence, testimony as to conditions previous to the accident by persons who had also slipped on the same floor is evidence tending to show knowledge on the part of the owner of the store of the dangerous condition. Further, the question of whether the condition which caused the injury had existed so long as to be discoverable by the store owner within a reasonable time is for the jury. Rothschild v. Fourth and Market St. R. Co., supra.

[10] Defendants claim separately as to the individual defendants Bromfield, Scott, and Morris, that the evidence is not sufficient to support the verdict as to any of them. The evidence shows that Scott who was the employee of Levy Brothers, a corporation, applied the wax, and that he was negligent, therefore the objection as to him is manifestly without merit. From the evidence it appears that Bromfield was the manager of the store and Morris' duties were at the cashier's desk; Morris was not on duty when the accident occurred. However, it was alleged by plaintiffs in their complaint that all of the defendants "owned, operated, maintained and controlled" the store in which the accident occurred. That allegation was admitted by defendants by their failure to deny it. Therefore, it must be assumed that they were jointly in control of the store and accordingly jointly liable for negligence in failing to maintain the premises in a safe condition.

[11-13] However, as to defendant Morris, as we have seen, a motion for a new trial was granted on the ground of insufficiency of the evidence the day following the perfection of this appeal by all of the defendants, the motion having been made prior to filing the notice of appeal. She now asserts that the court was without jurisdiction to grant the new trial because of the perfection of the appeal and that now her appeal must be entertained. She is in error. A trial court retains jurisdiction to hear and determine a motion for a new trial after an appeal has been taken from the judgment. City of Vallejo v. Superior Court, 199 Cal. 408, 249 P. 1084, 48 A.L.R. 610; Estate of Waters, 181 Cal. 584, 185 P. 951. The order granting the new trial has become final as to defendant Morris, no appeal having been taken therefrom by plaintiffs. The judgment as far as that defendant is concerned is vacated and set aside by the order granting the new trial, and the purported appeal therefrom must therefore be dismissed. No appeal lies from a judgment which has been vacated. Lantz v. Vai, 199 Cal. 190, 248 P. 665.

[14-16] The deposition of defendant Bromfield, taken by plaintiffs prior to trial pursuant to section 2055 of the Code of Civil Procedure, was read at the trial and contained the following testimony:

"Q. Do you recall anything about orders being issued that the floor not be waxed after that (after the accident)?

"Mr. Scott: (defendants' counsel) * * I wish to offer the objection that it is incompetent, irrelevant and immaterial.

"The Court: Overruled.

"A. That is right, I issued orders that the floor be not waxed.

"Q. Was that on account of other accidents besides this one?

"Mr. Scott: * * * we object as incompetent, irrelevant and immaterial. * * *

"Q. The Court: Overruled.

"A. Well, we have had people slip on the San Mateo floor (the floor here involved)."

The last answer was corrected by Bromfield to read: "We have had people slip on the floors of both our stores from time to time, either slip or fall, and with these number of * * * a number of incidents like that have happened, I thought it might be wise to try some different preparation on the floor, but even since that, we have had a number of women fall on the floor, since we have stopped waxing, so that it does not seem to alter the circumstances greatly. Mr. Scott: At this time, if Your Honor please, I move that the entire answer be stricken out as not responsive to the question, and the jury instructed to disregard the answer. The Court: Denied." Defendants complain that the foregoing constituted a prejudicially erroneous admission of evidence of repair made or precautions taken after the accident to prove negligence, citing Helling v. Schindler, 145 Cal. 303, 308, 78 P. 710; Anstead v. Pacific Gas & Electric Co., 203 Cal. 634, 265 P. 487; Sappenfield v. Main St. R. R. Co., 91 Cal. 48, 27 P. 590; Hager v. Southern Pacific Co., 98 Cal. 309, 33 P. 119; Limberg v. Glenwood Lumber Co., 127 Cal. 598, 60 P. 176, 49 L.R.A. 33; and Morris v. Sierra,

etc., Power Co., 57 Cal.App. 281, 207 P. 262. Defendants' contention cannot prevail for several reasons. In the first place defendants' objection to the question originally put was properly made, that is, that the evidence was incompetent, irrelevant and immaterial. However, the next question was whether the orders to cease waxing were given because of other accidents, and although objected to, the answer before the correction did not deal with precautions taken after the accident. The answer as corrected contains statements with respect to such orders, but defendants' motion to strike the corrected answer was solely on the ground that it was not responsive. Inasmuch as the question did not call for an answer on the subject of giving orders to cease waxing, but the answer did contain statements concerning that subject, defendants should have based their motion to strike on the grounds of incompetency and irrelevancy. This they failed to do. The answer as corrected was in part responsive to the question, but defendants did not in their motion to strike ask that only the unresponsive portions be stricken. Therefore, they cannot now complain of the ruling on their motion. Their motion to strike not having been made upon the proper grounds upon which they now claim the evidence should have been excluded, they cannot raise the question on this appeal. Objections to evidence must be specific and state the correct grounds of inadmissibility before complaint can be made on appeal of the trial court's ruling. 2 Cal.Jur. 269–271. Although proper objection was made to the evidence when the question was first asked, no proper grounds were specified when the same evidence appeared in defendant, Bromfield's answer as corrected, to the second question. There was therefore evidence as to orders to cease waxing the floors, to which no proper objection was made, independently of the evidence on that subject, to which proper objection was made. A judgment will not be reversed on appeal under those circumstances, as it cannot be said that defendants were prejudiced thereby.

[17-20] In the second place it has been held that if evidence is admissible for any purpose, it must be received, even though it may be highly improper for another purpose. Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d 850. Although evidence of the character here in question may not be admissible to prove negligence at the time of the accident, it is proper to impeach the testimony of a witness. Inyo Chemical Co. v. City of Los Angeles, supra. In the case at bar, the record discloses that prior to the testimony of the witness Bromfield with relation to the cessation of waxing the floor, said witness had testified that he had "looked at the floor (immediately after the accident) and—did not notice anything unusual about the floor", and the defendants at all times, maintained that there was nothing wrong with the floor. The evidence of his having later ordered that the floor not be waxed tended to impeach that testimony by showing that he had changed his mind with reference to there being nothing wrong with the floor, and was admissible for that purpose. The word "unusual" as used by the witness under the circumstances may be interpreted to mean "wrong". In the Inyo Chemical Company case, supra, one of the main issues was whether or not the defendant should have installed and maintained drainage facilities to prevent the flooding of plaintiff's land which was alleged to have been caused by defendant's negligent construction and maintenance of an aqueduct. Defendant's expert witness, who was in charge of the construction of the aqueduct testified on direct examination that in his opinion no drainage facilities were necessary. On cross-examination he was asked if after the flooding he authorized the construction of spillways. The question was held to be proper as weakening the value of his opinion. It may also be observed that in the instant case defendants made no request that the jury be instructed that the evidence of orders to cease waxing could be considered only as impeaching evidence and not to prove negligence. They would have been entitled to such an instruction (Inyo Chemical Co. v. City of Los Angeles, supra); but having made no request, they waived their right thereto.

[21] Further, it may fairly be said that defendants were not prejudiced by the admission of the evidence even if it were error. The answer by the witness as corrected and heretofore quoted was definitely favorable to defendants. He stated that they had ceased waxing but that it had no effect on the condition with respect to accidents. People slipped on the floor whether it was waxed or not. Furthermore, the

evidence was not particularly vital because, as we have seen, it was established that the negligence of defendants consisted in an excessive application of wax rather than the mere waxing alone. Therefore, whether or not the waxing was discontinued was not necessarily the turning point in the case, the jury's implied finding of negligence could be founded on the manner of the application of the wax alone.

[22-25] Defendants contend that the existence of public liability insurance on their part was brought out at the trial to their prejudice. The following events transpired in that respect: Mrs. Meyers, a store employee, was on duty at the cashier's desk in the store near where and at the time when Mrs. Hatfield fell. She assisted the latter to a seat immediately after the accident and a conversation was had between them. Defendants called Mrs. Meyers to the stand and in the course of the direct examination the following occurred.

"Q. Did you have a conversation with her (plaintiff, Pearl Hatfield)? A. When I first got to her, I asked her if she was hurt.

"Q. She said what? A. 'I don't know. I am terribly embarrassed.'

"Q. Did you see what her condition was? A. I did. I could.

"Q. What was her condition? A. She was pregnant.

"Q. Did you have a conversation with her about that? A. I did.

"Q. What did she say? A. I asked her how far she was, and she said she was going into her 7th month. I believe that is what she said.

"Q. Was there anything else said about that condition, or about any advice, she had? A. You mean why she fell or anything like that?

"Q. Yes? A. She said to me when I took her by the arm, she said, 'I think I slipped on something'.

"Q. Yes. A. She said, 'I was supposed to go with my husband', I believe she said 'to the San Joaquin Valley, but instead I come down here and fall down. As a matter of fact I am not supposed to walk much.' She also mentioned something about her pelvis, but I don't remember what it was. Only I do remember she said her pelvis."

On cross-examination by plaintiffs, the witness was questioned in regard to that conversation, and it appeared therefrom, among other things, that the witness asked Mrs. Hatfield for her name and then the witness was asked if she told Mrs. Hatfield why she had asked for the name. Defendants' objection to that question was overruled, but it appears not to have been answered, as immediately thereafter the following appears:

"Mr. Foley: (plaintiffs' counsel) Whatever the conversation was, will you tell us what it was? A. She said she was embarrassed, and I told her not to feel embarrassed, that I was there to help her.

"Q. What did you say to her? A. As I remember, I said we were insured."

Thereafter the cross-examination proceeded upon different subjects, defendants failing to object to the question, to move to strike the answer, to assign misconduct, or to request that the jury be instructed to disregard the answer. After the witness was excused, and both parties rested, and out of the presence of the jury, defendants charged plaintiffs' counsel with misconduct and moved for a mistrial. At that time plaintiffs' counsel stated that he did not know what the answer would be. The motion was denied. The court on its own initiative in instructing the jury gave the following instruction: "You are instructed that no insurance company is a party to this suit and you are instructed to disregard any reference to insurance that may have been made by anyone during the course of the trial." Under these circumstances we do not believe that a reversal of the judgment is required. It is the general rule that evidence that defendant is insured is not admissible in personal injury actions, and that the admission thereof is prejudicial error. 10 Cal. Jur., Ten. Yr.Supp. 664, 665. There are, however, well recognized qualifications to that rule. One of those is founded upon sections 1854 and 2048 of the Code of Civil Procedure. Section 2048 provides: "The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith." Section 1854 provides: "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is

necessary to make it understood, may also be given in evidence." These rules have been recently recognized by this court. People v. Dyer, 11 Cal.2d 317, 79 P.2d 1071. Pursuant to those rules it has been held that where the defendant brings out on direct examination part of a conversation relevant to the accident, plaintiff may inquire fully into the entire conversation on cross-examination although the fact that defendant is insured is thereby incidentally disclosed. Weis v. Davis, 28 Cal.App.2d 240, 82 P.2d 487; see, also, Ashley v. Rivera, 220 Cal. 75, 29 P.2d 199. It is manifest that these rules entitle a litigant to inquire into on cross-examination the whole of a conversation first touched upon in the direct examination. Here defendants questioned the witness relative to the conversation on direct examination, and the conversation had to do with the accident and occurred immediately thereafter.

[26-29] Defendants urge, however, that the injection of insurance into the case was done by plaintiffs' counsel designedly and with the intent to influence the jury, and that therefore prejudicial error was committed. But even assuming that error did result, we do not believe that the defendants may successfully claim prejudice in view of all of the circumstances. It will be remembered that no objection was made by defendants until after the witness Meyers left the witness stand, and that even then defendants never at any time made a motion to strike either the question or the answer or asked the court to instruct the jury to disregard the reference to insurance. In fact they expressed the thought that they did not want the jury so instructed. They contented themselves with a charge of misconduct and a motion for a mistrial made after the witness was excused and at the close of the evidence in the case. The court on its own initiative instructed the jury that insurance was not involved in the case. Manifestly, there was nothing in plaintiffs' cross-examination of the witness to indicate a design and intent on their part to inject insurance into the case and thereby influence the jury; the question asked was merely in regard to the conversation. The witness was defendants' rather than plaintiffs' and the event in question occurred on cross-examination. It cannot be presumed therefore that plaintiffs' counsel knew what the answer would be, as might be the case if the plaintiff or one of his witnesses was testifying. Defendants refer to the affidavits filed in support of defendants' motion for a new trial as showing the improper design and intent on the part of plaintiffs' counsel to influence the jury. The affidavits are conflicting, and the trial court passed on that conflict adversely to defendants in denying their motion for a new trial. Defendants therefore must necessarily depend on the affidavit of plaintiffs' counsel which deals with an interview he had with defendants' witness, Meyers, in which he narrates his conversation with her. That affidavit does not show an improper design on the part of plainitffs' counsel to inject the insurance issue into the case. It appears therefrom that he merely advised the witness as to what he honestly believed the law to be, that is, that if part of a conversation comes into evidence, the whole may be brought out, and that a witness should testify to the exact truth and not according to the instruction of anyone. Also it is worthy of note that plaintiffs' counsel stated, at the time the motion for a mistrial was made, that he did not know what the answer to his question would be. One of the grounds of defendants' motion for a new trial was the claimed misconduct of plaintiffs' counsel in injecting insurance into the case; the trial court denied that motion. We are not inclined to question the trial court's conclusion under the circumstances. Where counsel is charged with misconduct for improperly injecting insurance into the case, the denial by the trial court of a motion for a new trial made on that ground will be deemed a determination by it of good faith on the part of counsel and that defendants were not prejudiced. Levens v. Stocco, 5 Cal. App.2d 693, 43 P.2d 357. A denial of a motion for a new trial made upon the ground of misconduct of counsel, although not binding on this court, is entitled to great weight upon an appeal in which complaint is made of the misconduct. Citti v. Bava, 204 Cal. 136, 140, 266 P. 954; Lafargue v. United Railroads Co., 183 Cal. 720, 192 P. 538; Loggie v. Interstate Transit Co., 108 Cal.App. 165, 291 P. 618.

Finally defendants assert reversible error in the following instruction given to the jury:

[30, 31] "If you believe from the evidence that plaintiff, Pearl Hatfield, at the time and place in question, was in the building of defendants at its invitation express or implied, and that she sustained injuries without fault upon her part, and that

such injuries were proximately caused by the dangerous condition of said floor at the place in question, and that such dangerous condition of said floor was known to defendant, or in the exercise of reasonable care should have been known to defendants and that said danger, if any, was not obvious, and was not known to plaintiff, then you are instructed that plaintiff is entitled to recover damages from defendants therefor." Defendants claim that the instruction assumed that the floor was in a dangerous condition, and thereby led the jury to believe that such was an undisputed fact. It is clear that the instruction is not necessarily susceptible of that construction. It will be noted that although the first part of the instruction might create that impression, in the latter part the dangerous condition is not assumed, it is there stated: "said danger, if any, * * *". See State Compensation Ins. Fund v. Lamb, 96 Cal. App. 236, 273 P. 1080. In any event the jury was fully, completely, and properly instructed in several other instructions that plaintiffs, in order to recover, must establish that the floor was in a dangerous condition due to the failure of the defendants to exercise due care and any error in the questioned instruction was cured thereby.

[32, 33] Defendants urge in respect to its claim of prejudicial error that because the case is a close one, errors which ordinarily might not be prejudicial became so under such circumstances. That may be true, but the case is not necessarily a close one. The greater number of witnesses or quantity of evidence on one side does not mean that a case is close; nor does a sharp conflict in the evidence make it so. If it did, practically every vigorously contested case would be a close one. In cases of this kind it is ordinarily much simpler for the defendant than the plaintiff to produce evidence because of the accident occurring on premises under his control where many of his employees are present.

Suffice it to say that after a review of the entire record we find nothing therein which in our opinion justifies a reversal of the judgment. Therefore, the judgment as to defendants Levy Brothers, J. D. Bromfield and Millard Scott is affirmed. The appeal of defendant Maebel Morris is dismissed.

GIBSON, C. J. TRAYNOR, J. and MOORE and PULLEN, JJ. pro tem., concurred.

18 Cal.2d 773

HICKS v. OCEAN SHORE R. R., Inc., et al.

S. F. 16580.

Supreme Court of California.

Oct. 17, 1941.

Rehearing Denied Nov. 13, 1941.

1. Appeal and error ⇐110, 782

An order denying a motion for new trial is nonappealable and purported appeal therefrom must be dismissed.

2. Workmen's compensation ⇐2141

In action by injured employee against employers who failed to carry compensation insurance, on appeal from judgment for employee, it is not duty of Supreme Court to evaluate evidence for purpose of making new findings but merely to ascertain whether there is substantial evidence in support of the judgment. St.1937, p. 185; p. 271, §§ 3706–3709.

3. Appeal and error ⇐994(2)

The reversal of a judgment upon the ground of asserted perjury cannot be ordered except in those cases where the testimony is such as to shock the moral sense of the court, and the testimony must be incredible.

4. Trial ⇐140(1)

Where asserted perjured testimony is not inherently improbable, it is the exclusive province of jury to determine the truth of the matter in question.

5. Workmen's compensation ⇐2120

In action by employee injured while operating gasoline-driven power shovel against employers who failed to carry compensation insurance, if oil had been discovered on floor of cab of shovel, its presence would have been attributable to the presumed negligence of the employers. St.1937, p. 185; p. 271, §§ 3706–3709.

6. Workmen's compensation ⇐2141

In action by employee injured while operating a gasoline-driven power shovel, against employers who failed to carry compensation insurance, even though testimony of employee's witness may have been subject of justifiable suspicion, it was not within province of Supreme Court to substitute findings contrary to those made by the jury. St.1937, p. 185; p. 271, §§ 3706–3709.

7. Workmen's compensation ⇐2141

In action by injured employee against employers who failed to carry compensation insurance, the Supreme Court cannot usurp jury's exclusive function by substituting find-

ings contrary to those made by the jury. St. 1937, p. 185; p. 271, §§ 3706–3709.

8. Workmen's compensation ⇐2141

In action by employee injured while operating gasoline-driven power shovel, against employers who failed to carry compensation insurance, record regarding conflicting statements of employee as to manner in which accident occurred did not authorize Supreme Court to reverse judgment for employee on ground of asserted perjury. St.1937, p. 185; p. 271, §§ 3706–3709.

9. Master and servant ⇐270(9)

In action by employee injured while operating gasoline-driven power shovel against employers who failed to carry compensation insurance, where employee claimed that he was knocked unconscious when struck by a rock during a landslide and that his right hand was accidentally crushed by large gear wheel, evidence of former slides was admissible for limited purpose of showing the extent of the peril which existed and the knowledge of employers with reference to such conditions. St.1937, p. 185; p. 271, §§ 3706–3709.

10. Negligence ⇐125

Where accidents have occurred under circumstances substantially similar to those surrounding accident in question, and where they tend to serve notice of a dangerous condition, evidence thereof is properly admissible.

11. Workmen's compensation ⇐2141

In action by employee injured while operating gasoline-driven power shovel at north portal of tunnel against employers who failed to carry compensation insurance, where employee claimed that he was struck by rock and knocked unconscious during landslide and that his right hand was accidentally crushed by gear wheel, evidence of slide at south portal could not have been prejudicial to employers, where it was shown that a slide had occurred at the north portal only two months prior to accident. St.1937, p. 185; p. 271, §§ 3706–3709.

12. Workmen's compensation ⇐2141

In action by employee injured while operating gasoline-driven power shovel against employers who failed to carry compensation, instruction which merely served in a general way to follow the provisions of the Labor Code governing the type of action involved and informed jury, in accordance with established practice, regarding value in general of presumptions did not contain anything of a prejudicial character. St.1937, p. 185; p. 271, §§ 3706–3709.

13. Workmen's compensation ⇐2139

In injured employee's action against employers who failed to carry compensation insurance, it is appropriate to advise the jury of the significance of the neglect of employers to secure payment of their workmen's compensation in event of injury, and that an injury to an employee was presumed to have resulted from employers' negligence. St. 1937, p. 185; p. 271, §§ 3706–3709.

14. Trial ⇐260(5)

In injured employee's action against employers who failed to carry compensation insurance, the rejection of employers' proposed instruction was not error where it was substantially included in the general charge. St.1937 p. 185; p. 271, §§ 3706–3709.

15. Trial ⇐240, 260(1)

Where instructions are cumulative or merely amplifications of other instructions, or are argumentative, they should not be given.

16. Trial ⇐260(1)

A judgment will not be reversed because of the refusal to give cumulative instructions.

17. Workmen's compensation ⇐2121

In injured employee's action against employers who failed to carry compensation insurance, employee's ability to earn, rather than the record of his past earnings was proper factor in computing impairment of his future earning power. St.1937, p. 185.

18. Workmen's compensation ⇐2121

$8,500 verdict, reduced by trial judge from $15,000, to employee who had been earning $8 a day for injury to right hand which resulted in deformity of hand, deformity of little finger, atrophy of muscles and impairment of ability to use fingers, against employers who failed to carry compensation insurance was not excessive. St.1937, p. 185.

19. Workmen's compensation ⇐2135

In action by employee injured while operating a gasoline-driven power shovel when his hand was crushed by gear wheel, against employers who failed to carry compensation insurance, refusal to permit employers to show that injuries could have been avoided by disengaging clutch was proper, since negligence of employers is presumed, and con-

tributory negligence is not a defense. St. 1937, p. 271, § 3708.

20. Workmen's compensation ⇐2141

In action by employee injured while operating gasoline-driven power shovel against employers who failed to carry compensation insurance, rulings of court in admitting evidence offered by employee and in refusing certain evidence offered by employers could not have constituted error prejudicial to employers where the facts with reference to the manner in which injuries were received and the extent of injuries was fully covered by witnesses who testified on behalf of both parties. St.1937, p. 185.

21. Witnesses ⇐37(5)

In action by injured employee against employers who failed to carry compensation insurance, where evidence was offered for purpose of proving that on each of examinations made by a physician he took measurements of each finger of employee and gave degree of angulation and extent of the shortening, the employee was compentent to testify regarding those facts, contradicting the testimony of another physician who had testified for employers. St.1937, p. 185.

22. Evidence ⇐359(3)

In action by employee injured while operating gasoline-driven power shovel at north portal of tunnel against employers who failed to carry compensation insurance, photographs showing extent of landslide at south portal of tunnel were competent proof of hazardous nature of formation at both portals where witnesses had testified that the character of the formation in the entire hill was identical. St.1937, p. 185.

23. Workmen's compensation ⇐2135

In action by employee injured while operating a gasoline-driven power shovel when struck by rock during landslide, proof of presence or absence of shatter-proof glass in cab of shovel was immaterial, since employers, who failed to carry compensation insurance, were presumed to have been negligent and window of cab was open. St.1937, p. 270, § 3700, et seq.

24. Workmen's compensation ⇐2135

In action by injured employee against employers who failed to carry compensation insurance, employers' offer to prove that the neglect to carry compensation insurance was not deliberate was properly refused. St. 1937, p. 185.

25. Master and servant ⇐87

A court may reduce a statutory penalty exacted by the state for the failure of a violator to appreciate his obligation to the Commonwealth but there is no authority for excusing an employee for his failure to comply with legal requirements for the care of his employees. St.1937, p. 185.

26. Appeal and error ⇐207, 719(1)

Defendants' contention regarding opening statement and closing argument of plaintiff's counsel would not be considered where no assignment of error and no motion to strike and to instruct the jury not to consider them was made at the time.

27. Workmen's compensation ⇐2100

Payments in full of award of Industrial Accident Commission to employee did not deprive Superior Court of jurisdiction of action for damages against employers who failed to carry compensation insurance. St. 1937, p. 185.

28. Appeal and error ⇐870(6)

The proceedings on motion for new trial may be appropriately reviewed in connection with appeal from judgment.

29. Workmen's compensation ⇐2121

In injured employee's action against employers who failed to carry compensation insurance, where it was stipulated that on July 10, 1924, the employee was 20 years of age, but after trial an affidavit was filed stating that on August 5, 1920 an application, in the name of the employee, for a marriage license was made stating that the applicant was 22 years of age, in the absence of prejudicial error in the conduct of the trial, court's order making a reduction of $1,500 in the judgment based upon the employee's life expectancy at the age of 32, as established by his testimony instead of his expectancy at 38, if based upon the data contained in the application for marriage license, was proper. St.1937, p. 185.

30. New trial ⇐6

Questions raised upon motion for new trial are primarily addressed to the sound discretion of the trial court.

31. New trial ⇐99

On motion for new trial, newly discovered evidence is regarded with suspicion.

32. Appeal and error ⇐528(4)

Where after premature filing of notice of intention to move for a new trial, an affi-

davit was filed, the affidavit, not having been filed within statutory period or any extension thereof, did not properly constitute a part of the "record". Code Civ.Proc. § 659a.

See Words and Phrases, Permanent Edition, for all other definitions of "Record".

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by James P. Hicks against the Ocean Shore Railroad, Inc. and others for damages for injuries under St.1937, p. 185, authorizing such action where the employer fails to carry compensation insurance.

Affirmed.

For prior opinion of District Court of Appeal, see 109 P.2d 1032.

Keyes & Erskine, Anthony S. Devoto, A. P. Black, and Isador W. Botasof, all of San Francisco, for appellants.

Gardiner Johnson, of San Francisco, for respondent.

MOORE, Justice pro tem.

[1] The Industrial Accident Commission having made its award in the sum of $2,-114.50, which was paid, to plaintiff for injuries sustained by him in the course of his employment by defendants, he subsequently instituted this action for damages. The Labor Code, St.1937, p. 185, authorizes such an action where the employer fails to carry compensation insurance. After 21 days of trial, the jury returned a verdict in plaintiff's favor in the sum of $15,000. Upon defendants' motion for new trial, the judgment was reduced to $8,500 and the motion was denied. To this reduction plaintiff consented. The court also allowed counsel fees in the sum of $1,700. From the judgment as modified and from the order denying the motion for a new trial defendants appeal. The latter being nonappealable, the purported appeal therefrom must be dismissed.

On June 30th, while operating a gasoline driven power shovel as an employee of defendants, plaintiff was injured. He was excavating a "V" shaped cut into a steep bank at the north portal of Pedro mountain, near Shelter Cove in San Mateo county. His compensation was $8 per day. The excavation was for the purpose of reopening a tunnel through which the road bed of defendants' railroad had been laid at some time in the past. The hill through which the tunnel passed was about 200 feet high. The distance from the north portal to the south portal was about 354 feet. Prior to 1935 both portals had become completely covered by shattered rock which had fallen from the heights above. Extensive blasting had been done in and about the tunnel in 1930. This had displaced the conglomerate earth and rock in the entire general area. The geological formation was substantially the same at both portals and the tendency to slip when the angle of repose exceeded 45 degrees was the same. In such an area construction work was dangerous. The principal hazard characteristic of the structure was its tendency to slip and slide. Blasting displaced the strata and caused loose material to slide for indefinite periods. So great were the hazards that extraordinary protection would be necessary to effect a reasonable degree of safety to the workmen engaged in the construction.

It was the task of plaintiff so to operate the shovel at the north portal as to remove the loose earth and rock covering the old entrance. He had progressed with the excavation until he had gone more than 50 feet past the original portal. The shovel bucket had removed some tunnel timbers. As a result of his operations the bank in front of the shovel became at least 75 feet high and sloped at an angle of about 70 degrees. This operation continued to the time of the accident. No effort was made to blast the bank down to its angle of repose which was about 45 degrees.

In March preceding the accident a slide had occurred at the south portal which almost completely buried the power shovel. The engineer notified the officers of the railroad of that incident. In May a slide of great magnitude at the north portal displaced the rock and piled it up so high around the power shovel that large rolling boulders crushed into its radiator. Of that slide also defendants had knowledge. Some slides involved major displacements. On other occasions broken rock trickled down the bank. No look-out or watchman was on duty as plaintiff proceeded with his operations to warn him of impending slides or falling rocks. Defendants relied upon the "greaser" or helper of plaintiff to keep on the lookout for such slides and falling rock.

Prior to plaintiff's employment by defendants, he had performed the same labor on behalf of the Adams Construction Company

which, under a contract with defendants, had been clearing the rock and dirt from the face of the tunnel on defendants' right of way. The contract with the Adams Construction Company having terminated June 24, 1936, defendants continued the operations in progress at the time.

From the narrative related by plaintiff and believed by the jury, it appears that, while seated in the operator's cab of the power shovel and operating its levers, plaintiff detected some mechanical disturbance. He set his brakes and raised his seat from the passageway in order to visit the engine compartment and adjust the governor. Hearing the slide of rocks above him, he looked out and saw many rocks sliding from the top down the side of the bank. While in that position one of the falling rocks bounded through the open cab window and struck him on the forehead. Its approach was too sudden to enable him to observe its exact size or the direction from which it came. He was stunned by the force of the blow. He had no memory of any intervening fact until he was conscious of pulling his right hand in a severely crushed condition out of an opening in the cab wall two feet back of the operator's seat and immediately above the drum and feather touch control of the hoisting machinery. During his unconsciousness his hand had fallen into this unguarded opening and upon a large gear wheel which crushed it. There were no witnesses to the accident. Brunner, the greaser, the only person at the north portal that day other than Hicks, was inside the engine compartment of the shovel in the rear part of the cab. He did not see either what Hicks was doing or the falling of the rocks. Plaintiff was removed 30 miles distant to a hospital in San Francisco where he arrived about an hour after the accident. Shortly thereafter he was removed to another hospital where he underwent an operation on his hand. He remained there 23 days.

The injury to his hand was a severe laceration in his palm which reached about two-thirds of the way around his hand. The bases of the metacarpal bones of the index and little fingers were crushed. The extensor tendon of the little finger was severed as were also the sensory branches of the ulnar nerve in the hand. These injuries were permanent. The right hand was rendered inefficient to the extent of 40 or 50 per cent. Plaintiff was unable thereafter to perform his duties as a power shovel operator or to do other skilled mechanical work.

Before considering the points raised on appeal, it will illuminate our discussion to refer at this point to the principles underlying the obligations of the defendants under circumstances presented by the record before us. Where an employer has failed to secure the payment of compensation by taking out insurance, the employee may exercise the right granted him under the special provisions of the Workmen's Compensation Act (§§ 3706–3709 of the Labor Code) by bringing such action as this after he has received an award from the Industrial Accident Commission. Upon the trial of such action, it is presumed that the employer was negligent and that the injury to the employee was a direct result thereof. The employer in such an action may not defend upon the grounds of contributory negligence, assumed risk, or negligence of a fellow servant. Labor Code, supra.

It is admitted (1) that defendants were the employers; (2) that they carried no Workmen's Compensation insurance; (3) that the injury resulted while respondent was working in the course of his employment.

[2] It is not our purpose, and it is not our duty, to evaluate evidence for the purpose of making new findings but merely to ascertain whether there is substantial evidence in support of the judgment. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970. The many assignments of error are discussed, each in its turn.

[3, 4] The reversal of a judgment upon the ground of asserted perjury cannot be ordered except in those cases where the testimony is such as to shock the moral sense of the court. The testimony must be incredible. Where such testimony is not inherently improbable it is the exclusive province of the jury to determine the truth of the matter in question. Crabtree v. Western Pacific, 33 Cal.App.2d 35, 90 P. 2d 835; Hosman v. Southern Pacific Co., 28 Cal.App.2d 621, 83 P.2d 88.

[5] The bases of the claims of perjury center about the conflicting statements of plaintiff. Middleton, an officer of the Ocean Shore Railroad, Inc., testified that while at the emergency hospital one hour after the accident, in describing how the accident occurred, Hicks stated to him that the carburetor had continued to bother him; that he called Brunner, the greaser, to the

inside and sent him back to adjust the carburetor; that the trouble continued; that when it popped a couple of times, he left his own seat in order to hasten to Brunner's aid; that his feet suddenly went out from under him by reason of some oil on the floor of the cab; that he threw his arms out to avoid falling and that his right hand accidentally contacted the machinery. This testimony of Middleton was corroborated by Brunner. Hicks' testimony was that he did not remember what he had said at the emergency hospital; that he had been knocked unconscious when struck by the rock; that he did not regain consciousness until three days later. He admitted that he did not report to any one at the emergency hospital or to his fellow workers that his injury had been caused by the blow of a rock on his forehead. But in view of his testimony that he was unconscious for three days following the accident, it was not unreasonable for the jury to accept his account detailed from the witness stand instead of the story testified to by Middleton. None of defendants' witnesses testified that oil had been found on the floor of the cab after the accident. But if oil had been discovered on the floor of the cab, its presence would have been attributable to the presumed negligence of defendants. Crabtree v. Western Pacific, supra. Defendants contend that plaintiff made six conflicting statements at various times. But at no time did he fail to give the substance of the events as recited by him in court.

[6-8] Extravagant accusations are made by defendants with respect to the testimony of one Clarence H. Moore, a safety engineer for the State Compensation Insurance Fund. It is claimed that "Moore manufactured his testimony in an endeavor to support Hicks' perjured story"; that his inspection and observations were made while the work was in progress under the Adams Construction Company; that he had no direct information as to facts at the north portal on the day of the accident; that while he pretended to base his testimony upon his prior reports its substance was contrary to them and that he concealed the fact that he had made certain written reports which were favorable to defendants. But in view of the fact that Moore testified that the north portal where plaintiff was injured was an unsafe place to work, that testimony cannot be treated as a nullity. There is no such showing made in more than 2,000 pages of defendants' briefs as would lead to the conclusion that Moore's testimony was inherently improbable. Even though the testimony of the witness may have been the subject of "justifiable suspicion" it is not within the province of an appellate court to substitute findings contrary to those made by the jury. Crabtree v. Western Pacific, supra. To do so would be a clear usurpation of the jury's exclusive function. Hosman v. Southern Pac. Co., supra. The witness Moore was an engineer and his appraisal of the conditions at the north portal some three weeks prior to the accident was of substantial evidentiary value. The facts were fully disclosed to the jury so that they were enabled properly to evaluate Moore's testimony. Moreover, all of the issues of fact were presented to the trial court upon the motion for new trial which was denied. We are not inclined to interfere with its ruling.

[9, 10] Defendants assign as error the ruling of the court in admitting evidence of acts of negligence committed at the south portal inasmuch as the steam shovel operations of plaintiff were at the north portal. Before the commencement of the excavation the slope of the material at the north portal was 34 degrees and at the south portal 45 degrees. The purpose of receiving evidence of former slides was to show the extent of the peril which existed at the time of the operations by plaintiff and the knowledge of defendants with reference to such conditions. The slide which occurred in March, 1936, buried the dipper and bucket of the shovel. The evidence was received for the limited purpose of proving knowledge on the part of the defendants of the existing perils. That evidence may be introduced for a limited purpose is now definitely established. 10 Cal.Jur. § 106, p. 816; Evid., § 13; Smith v. Whittier, 95 Cal. 279, 30 P. 529. Where accidents have occurred under circumstances substantially similar to those surrounding the accident in question and where they tend to serve notice of a dangerous condition, evidence thereof is properly admissible. Long v. Breuner Co., 36 Cal.App. 630, 172 P. 1132; Malone v. Hawley, 46 Cal. 409; Gorman v. County of Sacramento, 92 Cal.App. 656, 268 P. 1083. As stated in McCormick v. Great Western Power Co., 214 Cal. 658, 8 P.2d 145, 147, 81 A.L.R. 678, evidence "of previous accidents similar in character to the one in question, and not too remote therefrom in place or point of time, is admissible".

The evidence introduced by plaintiff showed that the earth structure at Pedro mountain was badly fractured shale, slate, conglomerate and sandstone which is considered unstable ground. The formation is stratified and badly broken, rotten rock. Because of this "rotten" condition of the rock, its characteristic tendency is to slip and slide and unless it be sloped from 60 to 45 degrees from horizontal it may not hold in position. "It is the typical formation along the coast within a mile on either side of Pedro Point." The geological formation was substantially the same at both portals.

[11] Thirty days prior to the accident, Safety Engineer Moore advised defendants that it was not advisable to work the shovel on a bank over 20 feet in height at any time; that it was not safe for a shovel of the capacity operated by plaintiff to be operating against the high bank for the ground would slide out as it had done at the south portal. Moreover, evidence of the slide at the south portal could not have been prejudicial for it was shown that a slide had occurred only two months prior to the accident at the north portal, which filled the pit and covered the caterpillars to the floor of the shovel, and rock had rolled down and caved in the radiator.

[12, 13] Defendants assign as error the giving of six instructions requested by plaintiff. To set them forth here at length would unduly prolong this opinion. Nothing is contained in the challenged instructions of a prejudicial character. When read in connection with the entire charge to the jury, they merely served, in a general way, to follow the provisions of the Labor Code governing this type of action. The court followed the established practice in instructing the jury with reference to the value in general of presumptions. In particular it was appropriate and necessary to advise the jury of the significance of the neglect of defendants to secure the payment of their workmen's compensation in event of injuries and that an injury to an employee was presumed to have resulted from defendants' negligence as provided by sections 3700 et seq. of the Labor Code.

[14-16] Defendants' proposed instruction II was substantially included in the general charge. Hence its rejection was not error. Defendants' instruction XXV was read to the jury. Since it contained the substance of their proposed instructions XXIII and XXIV the refusal of the latter instructions was correct. Bellandi v. Park Sanitarium, 214 Cal. 472, 6 P.2d 508; Cowgill v. Rasmussen, 2 Cal. App.2d 279, 37 P.2d 860. Where instructions are cumulative or merely amplifications of other instructions, or are argumentative they should not be given. Estate of Clark, 180 Cal. 395, 181 P. 639; Bellandi v. Park Sanitarium, supra. A judgment will not be reversed because of the refusal to give cumulative instructions. Cowgill v. Rasmussen, supra.

[17] Defendants contend that the verdict was unreasonably excessive. For the injury sustained by plaintiff the amount of the judgment finally entered was not excessive. Prior to the accident plaintiff's right hand was normal. One year thereafter a scar practically encircled it. It was swollen and the back of the hand was deformed; there was a deformity of the little finger which was held in a moderate amount of flexion. The atrophy of the muscles lessened plaintiff's ability to use his little finger, while the index finger is also moderately flexed and turned toward the ulnar side of his hand. The function of his hand was at that time considerably reduced. The metacarpal phalangeal joint was almost rigid and the second joint was held in extension. He was unable to bring his fingers down because two of them were held up. While he gripped 42 pounds with his left hand, in his right he gripped only 15 pounds. At the time of the trial in the summer of 1937, his injury had reached the maximum of improvement by natural means. It was a permanent injury and his grasp will always be limited and restricted unless his finger should be amputated and the fractured metacarpal bones removed. If such operation should be performed and the index metacarpal reconstructed so as to make a smooth hand with three fingers, he would still have about 40 per cent permanent disability in that hand. This permanent condition created by the injuries sustained by plaintiff, together with the shock, pain and anxiety suffered, to say nothing of the permanent impairment of his earning power, are ample to justify the judgment. In evaluating the damages suffered, the jury had the advantage of medical testimony showing that $2,000 would be necessary for future treatment. Also, it was shown that plaintiff had been employed steadily since

20 years of age at wages commencing at $120 per month and increasing to $160 per month during the 11 years he was in the employ of the Associated Oil Company. He left that employment to begin work at the Pedro mountain at $4 per day and in five months' time his wages had been increased to $8 per day, working six days per week. In his last position he "gave promise of being a skilled mechanic". Having acquired the capacity and skill to operate a power shovel, he demonstrated an ability to earn as much as $12 per day, the usual wage for such operator. His ability to earn rather than the record of his past earnings was the proper factor in computing the impairment of his future earning power. Hosman v. Southern Pacific Co., supra; Holmes v. California Crushed Fruit, 69 Cal.App. 779, 232 P. 178; Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 P. 72.

[18] The question whether the jury's verdict was excessive was presented to the trial judge who, in the proper exercise of his function reduced the judgment to $8,500. An appellate court may not interfere unless the amount of the damages finally allowed is so "outrageously excessive as to suggest, at the first blush, passion or prejudice * * *". Hale v. San Bernardino, etc., 156 Cal. 713, 106 P. 83, 84. The trial of this action required 21 days during which the court was enabled to become familiar with the parties and the witnesses. Arguments for a new trial were conducted on two separate occasions and extensive briefs were submitted. The order of the trial judge in modifying the judgment and in denying the motion was not an arbitrary or casual decision. It was a deliberate determination advisedly made. In view of the injuries sustained, the pain suffered and the permanent impairment of earning power, as well as the painstaking effort of the trial court upon a consideration of the motion for new trial and its reduction of the amount, we cannot hold that the judgment is excessive. Mudrick v. Market St. Ry. Co., 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533; De Luca v. Red Salmon Canning Co., 2 Cal.App. 2d 124, 37 P.2d 704.

As one of the bases for their contention that the damages were excessive, defendants contend that plaintiff did nothing to minimize his injuries but did everything possible to aggravate them and thereby prevented a complete recovery. In support of this contention they cite parts of the evidence to show that plaintiff was unreasonable in neglecting to perform light work and refusing to submit to medical and surgical treatment. This, they contend, is the sole and proximate cause of his continued physical disability. This contention presents another conflict of testimony. Proof was offered on behalf of plaintiff to the effect that instead of causing a setback, his delay in doing work and in having medical and surgical treatment was proper to allow for the maximum natural recovery and that it was not advisable for a man with the type of deformity suffered by him to engage in even light work; that such work would have been calculated to cause the deformity to become greater in view of the fact that the metacarpal bones had not firmly united.

[19] Defendants assign as error the refusal of the court to allow them to show that plaintiff's injuries could have been avoided by disengaging the clutch. The ruling of the court was correct. Under section 3708, supra, negligence of the employer is presumed and contributory negligence is not a defense. Spivok v. Independent Sash & Door Company, 173 Cal. 438, 160 P. 565, is distinguishable. There an adequate stairway had been provided for the employee to walk on but he chose a hazardous place to walk.

[20, 21] Defendants assign as prejudicial error certain rulings of the court in admitting evidence offered by plaintiff and in refusing certain proof offered by defendants. In our opinion the rulings complained of could not have constituted prejudicial error. The facts with reference to the manner in which the injuries were received and the extent of the injuries were fully covered by witnesses who testified on behalf of both parties. Although in some of the instances mentioned the court might have erred technically, upon a review of the whole case we are satisfied that the ruling in none of the several instances could have had a substantial effect upon the verdict of the jury. To illustrate: The proof elicited from plaintiff was offered solely for the purpose of proving that on each of the examinations made by Dr. Bunnell he took measurements of each finger and gave the degree of angulation and extent of the shortening. Plaintiff was competent to testify as to those facts, contradicting the testimony of

a physician who had testified for defendants.

[22] The photographs in question were properly admissible to show the extent to which the rocks slid down at the south portal and buried a dipper and bucket. Other witnesses had testified that the character of the formation in the entire hill was identical. From this it was a fair inference that digging into the north portal would probably create a similar catastrophe of which defendants had notice by reason of their knowledge of the terrain. The photographs were competent proof of the hazardous nature of the formation at both portals.

[23] The proof of the presence or absence of shatter-proof glass was immaterial for the reason that the defendants were presumed to have been negligent and the window was open.

If Dr. Claussen had testified "that if there had been a history given of a concussion, he would have entered it", it would have been a conclusion and improper.

[24, 25] The court correctly denied defendants' offer to prove that the neglect of the Ocean Shore Railroad, Inc., to carry compensation insurance was not deliberate. While the court may reduce a statutory penalty exacted by the state for the failure of a violator to appreciate his obligation to the commonwealth, there is no authority for excusing any employer for his failure to comply with legal requirements for the care of his employees. When the operations began on the morning of June 30th, the defendants knew that they carried no compensation insurance. Whether they carried insurance might have been a matter of their own concern but when they conducted operations through the agency of their employees, they did so at their own peril if they carried no compensation insurance. The present wish of defendants that they had taken out compensation insurance and their claim that they would have done so were immaterial. Soria v. Cowell Portland Cement Co., 99 Cal.App. 108, 277 P. 1061.

To none of the hypothetical questions propounded was objection made. We are directed to no specific conduct of plaintiff's counsel that would justify the claim that he had distorted the testimony of the witness Kent. Neither have we discovered evidence of any such effort.

[26] Defendants assign a portion of the opening statement and a portion of the closing argument of plaintiff's counsel as prejudicial errors. With respect to the opening statement, no assignment of error and no motion to strike and to instruct the jury not to consider it was made at the time. In the absence thereof defendants' contention is in vain. Estate of Albertson, 31 Cal.App.2d 211, 87 P.2d 883; Gillette v. San Francisco, 41 Cal.App.2d 758, 763, 107 P.2d 627. For the same reason the assignment of a portion of the closing argument of plaintiff's counsel will not be considered.

[27] Contrary to defendants' contention, their payment of the Commission's award to plaintiff prior to this action did not deprive the superior court of jurisdiction of the action. Such a contention was disposed of in Coffin v. Bloodworth, 28 Cal.App.2d 522, 82 P.2d 953, 954, where an identical claim was made. It was there held that the payment in full of the award of the Industrial Accident Commission did not deprive the superior court of jurisdiction conferred upon it by statute, the court declaring that "The phrase 'secure the payment of compensation' has reference to the time before a contingency arises that requires the payment of such compensation and not, as contended by appellants, the actual payment thereof."

[28] Finally defendants assign as error the order of the court in denying their motion for a new trial. While such an order is not appealable, we may appropriately review the proceedings on the motion in connection with the appeal from the judgment. At this point some of the orders made will be clarified by a statement of them as they occurred. Verdict was returned September 21, 1937, in the sum of $15,000. On September 30th, defendants prematurely filed their notice of intention to move for a new trial. On October 7th the parties stipulated that the oral motion of defendants for a judgment in their favor notwithstanding the verdict and plaintiff's motion for counsel fees might be argued October 21st. At some time subsequent to that stipulation, arguments were made and on November 20th judgment was entered on the verdict. On November 26th the order was signed and filed by the judge purportedly modifying the judgment by deducting $5,000 therefrom with plaintiff's consent. Such

consent was filed and on December 28th the court entered judgment in the sum of $10,000 and $1,700 attorney's fees. Thereafter defendants on December 11th filed a second and timely notice of intention to move for a new trial and the court made an order extending time to prepare, serve and file affidavits in support thereof. In January and February, 1938, defendants filed certain affidavits in support of their motion for a new trial. On February 9th, following the hearing on the motion, the court modified the judgment by deducting $6,500 from the amount of the verdict leaving a judgment for $8,500 and $1,700 attorney fees.

From these facts it appears that, upon the record, the judge was of the opinion that the verdict should be reduced in the amount of $5,000; also that, after hearing the last arguments and considering the affidavits in support of the motion he concluded to reduce the judgment in the further sum of $1,500.

[29] The greater portion of the evidence presented by the affidavits deals with facts in connection with plaintiff's operations. The outstanding claim relates to the alleged dishonesty of plaintiff concerning his age as presented in the affidavit of defendant Middleton. The merits of plaintiff and his cause had been the subject of a number of hearings during the twelve months prior to the trial of this action. By the exercise of reasonable diligence and by the use of the information gained defendants could have presented documentary or primary proof of their claims if they existed. At the trial it was stipulated by all parties that on July 10, 1924, plaintiff was 20 years of age. There was not the slightest proof contrary to that stipulation developed during the trial. After argument had been made and because of the premature filing of the notice of intention, the affidavit of Middleton was filed. It contains no substantial proof of the contentions made. The only document presented was the application of "Jack P. Hicks" for a marriage license made August 5, 1920, when the applicant represented himself as 22 years of age. While we have only an inference that plaintiff was the person described in the application for the license, apparently the trial judge, in fear that injustice might result, made the further reduction of $1,500 in the judgment based upon plaintiff's life expectancy at the age of 32 years, as established by his testimony instead of his expectancy at 38 years, if based upon the data contained in the application for the marriage license. In the absence of prejudicial error in the conduct of the trial, the court's order was practical and operated for substantial justice.

[30-32] Questions raised upon motions for new trial are primarily addressed to the sound discretion of the trial court. Coffin v. Bloodworth, supra. There is nothing in the affidavits filed by defendants that places them beyond the rule laid down in the cited authority. Newly discovered evidence is regarded with suspicion and disfavor. Arnold v. Skaggs, 35 Cal. 684. Under this rule the court's conduct in denying a motion for a new trial would not have been arbitrary had he made no further reduction on account of the averments in the affidavits of MacGraw and Middleton and others. The Middleton affidavit, not having been filed within the statutory period (Code Civ.Proc., § 659a) or any extension thereof, does not properly constitute a part of the record.

The purported appeal from the order denying the motion for a new trial is dismissed.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, and TRAYNOR, JJ., and PULLEN, J. pro tem., concurred.

18 Cal.2d 816

HILDEBRAND v. STATE BAR OF CALIFORNIA.

S. F. 16384.

Supreme Court of California.

Oct. 20, 1941.

1. Attorney and client ⇐38

An attorney, who went to chiropractor's hospital in response to information from chiropractor or physician that patients wished to see attorney professionally, was not guilty of "solicitation", and therefore was not subject to discipline for professional misconduct, notwithstanding patients may not have requested chiropractor or physician to obtain attorney for them, in absence of any arrangement between chiropractor or physician and attorney, by which chiropractor or physician was to obtain clients for attorney.

See Words and Phrases, Permanent Edition, for all other definitions of "Solicitation".

2. Attorney and client ⇐38

An attorney's exhibition of copies of checks to prospective clients and to relative of prospective client was not "solicitation" contrary to rules of professional conduct, where attorney was merely showing what the possibilities of recovery were in personal injury suits in order that prospective clients and relative would have a clear understanding of the matter, where copies were not used as part of plan to solicit attorney's employment by a stranger whom the attorney had no cause to believe was interested in retaining attorney.

3. Attorney and client ⇐38

The conduct of attorney in informing prospective clients whom attorney justifiably believes desire to retain attorney, that attorney is good attorney and will obtain satisfactory results for client, and that attorney has been successful in other cases of similar nature, is not "solicitation" contrary to rules of professional conduct.

4. Attorney and client ⇐38

That attorney's contract of employment with client contained provisions for disbursement by attorney of such portion of the sum recovered for client's personal injuries, as represented medical services and hospital expenses, did not show "solicitation" contrary to rules of professional conduct, or an unethical arrangement with the physician or hospital.

5. Attorney and client ⇐38

That attorney made a loan to client did not indicate "solicitation" contrary to rules of professional conduct, where loan was made after attorney was retained by client.

6. Attorney and client ⇐53(2)

Evidence was insufficient to show that attorney employed laymen to solicit and obtain special employment for attorney in connection with personal injury cases contrary to rules of professional conduct.

7. Attorney and client ⇐38

An attorney's contract employing investigator whose compensation is contingent on recovery is proper as long as the investigation is merely to uncover the facts as they actually exist.

8. Attorney and client ⇐38

That the same friend recommended attorney to several different clients was not of itself sufficient to show that attorney was guilty of professional misconduct in soliciting professional employment in connection with personal injury cases, or in employing a layman to solicit and obtain such professional employment.

9. Attorney and client ⇐53(2)

Evidence was insufficient to show that attorney was guilty of professional misconduct in soliciting professional employment from woman whose husband was killed in railroad accident.

10. Attorney and client ⇐57

Where evidence is conflicting in disciplinary proceeding against attorney, findings of local administrative committee and of Board of Bar Governors are not necessarily binding on the Supreme Court.

11. Attorney and client ⇐53(2)

In disciplinary proceeding against attorney charged with solicitation of professional employment, evidence which is conflicting, contradictory, and colored with self-interest and animosity, is not of that clear and convincing nature which is necessary to establish a finding of culpability on part of attorney.

12. Attorney and client ⇐53(2)

Charges of unprofessional conduct on part of attorney should be sustained by convincing proof and to a reasonable certainty, and any reasonable doubts should be resolved in favor of attorney.

13. Attorney and client ⇐53(2)

Evidence was insufficient to show that attorney was guilty of professional misconduct in soliciting professional employment from railroad employee who was injured in railroad accident.

In Bank.

Proceeding by Clifton Hildebrand against the State Bar of California to review recommendation of Board of Bar Governors that Clifton Hildebrand be suspended from the practice of law.

Charges dismissed.

L. E. Goodman and Sheridan Downey, both of San Francisco, for petitioner.

Edward F. Treadwell, of San Francisco, W. E. Craven, of Merced, J. W. O'Neill, of Oakland, Gilford G. Rowland, of Sacramento, and Claude Minard, of San Francisco, for respondent.

PER CURIAM.

Pursuant to an order issued by The State Bar of California, the petitioner, Clifton Hildebrand, an attorney at law, was directed to appear before Special Local Committee No. 3 for the county of Alameda on or about July 18, 1939, then and there to show cause why he should not be disciplined for alleged professional misconduct on four separate charges as set forth in the said order. The charges consisted of three counts of violation of the provisions of Rule 2 (commonly known as the "solicitation" rule) and of violation, on one count, of rule 3 (generally referred to as the "ambulance chasing" rule) of the Rules of Professional Conduct of The State Bar of California. Petitioner filed his answer to the order to show cause in which he denied having violated the rules to which reference has been made. After extended hearings were had before the local administrative committee, findings of violation as charged were made on each of the four counts, and thereupon it was recommended by the said committee that petitioner be suspended from the practice of the law for a period of six months on each count,—the suspension to run concurrently. Following submission of the record to the Board of Bar Governors that body made its own findings, in which it was adjudged that each of the four charges set forth in the order to show cause was sustained by the evidence, together with the recommendation that the same sentence be imposed as that advised by the local administrative committee.

The Hash-Martin Matter.

In the charge on the first count as set forth in the order to show cause, which will be referred to as the Hash-Martin matter, petitioner was accused of having wilfully solicited (on or about or shortly after October 30, 1937) the professional employment of himself as an attorney at law in connection with an automobile accident which occurred near Livermore, California, on Saturday afternoon, October 30, 1937, as a result of which Vernon Hash and John Martin sustained serious injuries and Mrs. John Martin was fatally injured, her death occurring about three days thereafter. The solicitation was alleged to have been made by petitioner to Mrs. Donna Martell, a sister of Vernon Hash and Mrs. Martin, and a sister-in-law of John Martin.

The injured persons were taken to the Livermore General Hospital, which was a private institution operated by Dr. Lawrence J. Giubbini, who was a licensed chiropractor but who was not a medical practitioner. Dr. W. L. Meyers was called to the hospital to treat their injuries. Shortly thereafter Mrs. Martell of San Francisco was summoned to the hospital. Petitioner had nothing to do with their being taken to the hospital, the calling of Dr. Meyers, or the summoning of Mrs. Martell to the hospital. Both Dr. Giubbini and Dr. Meyers were friends of petitioner herein, and each formerly had been his client. According to the testimony of Mrs. Martell, it appears that soon after she arrived at the hospital she expressed some concern to Dr. Giubbini about the ability of her brother, Mr. Hash, to pay for medical and hospital expenses; that Dr. Giubbini told her in effect that "they" would take care of his (Mr. Hash's) expenses; (it does not appear who was meant by "they" nor that Giubbini's statement was authorized by petitioner); that later that morning she was requested by Dr. Giubbini to go to his home, which was adjacent to the hospital, for the purpose of meeting "an attorney and investigator and others over there"; that she appeared at Dr. Giubbini's residence at about 10:30 o'clock that morning where she was introduced by Dr. Giubbini to petitioner herein; that petitioner wanted her to sign a paper to the effect that she would permit him to "take care of the accident and settle everything for us"; that he

showed her photostatic copies of checks representing different sums of money which petitioner stated he had recovered for some of his clients in connection with various damage suits; that he told her they had investigated the Hash-Martin accident, that the father of the driver of the other automobile involved in the accident was wealthy and assured her that the Hash-Martin suitors could expect to receive a considerable sum of money as damages for the injuries sustained by them if she would permit him to settle their accident claim; that she told petitioner she could not sign any papers on behalf of either her brother or brother-in-law and that petitioner would have to wait "until they got better, they would have to attend to that themselves"; that theretofore she had not known nor ever heard of petitioner; and that she had not requested Dr. Giubbini, or anyone else, to have petitioner come to the Livermore hospital in connection with the injuries sustained by her relations. The evidence shows that shortly after the conversation had between petitioner and Mrs. Martell he went to the hospital and was introduced by Dr. Meyers to Vernon Hash and John Martin, and that on that occasion each of the injured men signed an agreement to employ petitioner. The testimony of Vernon Hash was likewise to the effect that theretofore he had not asked any one to call petitioner, or any other attorney, to come to see him, and that he had not discussed the prospective employment of an attorney with anyone. Mr. Hash testified in part as follows: "* * * he (petitioner) was introduced to me by Dr. Meyers, and he told me that * * * he could handle my case, it would do me a lot of good * * *. He showed me checks he had got for other people, different amounts." John Martin also testified that petitioner told him he was an attorney and that he, petitioner, "could handle my case for me"; that prior to that occasion he had not known nor heard of petitioner; and that he had not asked anyone to call an attorney on his behalf. With respect to Mr. Martin there was evidence to show that because of the seriousness of his injuries, during the first few days following his arrival at the hospital, he was not wholly aware of what took place in his presence, and that he was assisted in the signing of his name to the employment agreement.

As opposed to the foregoing, convincing evidence was offered on behalf of petitioner. Dr. Giubbini testified that he talked with Vernon Hash about the case during the afternoon of the day that the latter was brought to the hospital; that Mr. Hash asked him to get a lawyer "right now" and whether Dr. Giubbini knew of an attorney in San Francisco; that he, Dr. Giubbini, replied that he did not know any attorneys in San Francisco but that he knew several in Oakland, and that he then recommended petitioner to Mr. Hash. The testimony of Dr. Meyers was to the effect that at some time during the evening following the happening of the accident Mr. Hash told him that Dr. Giubbini had recommended petitioner as an attorney; that Mr. Hash asked him about petitioner's qualifications and that he told Mr. Hash that he knew petitioner and thought him well qualified to handle that type of case; that Mr. Hash then asked him to contact petitioner, whereupon he instructed one of the nurses to telephone to petitioner and tell him to come to the hospital; (petitioner testified that Dr. Meyers telephoned him that some people at the hospital desired to see him about a case) that Mr. Hash asked him to contact his sister (Mrs. Martell) for the reason that he "would like her to know about what they were going to do to see if satisfactory to her". Petitioner testified that in response to a telephone call which he received from Dr. Meyers the night before advising him that some people at the hospital desired to see him professionally, he came to the hospital on Sunday, the day following the accident; that when he arrived there he went to Dr. Giubbini's home, where Dr. Meyers introduced him to Mrs. Martell as the attorney about whom Dr. Meyers and Mr. Hash had spoken; that Dr. Meyers told Mrs. Martell that her brother had said he wished her to talk over the matter (of presenting claim for damages in connection with the accident) with petitioner, and that her brother wished petitioner to "explain the situation" to her. According to his testimony, petitioner then explained certain aspects of the matter to Mrs. Martell and showed her photostatic copies of checks representing various sums of money which he had obtained as the result of litigation he had conducted in other damage suits,—for the purpose of enlightening her as to the nature of the case and in answer to her questions with respect to certain features of a damage case, i. e., as to the length of time required before a recovery or settlement might be expected, the amount that might be anticipated as recovery for the type of injury received, etc. In that regard peti-

tioner testified that he found when clients asked him questions about different cases they remembered more about the matter if it were explained graphically to them, whereupon the following colloquy took place:

"Q. When you showed her the checks, did you say you wanted her to see the accomplishments in your other cases? A. I didn't put it exactly that way. She asked questions about what they could expect to get, what the cases were worth, and I tried to give her some idea by giving some examples of what had been done in other cases."

[1-3] From the foregoing it is apparent that the testimony of the several witnesses presented a sharp conflict. However, the evidence is clear that petitioner was informed that there were some people at the hospital who wished to see him professionally. He went to the hospital to see those people in response to that information. While it is true that the testimony of Hash and Dr. Giubbini and Dr. Meyers is conflicting as to whether Hash had requested the doctors to obtain an attorney for him, and even accepting Hash's version as true, it does not appear that petitioner knew the fact, if such were the case, that the people had not requested to see him professionally. There is no convincing showing of any arrangement between either Dr. Meyers or Dr. Giubbini and petitioner by which the former were to obtain clients for the latter, or that Giubbini in any way represented petitioner. Therefore, it is entirely reasonable to conclude that when petitioner went to the hospital he was doing so in entire good faith and upon the justifiable assumption that he was there to meet persons who desired to employ him. There was no solicitation on petitioner's part or any unethical conduct in going to see those persons under such circumstances. If such were solicitation an attorney would never be permitted to speak to a prospective client concerning a prospective professional employment except in those instances only in which the client personally asks for an attorney to represent him in some matter. After arriving at the hospital and being introduced to Mrs. Martell, petitioner discussed the case with her and proposed that she sign a contract employing him. He exhibited to her copies of checks he had obtained in settlement of other cases. The same occurred with Martin and Hash. We fail to see how such conduct constituted solicitation contrary to the rules of professional conduct. It was merely a showing by petitioner of what the possibilities of recovery were in personal injury cases in order that the prospective client would have a clear understanding of the matter. Petitioner clearly and positively testified that the exhibition of the checks to Mrs. Martell was in response to her request to him for more complete information about such cases. Mrs. Martell's evidence apparently to the contrary is not sufficiently convincing to overcome that evidence. She probably had little recollection of just what took place on the occasion as she was very disturbed about the condition of her sister and brother. The proposed signing of the employment contract and the signing thereof in the case of Hash and Martin, was merely for the mutual protection of the clients and the attorney in order to eliminate any possibility of future misunderstanding. While it may overstep the bounds of becoming modesty for an attorney to inform a prospective client who he justifiably believes desires to retain him, that he is a good attorney, will obtain satisfactory results for the client, and that he has been successful in other cases of a similar nature, such conduct falls short of constituting solicitation as forbidden by rule 2 of the Rules for Professional Conduct. The mere exhibition of the copies of the checks, was nothing more at most than a graphic portrayal of the familiarity with and success in the type of case involved, and certainly is not sufficient evidence of solicitation without other positive evidence that the checks were used as a part of plan to solicit the employment by a stranger who the attorney has no cause to believe is interested in retaining him.

[4, 5] We are not unmindful of the fact that the contracts of employment of petitioner as counsel, contained provisions for the disbursement by him of such portion of the sum recovered as represented the medical services and hospital expenses. But there is nothing improper in such provisions. They do not indicate solicitation, or an unethical arrangement with the doctor or hospital. It is merely a convenient method whereby the sums recovered are devoted to one of the purposes for which they were recovered, an element of such recovery being medical and hospital expenses. All too frequently a settlement is made or recovery is had, and the recipient neglects to discharge those obligations. The fact that a

loan was made by petitioner to Hash was of slight importance since it was made after petitioner was retained.

For the foregoing reasons we do not believe that the evidence is sufficient to support the charge made against petitioner in the Hash-Martin matter.

The Gus Meyer Case.

On this charge petitioner was accused of having violated rule 3 of the Rules of Professional Conduct, in that he employed one Francis M. Hrubanik, a person not licensed to practice law in the state of California, to solicit and obtain professional employment for him in connection with personal injury cases.

From the record on that matter it appeared that on November 29, 1937, Gus Meyer was struck and injured by an automobile while he was working for a company which was engaged in constructing a highway through the Altamont pass near Livermore. He was taken to the Livermore General Hospital for treatment. (There is no showing that petitioner was in any way concerned with his being taken to that hospital.) Mr. Meyer testified that after he had been there two or three days Dr. Giubbini brought to see him a man named Hrubanik; that Dr. Giubbini told him that Hrubanik was a friend of his (Dr. Giubbini's) and one of the investigators for a very reliable law firm in Oakland, of which petitioner was a member, "that they would be good people to deal with" and "they would like to take this case"; that on that occasion Hrubanik showed him photostatic copies of checks which assertedly evidenced the amount of different recoveries which the said firm had obtained in other personal injury cases; that he informed Hrubanik that he would have to talk the matter over with his wife before making an agreement as to the employment of an attorney to represent him; that Hrubanik said he could not wait until Mrs. Meyer came to the hospital and that he told Hrubanik that if he would return in a few days he (Meyer) would then advise him of their decision; that Hrubanik came again several days later at a time when Mrs. Meyer was present; and that he (Meyer) then signed an agreement—which agreement was written by Hrubanik "right there in the room"—in which he authorized petitioner's firm to represent him. Mr. Meyer further testified that prior to the time he signed the said agreement he had not been introduced to petitioner; that he did not ask that Hrubanik call on him, nor did he ever ask any person to procure an attorney for him; that Dr. Giubbini was present during his conversations with Hrubanik; that Dr. Giubbini told him that the driver of the automobile which struck him was covered by insurance; that it was not until three or four days after he had signed the contract that petitioner appeared at the hospital, at which time Dr. Giubbini brought petitioner to him and introduced him as his (Meyer's) attorney; and that he then told petitioner that he had already "signed up" with Hrubanik. The wife of Gus Meyer testified that her husband introduced Hrubanik as "the man * * * that Dr. Giubbini had brought in to see him"; that Hrubanik stated that he represented petitioner's firm, whereupon he proceeded to show her photostatic copies of several checks which assertedly represented the respective amounts of settlements obtained in other personal injury cases; and that prior to that occasion she had never heard of petitioner. The witness Charles Cordano, who as a patient occupied the same room in the hospital with Gus Meyer, testified that he remembered that Dr. Giubbini brought Hrubanik into the room and introduced him as an investigator who represented attorneys; also that he heard Hrubanik tell Mr. Meyer that "he had a very good case, and he could get him a pretty good settlement".

As opposed to the foregoing, petitioner testified that it was he and not Hrubanik who first talked with Gus Meyer. He stated that during the first week that Gus Meyer was in the hospital both he and Hrubanik were working on a case in the vicinity of Fresno; that each left Fresno on Friday evening of that week and that they traveled separately to Oakland; that he, petitioner, stopped at the Livermore hospital that evening and talked with Dr. Giubbini; that prior to that time he knew nothing of the Gus Meyer case; and that Dr. Giubbini then told him that Mr. Meyer wanted an attorney and wanted to see him, and that Dr. Giubbini theretofore had recommended him to Mr. Meyer. Petitioner testified that he then talked briefly with Mr. Meyer concerning his case; that Mr. Meyer indicated that it was his desire to employ petitioner to represent him but that due to the fact that he, petitioner, was "in a hurry" at the time, he told Mr. Meyer that he would send his investigator to the hospital to investigate the case; that on his return to Oakland he telephoned to Hrubanik and instructed him to go to the Livermore hos-

pital on the following day for the purpose of investigating the Meyer case, but before doing so to call at petitioner's office and secure a proposed contract of employment which Hrubanik was to take with him and which was to be signed by Gus Meyer; that on the following morning Hrubanik telephoned to petitioner from Livermore and stated that he had forgotten to take the contract with him, and that thereupon petitioner dictated over the telephone the contents of the agreement he wished Mr. Meyer to sign. In addition to other evidence introduced by petitioner in support of his testimony, Dr. Giubbini testified that Gus Meyer had requested him to recommend an attorney and that he had recommended petitioner, and that petitioner's first conversation with Gus Meyer took place prior to the time that Mr. Meyer was introduced to Hrubanik. Hrubanik confirmed the testimony given by petitioner as to the manner and circumstances in which he, Hrubanik, had prepared the agreement for Mr. Meyer to sign, and, in addition thereto, denied having shown photostatic copies of checks to Mr. Meyer, or having made any statement to Mr. Meyer to the effect that prior to the signing of the contract he had investigated the facts of the accident. The evidence showed that Hrubanik had been employed by petitioner as an investigator for some time, and that in some instances his compensation therefor was made contingent upon the outcome of the cases on which he worked.

[6, 7] As may be seen from the foregoing, the evidence offered by petitioner is diametrically opposed to that adduced by the other witnesses. However, the evidence preponderates in favor of petitioner. As above stated, the evidence is positive that petitioner was informed by Dr. Giubbini that Meyer desired to consult him professionally. There was no substantial showing of any arrangement between Dr. Giubbini and petitioner. Petitioner testified positively that he saw Meyer about the case *before* Hrubanik called upon him. His testimony in that respect was corroborated by Dr. Giubbini and Hrubanik. Hrubanik's testimony to that effect was corroborated by men by the name of McKay and Carothers, disinterested witnesses. The latter testified that Hrubanik was in Los Angeles to see him Monday night, the date of Meyer's injury. McKay, who was assisting his friend Carothers in investigating the latter's case in which he was represented by petitioner, testified that petitioner was in and about Fresno, California, from Monday night until Friday, investigating the Carothers' case for petitioner. This evidence strongly tends to show that Hrubanik did not call upon Meyer two or three days after Meyer's injury as claimed by Meyer, and prior to the time of petitioner's call, and also that he was not investigating Meyer's case before the Saturday following the Monday of Meyer's injury. It is true that Hrubanik took the contract of employment to Meyer to sign, but that was at the direction of petitioner and after Meyer had agreed to employ petitioner, and the contract was dictated by petitioner. Meyer's claim that Hrubanik called on him before petitioner and solicited the case is rather weak. He was not too sure as to the order in which various calls were made on him by various people the four or five days following the accident. He testified that when petitioner called upon him the latter was in a hurry as he was either going to or returning from Fresno. Although he denied this later in his testimony, it is more reasonable to suppose that his first statement was correct. It coincided with petitioner's testimony. The only showing that petitioner employed Hrubanik to obtain cases for him was by the barest inferences which were squarely contradicted by positive testimony. Even if Hrubanik's compensation as an investigator may have been contingent on the recovery in a case, that is not vital, as such a contract is proper as long as the investigation is merely to uncover the facts as they actually exist. Wilhelm v. Rush, 18 Cal. App.2d 366, 63 P.2d 1158. Further, Hrubanik's testimony was to the effect that he was paid by petitioner in accordance with petitioner's view of the value of the work he did and was sometimes paid whether or not there was a recovery in the case. It is true that Cordano, a patient in the same room as Meyer at the hospital, testified regarding Hrubanik's call upon Meyer but it does not appear therefrom that Hrubanik called before petitioner did, and he was rather vague as to what did take place on the occasion of the visit.

[8] From the whole record the evidence is not clear and convincing that petitioner was guilty as charged in relation to the Meyer case. The fact that in the Hash-Martin matter and the Meyer case certain similarities appear is of little consequence. They were totally unrelated. Merely because the same friend may recommend an attorney to several different clients is not of controlling significance.

There remain for consideration the two counts of the order to show cause in which petitioner was charged with having solicited professional employment from Mrs. Vivian Mae Proctor and from Carl L. Bishop, respectively.

The Proctor Matter.

[9] The evidence presented in this matter was conflicting in several material particulars. However, it clearly appears that on or about August 14, 1936, while in the employ of the Western Pacific Railroad Company, one Chester A. Proctor lost his life as the result of a railroad accident. On the day after his death Mrs. Victor Smith, whose husband was a friend of Mr. Proctor's, called on the widow and during such visit recommended petitioner to her as an able lawyer. Thereupon, on the following day and at the request of Mrs. Proctor, petitioner went to her home in Thermalito, California, and had an interview with her, and later in the same day he again talked with her at the home of Mrs. Smith. At her first meeting with petitioner Mrs. Proctor told him that her husband (who in his lifetime had known petitioner) had instructed her to secure the services of petitioner in the event of an accident to him, Mr. Proctor. There was evidence to show that during both of the interviews which Mrs. Proctor had with petitioner she told him that she wanted him to represent her in the matter of her claim against the railroad company but that certain members of her family opposed the bringing of a legal action therefor, and, consequently, before she entered into a contract to employ petitioner she wished to wait until the inquest was held to see if the railroad company would offer her a settlement. There was also evidence to show that Mrs. Proctor requested petitioner to notify her of the date of the inquest; that on August 24, 1936, the day set for the inquest, petitioner went to her home to notify her of the hearing; that a conversation thereupon took place between petitioner and Mrs. Proctor, as a result of which she agreed to employ him to represent her, and that thereafter they attended the inquest together. About a month later it appears that, without the knowledge of petitioner and at the insistence of her brother-in-law, Mrs. Proctor, accompanied by the latter, had an interview with representatives of the railroad company, at which time she proceeded to effect a settlement of her claim. Mrs. Proctor testified that on that occasion she was informed that before she could obtain a settlement of her claim it would be necessary for her to discharge petitioner as her attorney; that thereupon a letter directed to petitioner was prepared for her signature by a representative of the railroad company, in which letter petitioner was informed by Mrs. Proctor of his dismissal; also, that at the same time and place she executed an affidavit, the contents of which were prepared by a representative of the railroad company and which were to the effect that petitioner had solicited her case. Petitioner protested to both the claims department of the railroad company and to Mrs. Proctor with respect to their action in settling the case "over his head" and without his knowledge or authority, and thereafter Mrs. Proctor made a statement in her own handwriting—the contents of which had theretofore been discussed with petitioner—in which she repudiated the statement previously made by her in the affidavit to the effect that petitioner had solicited her case. At the hearing before the local administrative committee Mrs. Proctor admitted that some of the statements which she had made in the affidavit were untrue, and that portions of her subsequently written statement in which she had exonerated petitioner from the charge of solicitation were also untrue.

The local administrative committee found that the alleged solicitation took place on August 24, 1936 (the day of the inquest); whereas the findings of the Board of Bar Governors recite that the date of solicitation was August 14, 1936, the day on which petitioner allegedly had his first conversation with Mrs. Proctor. Also, it appears that the local administrative committee's finding of solicitation was based in part on the charge that Mrs. Proctor's employment of petitioner was induced by his offer to advance money to her. In that regard the evidence showed that, on August 24, 1936, petitioner loaned Mrs. Proctor the sum of $50. Mrs. Proctor testified that the loan was made before the contract was entered into; petitioner's testimony in that respect is to the contrary. He testified that he did not solicit the case from Mrs. Proctor; that he loaned her the money, at her request therefor, in order to meet pressing needs; and that prior to the time the contract of employment was entered into nothing had been said about Mrs. Proctor's financial condition. However, as hereinbefore has been indicated, during the course of her testimony Mrs. Proctor admitted that she

had made untruthful statements both in the affidavit which she had signed at the time of the settlement with the railroad company, as well as in the written statement which she later made in which she denied the truth of her former statement that petitioner had solicited the case. Lacking the testimony of Mrs. Proctor the charge against petitioner must fail, and in view of the conflicts which are to be found in her testimony, as well as the interest which she was shown to have had at the time and under the circumstances in which she made the affidavit wherein she accused petitioner of solicitation,—together with other facts and circumstances shown by the evidence,—her statements with regard to the question of solicitation are not entitled to receive full credit as against those made by petitioner and his witnesses. Moreover, there was evidence in the record to show that Mrs. Proctor was rendered penniless by the death of her husband and that, according to two witnesses, on the day following his death she was without funds with which to meet even the minor expense of a telephone call to petitioner. If that testimony is to be believed, it is not unreasonable to believe as true the testimony of petitioner that Mrs. Proctor requested the money to meet urgent demands.

The Bishop Matter.

The charge on the fourth count is that of solicitation of professional employment by petitioner of one Carl L. Bishop, on or about January 5, 1938, and March 6, 1938, in connection with a railroad accident which occurred in Arizona in November, 1937, as a result of which Bishop, an employee of the Southern Pacific Company, suffered the loss of an eye. It appears that about a month after his injury Bishop had an interview in Phoenix, Arizona, with one A. H. Strasser, a local officer of the Brotherhood of Railroad Trainmen, with regard to Bishop's asserted claim for damages against the railroad company; that Bishop, who was then on his way to San Francisco, where he expected to receive treatment at the Southern Pacific Hospital in that city, was informed by Strasser with respect to the legal aid department of the brotherhood and of the fact that petitioner herein was regional counsel of said brotherhood; that at Bishop's request therefor Mr. Strasser gave him petitioner's name and address; and that, also at Bishop's request, shortly thereafter Strasser wrote a letter to petitioner at his office in Oakland, California, in which he requested petitioner to communicate with Bishop at the hospital in San Francisco. Thereafter, and on or about January 5, 1938, in accordance with Bishop's request that he call upon him, petitioner talked with Bishop at the hospital concerning his injuries, and discussed with him the question of presenting Bishop's claim to the railroad company. However, on that occasion no contract for the employment of petitioner as attorney for Bishop was entered into, but at the instance of petitioner Bishop was then examined by doctors other than those at the hospital in order to determine the extent of his injury, after which petitioner advised Bishop not to present his claim at that time but to wait until the "progressive" condition with respect to his injury could be ascertained. According to petitioner's testimony, Bishop then stated that he desired to see petitioner at a later time. On the following day Bishop returned to his home in Globe, Arizona. About two months later petitioner informed Strasser, at Tucson, Arizona, that he, together with an investigator for the Brotherhood of Railroad Trainmen, intended to be in Arizona shortly in connection with litigation which petitioner was conducting in that vicinity, and thereupon Strasser communicated with Bishop and suggested that he meet petitioner in Tucson. Thereafter Bishop went to Tucson, and on learning that petitioner would be delayed in his arrival Bishop returned to his home in Globe. After petitioner had arrived in Tucson, and as a result of a telephone conversation held between Strasser and Bishop concerning petitioner's presence in Arizona, Bishop expressed a willingness that petitioner call on him at his home in Globe. On or about March 5, 1938, accompanied by an investigator for the Brotherhood of Railroad Trainmen, petitioner called on Bishop, and, according to petitioner's testimony, Bishop "seemed to be all ready to have me handle the case as soon as I saw him", but that he expressed the desire that petitioner first discuss the case with his wife. On the following morning petitioner had an interview with Bishop and his wife, at which time Bishop entered into an agreement to employ petitioner to represent him in seeking to collect damages for his injury. On that occasion Bishop advised petitioner that he had been offered a settlement by the railroad company in the sum of $6,500; whereas there was evidence to show that, in fact, he had been offered the sum of $5,500. It was agreed

that petitioner's compensation was to be based on the amount of money which he might be enabled to obtain in excess of that theretofore offered to Bishop in settlement. Thereafter, through petitioner's efforts a settlement was offered to petitioner in the sum of $8,500. However, after Bishop had learned of the increase in the amount offered in settlement, and admittedly in order to avoid paying an attorney's fee to petitioner, he sought to discharge petitioner as his attorney. In pursuance of that purpose Bishop threatened to and did lodge a complaint against petitioner with the Bar Association (which complaint that body refused to entertain) to the effect that petitioner had solicited the case from him. However, on petitioner's claim that he was entitled to a proper fee for his services Bishop agreed to and did pay petitioner therefor. Shortly before the settlement was effected on Bishop's behalf, petitioner requested Bishop to sign a statement indicating the manner in which the contract between them had been entered into, and it was shown that after Bishop had approved the language thereof he signed the said statement—in which he asserted, in effect, that petitioner had not solicited employment by him but that he, Bishop, had voluntarily entered into the contract.

The findings of the local administrative committee and of the Board of Bar Governors recite that the alleged solicitation of Bishop occurred on or about March 5, 1938; also that the charge of solicitation was predicated, in part, on the fact that petitioner had offered to loan money to Bishop.

The evidence shows that during the conversation had on March 6, 1938, with Bishop and his wife, petitioner exhibited some photostatic copies of bank checks indicating various amounts of recoveries as well as data relative to damage actions which previously had been conducted by petitioner; also, that at that time petitioner agreed to loan Bishop a sum of money monthly to meet his living expenses pending the outcome of the case. At the hearing before the local administrative committee Bishop testified that petitioner had solicited the case and that his statements to the contrary, which he had theretofore made in writing, were not true. It was stipulated that the testimony of Mrs. Carl Bishop would have been the same as that of her husband. Petitioner testified that he did not solicit the case either through display of the checks or by offering to loan any money, but that Bishop said "they didn't have any money in the house and they were up against it, and he wondered if I could let him have a little money"; also, that "he (Bishop) told me he wanted me to explain the matter (of presenting Bishop's claim) to his wife. I did. I told her about these doctors, showed them some photostatic checks of cases where the company had sent the man back to work * * * where autopsies revealed they had (other) injuries, * * * and I told her all about Federal Employers' Liability Act and tried to make clear to her what it was all about. Finally she said it was all right, whatever her husband wanted to do. He said, 'Fine. Go ahead. I want it investigated right away.'" In addition to that introduced by petitioner, there was other evidence to show that following his injury Bishop had been in indigent circumstances and that others had given and loaned him funds for his immediate needs. The investigator for the Brotherhood of Railroad Trainmen, who was with petitioner at the time the agreement to employ petitioner was entered into, made the following statement in an affidavit which was received in evidence; "Bishop asked for Hildebrand's advice on the matter (of his claim) and Hildebrand gave it; * * * it is not correct, however, that Hildebrand * * * 'importuned him to handle the case' as Bishop was entirely satisfied with the suggestions made in response to his request for advice."

The question thus squarely presented in the Bishop matter is whether—in the light of all the facts and circumstances hereinbefore detailed, and considering the conflict in the testimony given by the respective witnesses—it can fairly be said that petitioner was guilty of having solicited the case, on or about March 5, 1938.

[10-13] However, in the Bishop matter, the evidence is conflicting with regard to the question whether either of those acts was in fact performed for the purpose of soliciting employment; also, there were other facts and circumstances shown to have been present in connection with that matter which raise a serious doubt as to whether the employment was in fact solicited.

In proceedings of this character where the evidence is conflicting, as was shown to be the fact herein, the findings of the local administrative committee and of the Board of Bar Governors are not necessarily

binding on this court. In re Petersen, 208 Cal. 42, 280 P. 124; 9 Cal.Jur. 10 Yr.Supp., p. 440. Also, in the present proceedings where it is apparent that the testimony given by each of the principal witnesses in support of the charges in the Proctor and Bishop matters was shown to have been in itself not only conflicting and contradictory but colored by self-interest and animosity, the evidence cannot be said to be of that clear and convincing nature which is necessary to establish a finding of culpability on the part of the accused. Furman v. State Bar, 12 Cal.2d 212, 83 P.2d 12; Bar Association of San Francisco v. Sullivan, 185 Cal. 621, 198 P. 7. Charges of unprofessional conduct on the part of an attorney should be sustained by convincing proof and to a reasonable certainty, and any reasonable doubts should be resolved in favor of the accused. Golden v. State Bar, 213 Cal. 237, 2 P.2d 325; Aydelotte v. State Bar of California, 209 Cal. 737, 290 P. 41.

There is no contention that petitioner failed to give proper attention and care to the cases and his client's interests. The results obtained and services rendered were satisfactory.

As hereinbefore has been indicated, it is the conclusion of this court that none of the charges set forth in the order to show cause was sufficiently supported by the evidence.

It, therefore, is ordered that the charges against petitioner should be, and they are, hereby dismissed.



18 Cal.2d 761

VALLE v. INGRAM et al.

INGRAM v. VALLE et al.

L. A. 16784.

Supreme Court of California.

Oct. 16, 1941.

Rehearing Denied Nov. 13, 1941.

1. Appeal and error ⇐931(1)

Upon appeal from judgment in favor of cross-complainant, conflicts in evidence must be deemed to have been resolved in favor of the cross-complainant and against the cross-defendants and appellants.

2. Quieting title ⇐44(3)

Judgment quieting title to undivided interest in land in attorney's wife was supported by evidence that plaintiff had engaged attorney to recover property wrongfully disposed of by her agent prior to his death, agreeing to give attorney a percentage of property recovered, that in addition to recovering property conveyed by agent attorney recovered from agent's wife an unrecorded deed from plaintiff to agent purporting to convey land in controversy, and that at attorney's direction the interest in land due attorney, as contingent fee, was conveyed to his wife.

3. Deeds ⇐17(1)

Consideration for a conveyance may be furnished by another than the grantee.

4. Deeds ⇐8

Even if a deed executed by grantor to her nephew and niece and delivered to an attorney under written instructions to withhold from recordation until grantor's death could not be recalled and canceled by mutual agreement of the parties, grantor nevertheless had the right subsequently to convey to her niece alone such present interest as grantor retained, and the aggregate interest acquired by niece in the property by the two deeds was more than sufficient to permit niece to convey an undivided one-third interest in the property.

5. Quieting title ⇐10(2)

If a deed executed by grantor to her nephew and niece could not be recalled or canceled because of its asserted irrevocable delivery to attorney under written instructions to withhold from recordation until grantor's death, and if grantor was precluded from subsequently conveying a fee title to her niece alone, then attempted subsequent reconveyance by niece to grantor would be ineffective to vest title in grantor so as to entitle grantor to a decree quieting title as against grantee of undivided one-third interest conveyed by niece.

6. Quieting title ⇐10(1)

In action to quiet title to land, plaintiff must stand on the strength of his own title and not on the weakness of his adversary's.

In Bank.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Louisa S. Valle against Minnie H. Ingram and others to quiet title

to realty, wherein named defendant filed a cross-complaint against plaintiff and others, seeking to quiet title in cross-complainant to an undivided one-third interest in the realty. From a judgment in favor of named defendant and cross-complainant, cross-defendants appeal.

Judgment affirmed.

Newby & Newby and Dee Holder, all of Los Angeles, and Charles D. Warner, of Chino, for appellants.

Oliver O. Clark, LaVerne M. Hayes, E. D. Reiter, and S. Oliver Bletz, all of Los Angeles, for respondents.

CARTER, Justice.

This is an appeal from a judgment entered in a quiet title action. Judgment went against plaintiff, Louisa S. Valle, on her complaint and in favor of the defendant and cross-complainant, Minnie H. Ingram, quieting the latter's title to an undivided one-third interest in the real property here involved. The effect of the decree is to leave a two-thirds undivided interest in the plaintiff. The cross-complainant, Minnie H. Ingram, acquired her one-third interest by means of a conveyance to her by Lovina G. Valle, niece of plaintiff and a cross-defendant herein, which conveyance was made while title to the property, originally belonging to plaintiff, stood in the name of said grantor. Such conveyance was made to the cross-complainant at the request of her husband, J. E. Ingram, an attorney, who was entitled thereto in discharge of a contingent fee due him for legal services rendered to plaintiff in connection with the recovery of her properties.

It appears that plaintiff, Louisa S. Valle, a widow, was the owner of considerable property in Los Angeles county, including three parcels referred to as the "Central Avenue property", the "Jackson-San Pedro property", and the "28th Street property". The last named parcel is the subject of this litigation. Prior to 1934 the plaintiff had appointed one Dunn her agent to manage and handle her properties. A general power of attorney had been executed by plaintiff to Dunn and it was the latter's misuse of such power which caused plaintiff after Dunn's death to consult with and employ the defendant, J. E. Ingram, for the purpose of taking whatever legal steps were necessary to recover her properties from the estate of Dunn or any others claiming through him. Dunn always had represented himself to plaintiff as a single man and plaintiff's suspicions were aroused as to his handling of her properties when a person claiming to be his widow presented herself at his funeral.

In all negotiations with Ingram, while employed by plaintiff as attorney to recover her properties, the plaintiff either was accompanied or represented by her nephew and niece, the cross-defendants Albert M. Valle and Lovina G. Valle. As consideration for his services in this respect, Ingram specified as his fee 50 per cent of the property recovered and a nominal money retainer, the latter being paid in installments. Though plaintiff first consulted Ingram in July, 1934, with respect to his employment for the purpose designated, it was not until September, 1936, that the terms of such agreement were reduced to writing. In the two-year interval, however, Ingram, according to his testimony, had rendered extensive service by way of conferences, investigations, both in and out of the city and county of Los Angeles, research, drawing of instruments, directing the probate of Dunn's estate, and many other efforts all directed to the ultimate recovery of plaintiff's properties and the clearing of the titles thereto. Ingram's employment as attorney continued until March, 1937, when he was discharged. The deed conveying the one-third interest in the Twenty-eighth street property to Ingram's wife in partial discharge of his fee antedated the termination of the employment.

In the course of his investigation and research, Ingram discovered that Dunn had sold and conveyed the Central avenue and the Jackson-San Pedro properties to third persons but had failed to account to plaintiff for the proceeds. Neither parcel, however, had been conveyed under Dunn's power of attorney but, instead, each had been transferred by deed bearing the forged signature of the plaintiff. Ingram testified that he also discovered that Dunn at the time of his death had held an unrecorded deed from the plaintiff to himself covering the Twenty-eighth street property here involved, and that this deed was in the possession of Dunn's widow who was concealing herself and the existence of said instrument. Both were found in an eastern city. Ingram further testified that he procured a return of this deed from Dunn's widow and the

execution by her of a deed quitclaiming to plaintiff any and all interest in and to the Twenty-eighth street property.

[1, 2] There are, of course, many conflicts in the evidence. Upon this appeal they must be deemed to have been resolved in favor of the cross-complainant and against the cross-defendants and appellants. Such conflicts are recognized in the opening brief wherein it is stated that: "There is a dispute between the parties as to what property was covered by the contract. Ingram claimed and testified that under the contract he was to receive 50 per cent of all the plaintiff's property, including the 28th Street property, while the plaintiff and Valle (nephew) testified that the only property covered by the contract was the Jackson Street property and the Central Avenue property; that the 28th Street property never was out of plaintiff's name but always stood there." This conceded conflict, like all other conflicts, must be deemed to have been resolved against the appellants by the court below. In our opinion there is nothing in the written contract between plaintiff and Ingram requiring a holding that the Twenty-eighth street property was to be excluded from its terms. The entire purpose of that contract was to procure a return to plaintiff of her properties formerly entrusted to the care and management of Dunn. Ingram testified that the Twenty-eighth street property was intended to be included in the contract along with other properties. He further testified, as already indicated, that his efforts had served to disclose and to procure the return of an outstanding deed purporting to convey this property from plaintiff to Dunn and also had served to procure from Dunn's widow a deed quitclaiming any interest therein to plaintiff. Ingram's testimony was substantiated in many particulars by the testimony of his secretary and that of Lieutenant Swan of the Los Angeles police bunco detail who had assisted or worked with Ingram in much of the investigation directed to the uncovering of Dunn's improper handling and disposition of plaintiff's properties. This and other evidence adequately supports the judgment.

[3] It goes without saying that Ingram was free to voluntarily reduce his fee, as he testified he did, from the agreed one-half interest to a one-third interest and to have the deed conveying the same run to his wife and cross-complainant, Minnie H. Ingram, rather than to himself. Citation of authority is unnecessary in support of the established principle that the consideration for a conveyance to one may be furnished by another.

We turn now to the contention which questions whether the cross-defendant and appellant, Lovina G. Valle, possessed at the time sufficient title to the Twenty-eighth street property to permit her to convey a one-third interest therein to the cross-complainant and respondent, Minnie H. Ingram. This necessitates a consideration of the several transfers which culminated in the vesting of said one-third interest. It appears that plaintiff Louisa S. Valle, came to Ingram's office on September 14, 1936, in company with her nephew Albert M. Valle, and informed Ingram that she desired to convey her properties to said nephew and his wife to preclude other relatives upon her death from succeeding to any part thereof. The deeds therefore to be held by Ingram and not recorded until after plaintiff's death. Ingram had plaintiff sign a written letter of instructions to that effect which is here in evidence. At this same time she executed and delivered to Ingram a deed conveying the Twenty-eighth street property to her nephew and niece which deed, pursuant to later written instructions, Ingram was to hold for recordation until the grantees requested that it be recorded. Consideration for this deed was the promise of the grantees to care for and to furnish a home to the grantor. Approximately five weeks later, the grantor and grantees appeared at Ingram's office and with the acquiescence of and without objection from the grantees, the grantor requested the return of said deed for the purpose of cancellation and to permit her by new deed to vest the fee title immediately in the grantee, Lovina G. Valle, alone. This was done, the consideration for the new deed again being the promise of the niece-grantee and her husband to care for grantor. This deed was promptly recorded, as testified by Ingram, in order, among other reasons, to prevent the widow of Dunn from in any way clouding the title by use of any outstanding deeds covering the property and running to her deceased husband, the grantor's former agent. It was just prior to and while the Twenty-eighth street property thus stood in the name of Lovina G. Valle alone that Ingram discussed the matter of payment

of his agreed fee with the Valles (plaintiff, niece and nephew) and it was then agreed, according to Ingram's testimony, that he would reduce his fee to a one-third interest in the property which Lovina G. Valle, pursuant to agreement, thereupon conveyed to Ingram's wife, the cross-complainant and respondent herein. This deed was recorded on October 28, 1936. Subsequently, and on February 24, 1937, Lovina G. Valle, purported to reconvey by grant deed to her aunt, plaintiff herein, the whole of the Twenty-eighth street property. Thereafter plaintiff commenced this action to quiet her title to said parcel and, as already indicated, judgment went against her on the complaint and in favor of the defendant and cross-complainant, Minnie H. Ingram, quieting her title to a one-third interest as against the several cross-defendants.

[4] We cannot accept the contention that these several transmutations of title to the Twenty-eighth street property were such as to prevent the niece and cross-defendant Lovina G. Valle from conveying to the cross-complainant Minnie H. Ingram a one-third undivided interest in said property. Even if we were to assume, without deciding, that the plaintiff, as grantor, and the niece and nephew, as grantees, could not have mutually agreed to withdraw and cancel the deed from the former to the latter, and held by Ingram to be recorded upon the grantor's death, there are other considerations which furnish a complete answer to this contention. In other words, even if the plaintiff as grantor could not recall the deed deposited with Ingram and purporting to convey the Twenty-eighth street property to her niece and nephew, there can be no question as to her right to later convey to her niece alone, which she did, whatever present interest she still retained in the property, and obviously the aggregate interest or title thus acquired by the niece in the property by said two deeds was more than adequate to permit her, while so seized, to convey an undivided one-third interest to the cross-complainant Minnie H. Ingram.

[5, 6] But in addition, if as contended, the original deed deposited with Ingram and purporting to convey the Twenty-eighth street property to the niece and nephew could not be recalled or terminated because of its asserted irrevocable delivery into the possession of Ingram for future recordation, thus precluding the plaintiff-grantor from thereafter conveying, as attempted, a fee title to her niece, it must necessarily follow that the latter was without the necessary title to permit her later to reconvey such fee title back to the plaintiff and original grantor. This being so, the decree of the court below refusing to quiet title in the plaintiff was proper. It is well settled that in an action of this character the plaintiff must stand upon the strength of his own title and not upon the weakness of the adversary's.

What we have said sufficiently disposes of this cause. Examination of the lengthy transcript satisfies us as to the propriety of the judgment. We fail to find in the evidence any overreaching of the client by the attorney. The cross-complainant being the owner and holder of an undivided one-third interest in the Twenty-eighth street property at the time she executed a mortgage thereon in favor of the defendant United States Credit Bureau, said instrument is not subject to the attack here made by appellants.

The judgment is affirmed.

GIBSON, C. J., CURTIS, EDMONDS, and TRAYNOR, JJ., and PULLEN, Justice pro tem., concurred.



18 Cal.2d 768

CARBONE v. SUPERIOR COURT OF NAPA COUNTY et al.

S. F. 16546.

Supreme Court of California.

Oct. 17, 1941.

1. Bastards ⇐16, 94

Costs, counsel fees, and maintenance of an illegitimate child may in court's discretion be enforced against putative father in suit for support before paternity has been established. Civ.Code, § 137, and § 196a, as amended by St.1939, p. 1758.

2. Bastards ⇐16, 94

The purpose of statutory amendment to provide for an award of costs, counsel fees, and maintenance of an illegitimate child in suit for support before paternity has been

established, may be determined from the interpretation of statute prior to amendment when right to counsel fees, costs, and support pending final determination of action was denied. Civ.Code, § 137, and § 196a, as amended by St.1939, p. 1758.

3. Bastards ⇐16, 94

The reference to statute providing that in divorce action court may require spouse to pay as alimony support and expenses necessary to prosecute or defend the action, in statute relating to support of an illegitimate child, makes all the appropriate provisions of divorce statute applicable to an action brought under statute relating to support of illegitimate child. Civ.Code, §§ 137, 138, and § 196a, as amended by St.1939, p. 1758.

4. Bastards ⇐16

Proof of parentage is a jurisdictional prerequisite for an order to support an illegitimate child. Civ.Code, § 137, and § 196a, as amended by St.1939, p. 1758.

5. Bastards ⇐16, 92, 94

Even though defendant in action for support and declaration of paternity denies paternity, court may make order requiring payment of support, costs, and counsel fees pendente lite if defendant is given opportunity to be heard and paternity is proved by preponderance of evidence, which order results in an "appealable judgment" independent of the final judgment in the action. Civ. Code, § 137, and § 196a, as amended by St. 1939, p. 1758.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Judgment".

6. Judgment ⇐564(2)

Although an order compelling support of illegitimate child before paternity has been established implies a finding of existence of paternity, proceeding need not be so complete or evidence so extensive as upon trial of issues of the case for judicial declaration of paternity, and hence the order is not "res judicata" on issue of paternity. Civ. Code, § 137 and § 196a, as amended by St. 1939, p. 1758.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

In Bank.

Petition by Diane Lee Carbone, a minor, for a writ of mandamus to compel the Superior Court of Napa County, Percy S. King, Judge, to make an order for costs, counsel fees, and maintenance of the minor petitioner pending trial of a suit for support under Civil Code, § 196a, as amended by St.1939, p. 1758.

Writ granted.

For prior opinion, see, 110 P.2d 444.

Allen Spivock, of San Francisco, for petitioner.

Rutherford, Rutherford & Rutherford, of Napa, for respondents.

TRAYNOR, Justice.

Plaintiff, an illegitimate child, brought an action through her mother, her guardian ad litem, against the defendant for support and a judicial declaration of paternity. The trial court issued an order directing defendant to show cause why he should not pay support, court costs, and attorney's fees pending determination of the action. Upon defendant's objection that the court had no jurisdiction to order him to make such payments until he was adjudged the father of the child, the court refused to proceed with the hearing or to take any evidence. Plaintiff thereupon petitioned this court for a writ of mandate to compel the respondent court to grant a hearing on the order to show cause, contending that the 1939 amendment to section 196a of the Civil Code gives the court power to order the payment of support, costs, and counsel fees pendente lite in an action brought under that section.

Section 196a provides: "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, or by a guardian ad litem * * * and in such action the court shall have power to order and enforce performance thereof, the same as under sections 137, 137.5, 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife." The references to sections 137 and 137.5 in the last clause of the section were added in 1939.

Section 137 provides in part as follows: "When an action for divorce is pending, the court may, in its discretion, require the husband or wife, as the case may be, to pay as alimony any money necessary to enable the wife, or husband, to support herself and her children, or to support

himself and his children, as the case may be, or to prosecute or defend the action."

[1] Under the plain language of section 196a as amended the court in an action to enforce the obligation of a father to support an illegitimate child has the same power to order the performance of that obligation as it has to order the performance of a husband's obligation under section 137 in a suit for divorce by a wife. Under section 137 the court, when an action for divorce is pending, may in its discretion order the husband to pay as alimony any money necessary to enable the wife to support herself and her children or to prosecute the action. Therefore it may likewise in its discretion order the payment of money necessary for the support of the illegitimate child and the prosecution of the action pending its determination. See 28 Cal.L.Rev. 442, 446.

[2] Not only is the amendment clear and explicit in its terms, but its purpose to provide for an award pendente lite is apparent from the previous interpretation of section 196a. Although it was held that the final judgment might include provision for attorney's fees (Kyne v. Kyne, 38 Cal. App.2d 122, 100 P.2d 806; Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163) and support of the illegitimate child from the date of filing the complaint (Kyne v. Kyne, supra; Mathews v. Hornbeck, 80 Cal.App. 704, 252 P. 667), the right to counsel fees, costs, and support pending the final determination of the action was denied. Schallman v. Haas, 33 Cal.App. 28, 164 P. 336. The legislature in adopting the amendment presumably had these decisions in mind and intended to change the law. Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449; Hoffman v. McNamara, 102 Cal.App. 280, 282 P. 990; People v. Weitzel, 201 Cal. 116, 255 P. 792, 52 A.L.R. 811; Pierce v. Riley, 21 Cal.App.2d 513, 520, 70 P.2d 206. See Thomas v. Driscoll, 42 Cal.App.2d 23, 108 P.2d 43.

[3] The contention that the reference to section 137 incorporates only the latter part of that section is untenable. That part provides for enforcement of a final judgment in a separate maintenance action by such orders as the court may from time to time deem necessary. Not only did the court have this power with respect to enforcement of the obligation to support the illegitimate child before the amendment to section 196a (see Civ.Code, sec. 138, and Sweet v. Hamilothoris, 84 Cal. App. 775, 782, 258 P. 652); but the reference to section 137 makes all the appropriate provisions of that section applicable to an action brought under section 196a.

[4-6] Respondent contends that the defendant cannot be ordered to support the plaintiff until he is proved to be her father. The situation, however, is basically the same as in a divorce action when the fact of marriage is denied. Proof of parentage is a jurisdictional prerequisite for an order to support an illegitimate child (Kyne v. Kyne, supra) just as the existence of the marriage is a jurisdictional prerequisite for the right of the court to order support, costs, and counsel fees pendente lite in an action for divorce. Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L.R.A. 793, 71 Am.St.Rep. 82; Ex parte Cook, 42 Cal.App.2d 1, 108 P.2d 46. See Lorraine v. Lorraine, 8 Cal.App.2d 687, 697, 48 P.2d 48. Even though the defendant in an action for divorce denies the existence of the marriage, the court may nevertheless make the order if defendant is given an opportunity to be heard and the marriage is proved by a preponderance of the evidence. See Hite v. Hite, supra; Bancroft v. Bancroft, 9 Cal.App.2d 464, 50 P.2d 465. The application is determined upon a record of its own and results in an appealable judgment independent of the final judgment in the action. Robbins v. Mulcrevy, 101 Cal. App. 300, 281 P. 668. Although such an order implies a finding of the existence of the relationship, the proceeding need not be so complete nor the evidence so extensive as upon the trial of the issues of the case and the order therefore does not determine those issues nor affect the final judgment. Sharon v. Sharon, 75 Cal. 1, 16 P. 345; Hite v. Hite, supra.

Since the decisions interpreting section 137 are directly applicable to actions under 196a the plaintiff, upon the hearing of the order to show cause, must prove by a preponderance of the evidence that the defendant is her father before he can be ordered to pay her support, costs of suit, or counsel fees pending the trial of the issues of the case. The defendant must be given an opportunity to be heard and to present his evidence. Then, even though the court upon a preponderance of the evidence presented at the hearing issues the order, its implied finding of paternity is not res judicata nor determinative of the

issue of parentage at the trial. The proceeding is merely a hearing upon an order to show cause for the purpose of determining plaintiff's right to an award pendente lite, and while defendant may put the jurisdictional prerequisite of parentage in issue, the evidence produced by the parties need not be so extensive as at the trial of the action. The resulting judgment is temporary in effect; except as to payments already accrued thereunder, its operation terminates upon the final determination of the action or upon order of the court. It is appealable independently of the final judgment in the case. The rights of an alleged father in an action under section 196a thus receive the same protection as those of an alleged husband under section 137.

In the instant case the trial court erroneously refused to permit plaintiff to introduce any evidence of paternity. Both plaintiff and defendant should have been heard on the order to show cause and a decision made as to the allowance of support, attorney's fees, and costs pending the trial of the action.

Let the writ of mandate issue as prayed.

GIBSON, C. J., CURTIS, EDMONDS, HOUSER, and CARTER, JJ., concurred.



18 Cal.2d 794

VORBURG v. VORBURG.

L. A. 17148.

Supreme Court of California.

Oct. 17, 1941.

1. Divorce ⇐165(3)

Affidavits for publication of summons in wife's divorce action, showing that wife's counsel, without avail, examined city and telephone directories where action was pending and husband had recently been arrested, and made other inquiries, that wife lacked knowledge of husband's whereabouts, and that copies of summons and complaint were sent to husband by registered mail but returned unopened, were not fatally defective as ground for setting aside default decrees fourteen years later on wife's motion. Code Civ.Proc. §§ 412, 413; Civ.Code, § 1163.

2. Appeal and error ⇐1024(3)
Process ⇐90

"Diligence" in determining defendant's residence, as a prerequisite to permitting publication of summons, is a relative term and must be determined by circumstances of each case, as a question for trial court in the first instance. Code Civ.Proc. § 412.

See Words and Phrases, Permanent Edition, for all other definitions of "Diligence".

3. Appeal and error ⇐1024(3)

If facts set forth in affidavit for publication of summons have a legal tendency to show that defendant cannot be found after exercise of diligence, judge's decision that affidavit shows the same to his satisfaction is to be regarded with the same effect as his decision upon any other matter of fact.

4. Process ⇐98

Where there is not an entire absence of evidence in affidavit for publication of summons to sustain the order for publication, it cannot be regarded as void. Code Civ.Proc. § 412.

In Bank.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action for divorce by Martha Vorburg against John Adrian Vorburg, wherein interlocutory and final decrees were entered for plaintiff. From an order refusing to vacate the decrees on plaintiff's motion, plaintiff appeals.

Affirmed.

Frank S. Hutton and F. C. Stevens, both of Los Angeles, for appellant.

No appearance for respondent.

PER CURIAM.

This is an appeal from an order refusing to vacate the interlocutory and final decrees of divorce entered in the above-entitled cause.

The action was commenced in Los Angeles county on October 11, 1923. An order for publication of summons was procured upon the affidavits of plaintiff and her counsel that after due diligence defendant could not be found within the state. Summons was duly published. Defendant failed to appear or answer within the time allowed by law and his default was accordingly entered. Thereafter and on April 1, 1924, an interlocutory decree of divorce was entered

in favor of plaintiff. On April 7, 1925, the final decree was entered.

In 1939, some fourteen years later, plaintiff, the prevailing party, moved the court below to set aside the interlocutory and final decrees of divorce upon the ground that there had been no proper service of summons upon the defendant and that said court therefore was without jurisdiction to enter said decrees. The motion was denied. It was urged in support of the motion, and it is reiterated here, that the affidavits upon which publication of summons was had disclose that due diligence was not exercised in an effort to locate the defendant in San Diego, his asserted last known place of residence. It is argued that this defect is apparent upon inspection of the judgment roll thereby rendering the interlocutory and final decrees void on the face of the record and open to attack at any time and in any proceeding.

[1] We cannot accept the contention. The court below properly denied the motion to vacate. Neither the affidavits for publication of summons nor the judgment roll as a whole discloses anything tending to invalidate the order directing publication of summons. The affidavit of plaintiff's counsel averred that he had examined, without avail, the city and telephone directories of Los Angeles (where the action was pending) at a time subsequent to the defendant's arrest and discharge in that city on an extortion charge; that unsuccessful inquiry as to the defendant's whereabouts was also made of the district attorney of Los Angeles county; that while at the time of the Los Angeles extortion charge the defendant gave his address as San Diego, inquiry of counsel who represented defendant on that charge disclosed that he "has not seen or heard of said defendant since that time" and was of the opinion that "defendant had departed from the state of California", leaving defendant's former counsel without "means of locating said defendant". Plaintiff's counsel also averred, as required by section 412, Code of Civil Procedure, that defendant had not filed a certificate of residence as provided in section 1163, Civil Code.

In a supporting affidavit plaintiff averred that she had known defendant for a period of only two weeks prior to their marriage; that he said his residence was in San Diego; that they had never lived together and consequently she knew none of his relatives or friends and that she had not seen him since his discharge on the extortion charge in Los Angeles a year earlier, and "has no means of finding out by inquiry where said defendant is".

On this appeal from the order denying plaintiff's motion to vacate the decrees fourteen years after entry, it cannot be said that the affidavits for publication of summons are fatally defective because of their failure to affirmatively disclose that a search had been made of the city and telephone directories of San Diego. Failure to make such search, if not made, was justified in view of the averment that defendant's former counsel had stated as his opinion that the "defendant had departed from the state of California". In its order for publication of summons the trial court declared that it satisfactorily appeared that the defendant "cannot, after due diligence, be found within this state". Moreover, as required by section 413, Code of Civil Procedure, the trial court directed in its order that a copy of the summons and complaint should be forthwith deposited as registered matter in the United States post office, postpaid and addressed to the defendant at San Diego, California, his last known residence. A further affidavit of plaintiff's counsel reveals that he did so register and mail a copy of the summons and complaint to the defendant in San Diego and that the same was returned unopened. In her present attack upon the order for publication plaintiff fails to mention these latter facts.

[2-4] Diligence is a relative term and must be determined by the circumstances of each case. The question is one for the trial court in the first instance. "If the facts set forth in the affidavit have a legal tendency to show the exercise of diligence on behalf of the plaintiff in seeking to find the defendant within the state, and that after the exercise of such diligence he cannot be found, the decision of the judge that the affidavit shows the same to his satisfaction is to be regarded with the same effect as is his decision upon any other matter of fact submitted to his judicial determination." Wheeler v. Craig, 206 Cal. 221, 224, 273 P. 558, 559; Clarkin v. Morris, 178 Cal. 102, 105, 172 P. 981; Rue v. Quinn, 137 Cal. 651, 656-657, 66 P. 216, 217, 70 P. 732; 21 Cal.Jur. 508, sec. 31. As further stated in Rue v. Quinn, supra, "There is not an entire absence of evidence in the affidavit on behalf of the plaintiff to sustain the order, and it cannot be regarded as void. The facts set forth therein afford some evidence

of diligence on the part of the plaintiff to find the defendant, and also that, notwithstanding such diligence, she could not be found within the state; and * * * it cannot be said that the affidavit is of no legal effect to authorize the court to be satisfied therefrom, or that it did not have a tendency to establish both the fact of diligence and of failure to find the defendant". As already stated, the affidavits here involved show that defendant could not be found after the exercise of reasonable diligence and we are satisfied that a sufficient foundation was thereby laid to support the order for publication of summons. This being so, the interlocutory and final decrees based on such service are not void upon the face of the judgment roll and may not therefore be vacated upon motion noticed some fourteen years after their entry.

The case of Stern v. Judson, 163 Cal. 726, 127 P. 38, relied on by plaintiff, is distinguishable. There a judgment based upon publication of service was set aside upon separate suit of the defaulted party based on alleged and proved false representations and fraud in the affidavits for publication. Such is not this case. Here, as already stated, the affidavits sufficiently disclose that a reasonable but abortive effort had been made to locate the defendant, and the trial court's finding that reasonable diligence had been exercised may not, under the authorities and the circumstances here present, be successfully challenged at this late date.

The order refusing to vacate the interlocutory and final decrees of divorce is affirmed.



18 Cal.2d 757

PACIFIC STATES SAVINGS & LOAN CO. v. WARDEN.

L. A. 17101.

Supreme Court of California.

Oct. 16, 1941.

1. Quieting title ⇐15

Generally, title to property may not be attacked by persons showing no color of title in themselves, in action to quiet title.

2. Quieting title ⇐15

In action to quiet title, want of validity of plaintiff's title may not be challenged by strangers and intruders, that is, persons who were neither in possession of the property nor connected in any way with the paramount source of title.

3. Quieting title ⇐43

Where plaintiff in verified complaint, in action to quiet title, alleges the defendant's adverse claim of title, and the defendant by verified answer admits the claim adverse to plaintiff and asserts ownership in himself, the defendant may be permitted to attack the validity of plaintiff's title sought to be quieted.

4. Quieting title ⇐44(1)

In an action to quiet title, the plaintiff must prove his title in order to recover.

5. Quieting title ⇐15

A defendant in an action to quiet title may effectually resist a decree against himself by showing simply that the plaintiff is without title, since if the plaintiff has no title he cannot complain that someone else, also without title, asserts an interest in the land.

6. Quieting title ⇐44(1, 3)

In action to quiet title, plaintiff by introducing in evidence two street improvement bonds and two deeds in foreclosure thereof executed by city treasurer and purporting to convey title to plaintiff made a "prima facie case" which required the defendant to go forward with the proof.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Case".

7. Quieting title ⇐10(2)

In action to quiet title, plaintiff's prima facie case made by introduction in evidence of two street improvement bonds and two deeds in foreclosure thereof executed by city treasurer, and purporting to convey title to plaintiff, would entitle plaintiff to judgment as against one shown to be a stranger to the title.

8. Quieting title ⇐43

Where plaintiff in verified complaint, in action to quiet title, alleged defendant's adverse claim of title, and defendant by verified answer admitted the claim adverse to plaintiff and asserted ownership in himself, the pleadings were sufficient to entitle de-

fendant to controvert plaintiff's prima facie case, either by evidence establishing that purported deeds to plaintiff conveyed no title, or that defendant himself was owner of the property.

9. Quieting title ⇐46

Where pleadings in action to quiet title are sufficient to entitle defendant to controvert plaintiff's prima facie showing, if evidence discloses that the plaintiff has no title, it becomes unnecessary to inquire into claims or title of defendant.

10. Appeal and error ⇐1056(1)
Quieting title ⇐44(2)

Where, in action to quiet title, plaintiff in verified complaint alleged the defendant's adverse claim of title and defendant by verified answer admitted the claim adverse to plaintiff and asserted ownership in himself, and plaintiff made a prima facie case by introducing two street improvement bonds and two deeds in foreclosure thereof executed by city treasurer and purporting to convey title to plaintiff, excluding testimony of city treasurer, offered by defendant for purpose of attacking regularity of proceedings leading up to execution of bond foreclosure deeds, on theory that defendant was required to show a prima facie interest in the property before he could attack validity of plaintiff's title, was reversible error.

In Bank.

Appeal from Superior Court, Orange County; Raymond McIntosh, Judge.

Action to quiet title by Pacific States Savings & Loan Company against C. P. Warden. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

Mace & Tuthill and Alan G. Campbell, all of Los Angeles, for respondent.

SHENK, Justice.

The plaintiff brought an action to quiet title to certain lots in the city of Newport Beach, county of Orange. In the complaint it alleged that the defendant claimed some interest in the real property adverse to the plaintiff. The defendant, C. P. Warden, filed a verified answer denying ownership in the plaintiff, and alleging ownership in himself. He prayed that the plaintiff take nothing by the action and that the defendant recover his costs. The court entered judgment for the plaintiff and the defendant has appealed.

It is contended that the trial court committed prejudicial error in sustaining objections to evidence offered by the defendant to rebut the plaintiff's prima facie showing of title. On the trial the plaintiff introduced in evidence two street improvement bonds and two deeds in foreclosure of the same, executed by the treasurer of the city of Newport Beach and purporting to convey title to the plaintiff. On this showing the plaintiff rested. The defendant thereupon called the city treasurer as a witness for the purpose of attacking the regularity of the proceedings leading up to the execution of the bond foreclosure deeds, thus challenging the validity of the plaintiff's title. Objection to the introduction of this evidence was sustained on the ground that the defendant was required first to show a prima facie interest in the property before he could attack the validity of the plaintiff's title. The defendant declined so to proceed and the judgment for the plaintiff followed.

The defendant relies on the rule that the plaintiff must succeed solely on the strength of his own title, and not on the weakness of his adversaries' title; while the plaintiff seeks support for the judgment in the rule that an attack upon the plaintiff's showing may not be made by a stranger to the title.

[1, 2] It may be said that since the decision in Doll v. Meador, 16 Cal. 295, this court has recognized as a general proposition that title to property may not be attacked by persons showing no color of title in themselves, and that want of validity may not be set up by strangers and intruders, that is, persons who were neither in possession of the property nor connected in any way with the paramount source of title. See cases cited in Williams v. City of San Pedro, 153 Cal. 44, at pages 51, 52, 94 P. 234.

[3] But so far as we are aware it is not the law of this state that the defendant has not established sufficient color or claim of title for the purpose of permitting him to attack the validity of the plaintiff's title sought to be quieted, when the plaintiff in a verified complaint alleges the defendant's adverse claim of title, and the defendant by verified answer admits the

claim adverse to the plaintiff and asserts ownership in himself.

[4, 5] In a quiet title action the plaintiff must prove his title in order to recover. Heney v. Pesoli, 109 Cal. 53, 58, 41 P. 819. It has been stated as an elementary rule that "if he has no title, he cannot complain that some one else, also without title, asserts an interest in the land. * * * A defendant in such an action may always effectually resist a decree against himself, by showing simply that the plaintiff is without title." Williams v. City of San Pedro, 153 Cal. 44, 49, 94 P. 234, 236. The last case cited was an action to quiet title. The plaintiff relied on a certificate of purchase from the state. It was said that the certificate was no more than prima facie evidence of ownership and that the defendants necessarily would have the right to show facts aliunde which would render it worthless and inoperative as a conveyance and thus rebut the prima facie case of ownership in the plaintiff. In that case the defendants merely denied the allegations in the complaint without making any claim of ownership. The judgment was affirmed on stipulated facts which disclosed the invalidity of the plaintiff's title. However, in a concurring opinion it was stated as an elementary and practically universal rule that a defendant will not be permitted to interpose to defeat the prima facie showing of title unless he pleads, or shows in some authorized manner, that he has some right, title or interest in the property. "A defendant who does not, himself, claim some right, title, interest, or possession has no status to question the validity of a conveyance of the property by a third person to the plaintiff." 153 Cal. at page 50, 94 P. at page 237.

[6-9] It may be said that the plaintiff's prima facie showing required the defendant to go forward with proof; also as against one shown to be a stranger to the title, the plaintiff's prima facie showing would entitle him to judgment. Davis v. Crump, 162 Cal. 513, 123 P. 294. The pleadings in the present case, however, were sufficient to entitle the defendant to controvert the prima facie showing of the plaintiff, either by evidence establishing that the purported deed to the plaintiff conveyed no title, or that the defendant himself was the owner of the property, and if the evidence disclosed that the plaintiff had no title it would become unnecessary to inquire into the claims or title of the defendant. Schroder v. Aden Mining Co., 144 Cal. 628, 630, 78 P. 20; Davis v. Crump, supra. It was said in Sears v. Willard, 165 Cal. 12 at page 14, 130 P. 869, that a plaintiff in an action to quiet title must fail unless he shows title in himself, and he is not in a position to complain if some one else, also without title, asserts an interest in the property, citing Williams v. City of San Pedro, supra. See, also, Rockey v. Vieux, 179 Cal. 681, 178 P. 712; Penn v. Dyba, 115 Cal. App. 67, 1 P.2d 461.

In the case of Knoke v. Knight, 206 Cal. 225, 273 P. 786, 788, the trial court apparently permitted an investigation into the facts behind the tax deed offered by the plaintiff where the defendant offered no evidence of her ownership of the land. The contention of error in this respect was rejected and the judgment against the plaintiff was affirmed. It was said: "It is hardly necessary to cite an authority in support of the well-established principle of law that in an action to quiet title the plaintiff must recover on the strength of his own title rather than any weakness of the defendant's. It has been repeatedly so held by this court." (Citing cases above referred to.)

The case of McPhail v. Nunes, 48 Cal. App. 383, 192 P. 95, is not contrary to our conclusion. In that case the defendants pleaded ownership of the property and attempted to prove ownership under a tax deed which was found to be invalid. Judgment for the plaintiff was affirmed on the ground that as it had been proved that the defendants had no title or possession, they were not in a position to attack the plaintiff's prima facie showing of ownership. A similar situation was presented in Hindle v. Warden, 50 Cal.App. 356, 195 P. 428, in which a judgment for the plaintiff was likewise affirmed.

[10] We conclude that it was prejudicial error for the trial court to exclude the evidence offered by the defendant.

The judgment is reversed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, JJ., and PULLEN, J. pro tem., concurred.

VILLAIN et al. v. CIVIL SERVICE COMMISSION OF SAN FRANCISCO et al.

S. F. 16380.

Supreme Court of California.

Oct. 20, 1941.

Rehearing Denied Nov. 17, 1941.

1. Municipal corporations ⇐216(2)

Under city charter authorizing Civil Service Commission to adopt rules to govern its action in carrying out civil service provisions of charter, in formulating and applying rule which defined permanent and temporary or seasonal positions and which stated that a position designated as permanent should be deemed such only after investigation and declaration of its permanency had been made by commission, the commission was acting by virtue of and in conformity with express mandate conferred upon commission by the charter. St.1931, p. 3060, § 141.

2. Municipal corporations ⇐63(1)

In determining whether persons who were appointed to positions of general clerk stenographer acquired a permanent status, whether a better method of classifying and filling civil service positions could be found was no concern of courts, in view of constitutional provision giving to chartered municipalities plenary power to prescribe in charters manner in which, method by which, the times at which, and terms for which its officers and employees should be elected or appointed. St.1931, p. 2973 et seq., § 1 et seq.; Const. art. 11, § 8½.

3. Municipal corporations ⇐216(2)

City Civil Service Commission's rule which defined permanent and temporary or seasonal positions was not arbitrary, where the rule did not empower commission to designate as temporary a position which was neither temporary in fact nor by law of its creation, or to hold a position permanent in fact indefinitely under temporary designation through neglect to make an investigation and declaration of permanency. St. 1931, pp. 3019 et seq., and 3062, 3064, §§ 69 et seq., and 143, 148.

4. Municipal corporations ⇐218(2)

Where City Civil Service Commission permitted those on general clerk stenographer eligible list seeking only permanent employment to waive appointment to temporary positions, and persons on eligible list without exercising right of waiver, who were not eligible to permanent positions because of higher rating by others, accepted temporary employment and signed written certification to "temporary position", and compensation received was from appropriation made for payment of salaries of temporary employees, and during prolonged temporary service such persons made no effort to test character of their positions, their positions were not "permanent" within civil service protection. St. 1931, p. 2973 et seq., § 1 et seq.; Const. art. 11, § 8½.

See Words and Phrases, Permanent Edition, for all other definitions of "Permanent".

In Bank.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Paula Villain and others against the Civil Service Commission of San Francisco and others, for a declaratory judgment decreeing that plaintiffs were holders of permanent civil service positions in the public welfare department of San Francisco, and ordering their reinstatement and payment of their salaries. From a judgment for plaintiffs, defendants appeal.

Reversed.

John J. O'Toole, City Atty., and Thomas P. Slevin and Norman Sanford Wolff, Deputy City Attys., all of San Francisco (Grover O'Connor, of San Francisco, of counsel), for appellants.

Michael Riordan and Frederick Levy, both of San Francisco, amici curiae for San Francisco Federation of Municipal Employees.

Grover O'Connor, of San Francisco, amicus curiae for San Francisco Municipal Civil Service Ass'n.

Joseph T. Curley and Marvin C. Hix, both of San Francisco, for respondents.

PULLEN, Justice pro tem.

The defendants, Civil Service Commission of the City and County of San Francisco et al., appeal from a declaratory judgment decreeing that plaintiffs are the holders of permanent civil service positions as general clerk stenographer in the public welfare department of the City and County, ordering their reinstatement in such positions, and the payment of their salaries at the rate of $150 a month, less sums earned, together with any increase provided by law

from respective dates of their purported discharge in the fall of 1938 and spring of 1939. The main question on appeal is whether the uncontradicted evidence supports the trial court's findings and conclusion that the positions held by plaintiffs were in fact permanent, although erroneously designated as temporary.

In August, 1934, the Civil Service Commission conducted an examination to establish an eligible list for appointment to the classified civil service position of general clerk stenographer. Plaintiffs, together with many others, participated in this examination, and qualified for appointment. On a list of 225 eligibles adopted by the commission on November 14, 1934, they ranked respectively as numbers 177, 191, 202, and 224. This eligible list remained in effect until its expiration by charter provision four years after adoption. Charter sec. 145, Stats. 1931, p. 3063.

The charter provisions which govern city and county employment (Charter, Stats. 1931, pp. 2973 et seq.) specify that whenever a position controlled by civil service is to be filled, "the appointing officer shall make a requisition to the civil service commission", and "thereupon, the commission shall certify to the appointing officer the name and address of the person standing highest on the list of eligibles for such position". Charter sec. 148, Stats. 1931, p. 3064.

It is further provided that "from the requisition of the appointing officer or otherwise, the commission shall determine whether the position is, in character, temporary, seasonal or permanent, and shall notify the candidate in accordance therewith to the end that the candidate may have knowledge of the probable duration of employment. The commission shall provide for such waiver of temporary or seasonal employment as it may deem just to candidates. Any appointment to a position declared permanent by the commission shall be on probation for a period of six months. At any time before the expiration of six months the appointing officer may terminate the employment". Charter sec. 148, Stats. 1931, p. 3065.

Supplementing the above provision is charter 141 (Stats. 1931, p. 3060) which authorizes the commission to "adopt rules to carry out the civil service provisions of this charter", and specifies that "such rules shall govern applications; * * * eligibility; * * * certification of eligibles; appointments; * * * lay-offs * * *; the filling of positions, temporary, seasonal and permanent; * * * and such other matters as are not in conflict with this charter". Rule 15 of the commission, adopted under authority of the provision last quoted, defines permanent and temporary or seasonal positions, and states among other things that a position designated as permanent shall be deemed such only after an investigation and declaration of its permanency has been made by the commission. It further declares that all positions which do not come within the stated definition of "permanent positions", shall be deemed to be temporary or seasonal, and that appointments to the latter positions shall expire automatically at the end of five months, and that the names of the appointees shall automatically return to their places on the register of eligibles and shall not again be considered for appointment to a temporary position under the same appointing officer until a period of at least one day has elapsed from the date of termination of the prior tenure.

In conformity with the procedure outlined above, the commission permitted those on the general clerk stenographer eligible list of 1934, who were interested only in securing permanent employment, to waive appointment to temporary or seasonal positions, and to retain their rank for certification to permanent appointments. Charter sec. 148, supra. Plaintiffs did not exercise this right of waiver, and during 1936 and 1937 they were called for and accepted temporary employment at a salary of $150 a month as general clerk stenographer in the county welfare department which later merged with the public welfare department. They knew that the positions which they accepted had never been declared by the commission to be permanent, but were designated as temporary. In accepting, each signed a written certification to a "temporary position". On the reverse side of the certification, Rule 15 of the commission, supra, was printed in full.

Had the positions been classified as permanent, plaintiffs would not have been certified to them, for it is admitted that at the time of certification there were approximately fifty eligibles whose names preceded those of plaintiffs on the civil service list, a great number of whom would undoubtedly have been willing to accept the positions, if offered to them as permanent employment. It was solely by reason of the fact that the positions were temporary,

that the plaintiffs, although among the lowest 25 per cent on the eligible list, were able to secure a place upon the city and county payroll.

After plaintiffs had held the positions for five months, they were discharged for one day, their names were returned to the eligible list, and they were then re-appointed to the same positions. During the one day of discharge, their work was allowed to accumulate; no other employee handled it. This process of a five months' period of employment, followed by an interval of one day of unemployment, was repeated through several successive periods, the last one terminating subsequent to expiration of the eligible list in November, 1938. Thereafter, as plaintiffs could only become eligible for re-appointment by passing another examination, the positions were filled by new appointees. Plaintiffs asserted that their tenure had ripened into a permanent employment, and requested that the commission recognize that status. Upon its refusal to do so, the present action was instituted.

Plaintiffs alleged that the positions held by them, although designated as temporary, were continuing in character, were in fact permanent, and should have been so classified. They charged that their tenure of those positions for more than the probationary six months' period (Charter sec. 148, supra) conferred upon them the status of permanent employees, and that the procedure whereby they were laid off for one day at the end of each five months' period (Rule 15, supra) was invoked arbitrarily for the express purpose of preventing them from acquiring a permanent status and avoiding the necessity of re-classifying the positions as permanent.

The trial court, finding all of plaintiffs' allegations to be true, concluded that the positions were permanent, that plaintiffs had acquired a permanent right to occupy them, and that the commission was without authority to adopt Rule 15, supra, or to apply the procedure there outlined.

[1, 2] These findings and conclusions are contrary to the undisputed evidence and the law. Charter section 148, supra, specifically directs the commission to determine whether a position is, in character, temporary, seasonal, or permanent, and to notify the candidate so that he may have knowledge of the probable duration of employment, and Charter section 141, supra, expressly authorizes the commission to adopt rules to govern its action in carrying out this and other civil service provisions of the charter. Therefore, in formulating and adopting Rule 15, supra, and in applying it, the commission was acting by virtue of and in conformity with the express mandate and direct authority conferred upon it by the charter. Whether a better method of classifying and filling civil service positions could be found, is a subject with which the courts are not concerned, for the Constitution, article XI, section 8½, subdivision 4, gives to chartered municipalities plenary power to prescribe in their charters the manner in which, the method by which, the times at which, and the terms for which its officers and employees shall be elected or appointed. So, as stated in City of Napa v. Easterby, 61 Cal. 509, 520: "We cannot inquire whether this is the best system which could have been adopted. It is the system found in the charter."

[3] The standard of classification, established by Rule 15, supra, is not arbitrary, unreasonable, or unjust. Among other things it defines as permanent: "(a) A position that is definitely enumerated in the quantity column of the annual salary ordinance and for which funds have been provided to sustain it for the fiscal year involved", or "(b) Any position whose past history, and future prospects, of its tenure or existence, are such that in the judgment of the civil service commission should cause such position to be treated as a permanent position; provided the filling of such position is authorized by the annual salary ordinance and annual appropriation ordinance, though not definitely enumerated in the quantity column of the annual salary ordinance; and provided further that, unless otherwise ordered by the civil service commission, no position shall be designated a permanent position under this subdivision (b) * * * except by resolution adopted by the civil service commission, and then only after such position has been filled by at least two immediately succeeding temporary appointments for the maximum period of five months each, and the civil service commission, after investigation, then declares that such position shall be deemed, for the purposes of its rules, a permanent position."

The rule does not and could not empower the commission to designate as temporary a position which is neither temporary in

fact nor by the law of its creation, or to hold a position permanent in fact within the meaning of subdivision (b), indefinitely under a temporary designation through neglect to make an investigation and declaration of permanency, thereby preventing the appointee from acquiring permanent tenure after serving through the probationary period. In effect the rule merely affords a means of procedure for carrying out the mandate of Charter section 148, supra, for proper classification by the commission of positions which have been duly created and permanently established in the mode prescribed by charter, by annual appropriation ordinance of the board of supervisors, and annual budget and salary ordinance. See Charter secs. 69–78, Stats. 1931, pp. 3019, et seq.; sec. 143, p. 3062.

[4] The present record affords no support for the conclusion that the rule was misapplied, or that the positions to which plaintiffs were appointed were erroneously classified. On the contrary, the undisputed evidence shows that the positions were in fact temporary and were properly so classified. At the time of plaintiffs' appointment, prevailing economic conditions necessitating unusual relief to indigents and unemployed, had placed added work on the welfare department. The very nature of the situation made it difficult to determine whether this burden would be a continuing factor, requiring the permanent employment of more workers. The duties of the department were of great magnitude and were variable and unpredictable, depending upon conditions beyond the control of the city, and subject to economic changes and the laws of the state and federal government. The liberalizing of the social security law in 1937, making more people eligible to receive old age assistance greatly increased the work of the department, but there was some expectation that after the peak of the load had been carried, this branch of the work would decline. Later developments indicated that the need for additional workers would be a continuing one but it was not until the fiscal year 1939–1940 that conditions were considered such as to fix definitely the possibility of a permanency in this type of employment. By that time plaintiffs' eligibility had automatically terminated. During the period of their service, the work was justifiably handled on a temporary basis.

The salary ordinance adopted by the board of supervisors for the fiscal year 1936-1937, in the section devoted to the welfare department, definitely enumerated and provided funds (rule 15, sub. a, supra), for only three positions of general clerk stenographer. The 1937-1938 ordinance enumerated and provided for the same three positions, and also contained a further provision for fourteen general clerk stenographers at a maximum monthly salary of $150. The 1938–1939 ordinance provided a further increase of sixteen general clerk stenographers. It was stipulated that none of the plaintiffs was ever appointed to or occupied any of these enumerated positions, nor was the compensation received by them taken from appropriations for positions which were designated as permanent in character; it was paid in whole or in part from an appropriation made by the board of supervisors for the payment of salaries of so-called temporary employees.

The requisition of the appointing officer which resulted in plaintiffs' certification was one calling for temporary appointees, and as such plaintiffs accepted the appointments and re-appointments. During the entire period of their prolonged temporary service they were fully aware of their status, but made no effort, by proceeding in mandamus or otherwise, to test the character of their positions or secure a declaration of permanency. In fact, had the positions been permanent, they would not have been eligible for appointment to them because of the many candidates with higher rating on the civil service list. During the period in question at least two of the plaintiffs were given notice by the commission that they might apply for permanent positions at a salary of $100 a month, but they failed to respond. There is no showing that the commission acted other than in the highest good faith in dealing with them, or that any injustice or discrimination was practiced against them.

Plaintiffs rely strongly upon several cases which were decided prior to adoption of the present charter. Stats.1931, p. 3108, effective January 8, 1932; McGillicuddy v. Civil Service Comm., 133 Cal.App. 782, 24 P.2d 942; Powers v. Board of Public Works, 216 Cal. 546, 15 P.2d 156; Rodgers v. Board of Public Works, 208 Cal. 291, 281 P. 64. The civil service provisions of the new charter so altered those of the prior charter as to make these

cases of little value in determining the issues here presented. The distinction is noted in Doerr v. Civil Service Commission, 21 Cal.App.2d 173, at page 176, 68 P.2d 731.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, CARTER, and TRAYNOR, JJ., concurred.



18 Cal.2d 790

HOWLAND v. HOWLAND et al.

L. A. 16432, 17879.

Supreme Court of California.

Oct. 17, 1941.

Rehearing Denied Nov. 13, 1941.

1. Appeal and error ⇐916(2)

Where judgment roll, on defendants' appeal thereon, included an answer filed by plaintiff to codefendant's amended third defense and second cross-complaint, Supreme Court was bound to assume, in absence of showing to contrary, that answer was duly filed.

2. Pleading ⇐165

An answer to defendant's supplemental answer and pleading was not required of plaintiff, and allegations thereof were deemed controverted. Code Civ.Proc. § 462.

3. Trial ⇐396(3)

In suit against plaintiff's husband and his father to quiet title to realty, findings that a conveyance by husband to plaintiff did not lack consideration and that plaintiff did not exert coercion or threats against husband and that the father approved of conveyance were responsive to the pleadings.

4. Appeal and error ⇐907(3)

On appeal on judgment roll, Supreme Court was bound to presume that findings which were responsive to pleadings were supported by evidence introduced at trial.

5. Appeal and error ⇐907(3)

On defendants' appeal on judgment roll, Supreme Court was bound to assume that findings of fact contrary to controverted allegations of fact were based on sufficient evidence.

6. Appeal and error ⇐907(3)

Where trial court in quiet title suit expressly found that plaintiff's interest in land did not depend exclusively upon an instrument executed by plaintiff's husband, who was codefendant, whether instrument was insufficient as a conveyance because of uncertainty of description of land was not determinative of case on defendants' appeal on judgment roll.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Suit by Lotus Howland against Oliver F. Howland and others to quiet title to land, wherein defendant George D. Howland filed a cross-complaint. From a judgment for plaintiff and from an order of the trial court terminating proceedings on appeal, defendants George D. Howland and Annie E. Howland appeal on the judgment roll. A motion was made to dismiss the appeal.

Motion dismissed and judgment affirmed.

George D. Howland and Frank M. Benedict, both of Los Angeles, for appellants.

Glen Behymer and Reynolds & Painter, all of Los Angeles, for respondent.

SHENK, Justice.

The defendants, George D. Howland and Annie E. Howland, have appealed from a judgment for the plaintiff Lotus Howland in an action to quiet title to certain land situate in the county of Los Angeles. The same defendants also appealed from an order of the trial court terminating all proceedings on the appeal. The plaintiff moved to dismiss the appeal from the judgment. That motion was denied for the reason that it was premature, and the denial was qualified as without prejudice to renewal of the motion if the appeal from the order terminating proceedings for a record in the lower court should be decided adversely to the appellants. Howland v. Howland, 11 Cal.2d 20, 77 P.2d 475. The appeal from the order terminating proceedings was affirmed. Howland v. Howland, 42 Cal.App.2d 4, 108 P.2d 41. Another motion to dismiss the appeal from the judgment was made after the transcript was filed. That motion, also the appeal on the merits presented on the judgment roll alone, are now submitted for decision.

The plaintiff alleged ownership of a one-quarter interest in land which was particularly described. The defendants answered. The defendants' pleadings disclose that the defendant George D. How-

land is the father of the defendant Oliver F. Howland and that the plaintiff and Oliver F. Howland were married in June, 1928. It is alleged therein that George D. Howland had conveyed a one-half interest in the property to his son for the purpose of providing for his education; that an open account was kept between father and son of all amounts furnished by the father and all amounts repaid by the son, and that the conveyance was intended as security for the repayment of the balance; that the balance due from the son to the father was $9,609.65; that on June 16, 1930, the plaintiff procured a duly executed and acknowledged writing from Oliver F. Howland, which did not contain a particular description of the land, but which purported to convey to the plaintiff a one-half interest in the land conveyed to Oliver F. Howland by his father; that the same was without consideration and was obtained by force, coercion and threats of blackening the name of Oliver F. Howland; that the delivery of said writing was kept a secret from the defendant, George D. Howland.

The trial court found that the plaintiff was the owner and entitled to the possession of an undivided one-quarter interest in the property; that in 1911 the defendant, George D. Howland, conveyed the westerly fourteen acres of said land to Oliver F. Howland, and that in July, 1929, the father and son exchanged deeds so that the son became the owner of an undivided one-half interest in the property; that on June 16, 1930, Oliver F. Howland conveyed a one-fourth interest in the land to the plaintiff; that an open account was not kept between father and son, and that the sum of $9,609.65 was not due to the father from the son; that the father did not depend upon the property conveyed to his son as security for any balance that might be due from the son; that the son was possessed of unencumbered property of a market value far in excess of any moneys due to the father; that the conveyance to the plaintiff by Oliver F. Howland was not without consideration, but was prompted by the express desire of said defendant to provide for and care for the plaintiff; and that the plaintiff did not exert any coercion, menace, force or threats on the defendant, Oliver F. Howland; that the conveyance to the plaintiff was not made for the purpose of defrauding the defendant, George D. Howland. The court also found that George D. Howland had notice, knowledge and information concerning said conveyance long prior to the commencement of the action and since the month of November, 1932, and that he acquiesced in and approved of the transfer.

[1, 2] The appellants contend that the findings are contrary to admissions contained in the pleadings. This contention is based on the appellants' assumption that the plaintiff did not answer the "amended third defense and second cross-complaint" of the defendant, George D. Howland, and that her default was duly entered. The judgment roll shows the entry of the default, but it also includes an answer filed by the plaintiff to said amended third defense and second cross-complaint, and it must be assumed, in the absence of any showing to the contrary, that said answer was duly filed. In fact, the plaintiff states, and it is not now denied, that on due application and notice the trial court set aside the plaintiff's default. In this connection the appellants also assert that the "supplemental answer and pleading" of the defendant, George D. Howland, was not answered by the plaintiff, and that the allegations thereof should have been deemed admitted to be true. An answer to such a pleading was not required and the allegations thereof were deemed controverted. Sec. 462, Code of Civil Procedure.

[3, 4] The findings are responsive to the pleadings and on this kind of an appeal it must be presumed that they are supported by the evidence introduced at the trial.

[5] Basing their contention on alleged "facts admitted by the pleadings", the appellants also assert that a deed conveying real property of considerable value from the husband to the wife, without any consideration therefor, must be set aside where it is shown that the husband is insolvent. The trial court properly proceeded on the theory that the alleged admitted facts were not admitted, and it found contrary thereto. The allegations of fact on which the appellants rely were controverted, and it must be assumed that the findings of fact contrary thereto were based on sufficient evidence.

[6] Finally, the appellants contend that the instrument dated June 16, 1930, set forth in the answers of the defendants, and the description contained therein, are too indefinite and uncertain to have any legal effect as a conveyance of real prop-

erty. Again the appellants assert a fact contrary to the findings. The trial court found expressly that the right, title and interest of the plaintiff did not depend exclusively upon the writing referred to by the appellants. In view of that finding, the sufficiency or insufficiency of that document would not be determinative of this appeal.

The motion to dismiss the appeal is dismissed. The judgment is affirmed.

GIBSON, C. J., EDMONDS, CARTER, and TRAYNOR, JJ., and PULLEN, Justice pro tem., concurred.



EVANS, Building and Loan Com'r, v. SUPERIOR COURT OF LOS ANGELES COUNTY.

Civ. 13345.

District Court of Appeal, Second District, Division 1, California.

Oct. 16, 1941.

As Modified Nov. 3, 1941.

Rehearing Denied Nov. 12, 1941.

Hearing Granted Dec. 11, 1941.

1. Mandamus ⇐28, 72

Generally, mandate may be used to compel an inferior tribunal, board, or officer to exercise its discretion or judgment, but not to coerce discretion by directing the manner in which the discretion or judgment shall be exercised.

2. Mandamus ⇐28

If an inferior tribunal acts arbitrarily against vested rights granted by law, and therefore against the law itself, such tribunal has not strictly "abused its discretion", but in contemplation of law has not exercised discretion at all, and reviewing court will by mandate compel recognition of legal rights and conformity with law.

See Words and Phrases, Permanent Edition, for all other definitions of "Abuse of Discretion".

3. Mandamus ⇐7

Issuance or denial of writ of mandate is not altogether a matter of right, but rests to a considerable extent in discretion of the court to which application therefor is made, and conclusion should be reached which will promote justice.

4. Courts ⇐207(4)

In view of its discretion in granting or refusing writ of mandate, District Court of Appeal overruled demurrer, based on the rule that mandate cannot be used to prescribe the decision of an inferior tribunal, to petition for writ of mandate compelling superior court to set aside order denying motion to recall and quash a writ of execution, direct stay of execution, and declare the effect of a judgment.

5. Building and loan associations ⇐41(10)

Where action against building and loan association on investment certificates was begun more than 30 days before commissioner took possession of association's assets, and there was no judicial determination authorizing liquidation of the association, but statutory suit to enjoin the commissioner from further proceedings to compel him to return assets was still pending, association had not gone into "liquidation" and was not protected from execution issued upon the judgment on the investment certificates after commissioner took possession of assets. Gen.Laws 1937, Act 986, §§ 13.11, 13.12, 13.16.

See Words and Phrases, Permanent Edition, for all other definitions of "Liquidation".

6. Building and loan associations ⇐42(3)

Two separate and distinct processes are involved in intervention of building and loan commissioner when he determines to liquidate an association, namely, taking over control of the association, after which association may seek to enjoin him from liquidation proceedings and require him to return business, assets and property, and liquidation of association, which may be effected only when authorized by judicial decree. Gen.Laws 1937, Act 986, §§ 13.11, 13.12, 13.16.

7. Building and loan associations ⇐42(6)

While building and loan commissioner is merely in possession of the business of an association pursuant to statute, he may enjoin only writs of execution issued in actions commenced within 30 days prior to date of his taking possession. Gen.Laws 1937, Act 986, § 13.16.

8. Building and loan associations ⇐42(3)

The statutory prohibition against levy of attachment or execution or creation of any lien upon any property of building and loan

association arises only pending the process of liquidation when authorized by statute. Gen. Laws 1937, Act 986, § 13.16.

9. Building and loan associations ⇐42(3)

Until judicial approval of building and loan commissioner's action in taking over business, assets, and property of association, creditors' right of action against association remains exactly the same as if its business were being conducted in the usual and ordinary course, subject only to statutory 30-day stay against actions or attachments. Gen. Laws 1937, Act 986, §§ 13.11, 13.12, 13.16.

10. Partnership ⇐325(4)

The chancery court does not, by appointment of receiver, get such control of firm assets as to enable it to prevent firm's creditors from proceeding at law to judgment, execution, and levy upon the assets, since proceedings are within control of parties and suit may be continued up to decree of dissolution, after which creditors may be enjoined.

11. Building and loan associations ⇐42(3)

A building and loan association goes into "liquidation" only upon judicial determination in favor of building and loan commissioner in statutory injunction suit, and, until such determination, the association is not protected from suits of creditors nor from levy of executions obtained in actions commenced more than 30 days before commissioner took possession. Gen.Laws 1937, Act 986, §§ 13.11, 13.12, 13.16.

Petition by Ralph W. Evans, as Building and Loan Commissioner, against the Superior Court of Los Angeles County, for a writ of mandate to compel respondent court to set aside order recalling and quashing a writ of execution, directing stay of execution, and declaring the effect of a judgment.

Alternative writ discharged and peremptory writ denied.

Alan G. Campbell, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and Douglas De Coster, Deputy Co. Counsel, both of Los Angeles (Mathes & Sheppard and J. Stanley Mullin, all of Los Angeles, of counsel), for respondents.

WHITE, Justice.

Petitioner seeks by this writ of mandate to compel respondent court to set aside its order denying a motion for an order recalling and quashing a writ of execution, directing stay of execution and declaring the effect of a certain judgment.

A chronological review of the litigation which forms the background leading up to the pending petition for a writ of mandate may be thus epitomized: On May 23, 1936, one Terry and others were the owners of Fidelity definite term investment certificates issued by Pacific States Savings and Loan Company, a corporation (hereinafter referred to as "Pacific States"), in the principal amount of $12,086.89, and were also holders of Fidelity Participating certificates issued by Pacific States in the nominal face amount of $4,028.96. On the above-mentioned date the aforesaid certificates matured and became payable. Subsequent demands met with refusal of payment thereof. On September 30, 1937, Terry et al. filed an action (hereinafter referred to as the Terry action) against Pacific States to recover the principal and interest due on said Fidelity definite term certificates and to recover that portion of the nominal face amount of the participating certificates acknowledged by Pacific States to be due.

On June 12, 1939, judgment was rendered by respondent court in the Terry action in favor of the plaintiffs therein and against Pacific States for the sum of $15,696.71. Pursuant to section 674 of the Code of Civil Procedure, abstracts of the judgment were recorded with the county recorders of Los Angeles county, Alameda county, and the city and county of San Francisco, on August 18, October 18, and September 5, 1939, respectively. On August 10, 1939, a motion for a new trial was denied, and on August 17, 1939, notice of appeal was filed by Pacific States. No undertaking on appeal to stay the execution of the judgment was filed. On August 26, 1940, the Terry judgment was affirmed as modified by this court.

The writ of execution which is the subject of the instant mandamus proceeding was issued upon the judgment in the Terry action on August 23, 1939. On August 25, 1939, the sheriff of the city and county of San Francisco, pursuant to said writ of execution, levied upon all moneys, debts and credits due Pacific States from Wells Fargo Bank and Union Trust Company, Union Trust office and head office, San Francisco, and American Trust Company, savings account office and head office, San Francisco.

On March 4, 1939, petitioner herein, as building and loan commissioner of the state

of California, took possession of Pacific States pursuant to the provisions of section 13.11 of the Building and Loan Association Act of California (Stats.1931, p. 483; Deering's Gen. Laws, Act 986), which statute will be hereinafter referred to as the "act". On or about March 5, 1939, however, Pacific States applied to the Superior Court of the State of California, in and for the County of San Francisco, to enjoin further proceedings by the building and loan commissioner, this proceeding being brought pursuant to section 13.12 of the act. Said action is entitled, "Pacific States Savings and Loan Company, plaintiff v. Ralph W. Evans, individually and as Building and Loan Commissioner of the State of California, defendant", and is numbered 286711 in the records of said superior court. The court, after citing the commissioner to show cause why further proceedings should not be enjoined, commenced on March 20, 1939, to hear the allegations and proofs of the parties to determine the facts and whether upon the merits the application of Pacific States should be dismissed or whether the commissioner should be enjoined from further proceedings and the business, property and assets returned and surrendered to Pacific States by the commissioner. For the purpose of brevity and convenience, this proceeding will hereinafter be referred to as "the injunction proceeding". It is contended in the instant proceeding and not denied that such action is still pending, has not been determined, and that evidence therein is still being introduced.

On August 30, 1939, Pacific States filed in the Terry action a "petition to recall and quash execution" and procured a temporary restraining order enjoining the further enforcement of the writ of execution pending determination of that petition.

On October 30, 1939, the commissioner for the first time filed his "notice of determination to liquidate the business and affairs of Pacific States", which notice he filed pursuant to section 13.16 of the act.

On November 8, 1939, respondent court denied the petition of Pacific States to recall and quash execution. Two days later the commissioner filed in respondent court a separate collateral suit in equity to enjoin the enforcement of the writ of execution, said action being directed against Earl S. Terry and Russell B. Mullens, as trustees, etc., and Daniel C. Murphy, sheriff of the city and county of San Francisco. This action is numbered 446479 in the records of said court. Further enforcement of the writ of execution was restrained pending the trial and determination of the last-mentioned action. On March 16, 1940, the action came on regularly for trial in the Superior Court of Los Angeles County, and at the conclusion of such trial the judge indicated his intention to render judgment for the plaintiff, but up to this date no such judgment has been formally rendered or entered. On August 2, 1941, the commissioner filed in the Terry action his "motion for order recalling and quashing execution, directing stay of execution and declaring the effect of the judgment herein". Such motion came on for hearing on August 15, 1941, and respondent court made its order denying the motion in question. On September 4, 1941, the commissioner filed in this court the petition for a writ of mandate which is now before us.

[1-4] Respondent court appeared by demurrer and answer, the latter of which does not controvert the facts hereinbefore narrated. By its demurrer respondent court urges that the petition for the writ does not state facts sufficient to constitute a cause of action, for the asserted reason that the writ of mandate cannot be used to prescribe the decision of an inferior tribunal, but only to compel the performance of a ministerial act or the compliance with a plain duty ordained by statute. We do not question the general rule as being that while mandate may be used to compel an inferior tribunal, board or officer to exercise its discretion or judgment, it may not be resorted to as a means of coercing such board or officer or inferior tribunal's discretion by directing the manner in which such discretion or judgment shall be exercised. However, it has been uniformly held that if an inferior tribunal acts arbitrarily against vested rights granted by law, and therefore against the law itself, such inferior tribunal has not strictly, as is frequently said, "abused its discretion"—a term which is responsible for some confusion of ideas on this subject —, but, in contemplation of law, under those circumstances the inferior tribunal has not exercised its discretion at all, but has sought to substitute its arbitrary determination in opposition to legally guaranteed rights. In such cases a reviewing court will by mandate compel a recognition by the officer, board, commission or inferior tribunal of these legal rights and compel conformity with the law. Furthermore, the issuance or denial of a writ of mandate is not altogether a matter of right, and as was said by our Supreme Court in the recent

case of Betty v. Superior Court, 18 Cal.2d —, 116 P.2d 947, 949, the determination to grant or refuse such a writ "rests to a considerable extent, in the discretion of the court to which application therefor is made" (citing cases) "and a conclusion should be reached which will promote justice". If, therefore, in the instant case the petitioner has shown that respondent court by denying the aforesaid motion has refused to perform a clear legal duty not involving the exercise of any discretion, then the writ should issue. We have therefore concluded to overrule the demurrer.

[5] Our consideration of the questions presented upon the merits of this controversy leads us to believe that a peremptory writ of mandate should be denied, for the reason that respondent court properly denied petitioner's motion to recall and quash execution, direct stay of execution and declare the effect of judgment. The motion with which we are here concerned was made upon the grounds "that ever since March 4, 1939, the property, business and assets of Pacific States Savings and Loan Company, hereinafter sometimes referred to as 'Pacific States', have been, and they now are in the possession of the Building and Loan Commissioner of this state, pursuant to the authority vested in him by the Building and Loan Association Act; that the said Building and Loan Commissioner determined to liquidate Pacific States; that he did, on October 30, 1939, file with the Superior Court of the State of California, in and for the City and County of San Francisco, written notice of his determination to liquidate Pacific States; that no attachment was levied or lien created herein within thirty days next preceding the taking of possession of Pacific States by the said Commissioner, and that the process of liquidation of Pacific States has not been completed and is still pending."

Section 13.11 of the act empowers the commissioner, when he has determined the existence of certain facts in connection with the operation of any building and loan association, to forthwith demand *and take possession* of the property, business and assets of such association and to retain such possession until said association shall, with the consent of the commissioner resume business, or until its affairs be liquidated. In the instant case the commissioner, acting under section 13.11, took possession of Pacific States on March 4, 1939.

Section 13.12 of the act provides that whenever the commissioner in the exercise of his powers takes possession of the assets, business and property of an association, and the latter deems itself aggrieved thereby, it may within thirty days after such taking apply to the superior court of the county wherein is located its principal place of business to enjoin further proceedings, and such court, after citing the commissioner to show cause why further proceedings upon his part should not be enjoined, and after hearing the allegations and proofs of the parties, and determining the facts, may upon the merits dismiss such application or enjoin the commissioner from further proceedings and direct him to surrender such business, property and assets to the association. In connection with the petition now before us, it should be noted that such an injunction proceeding was regularly instituted and remains undecided and pending in the superior court of the city and county of San Francisco, the object of which injunction proceeding is to test the validity and justification of the commissioner's action in taking over Pacific States. Should the superior court in the last-mentioned proceeding decide that the taking over by the commissioner was unwarranted, then the latter must return the business, property and assets of the association to it and will be enjoined from proceeding to liquidate the affairs of such association.

Section 13.16 of the act prescribes the powers and duties of the commissioner while acting as liquidator in the event liquidation is authorized by judicial decree and determined upon by the commissioner. In the eighth paragraph of section 13.16 it is provided that "the determination by the commissioner to liquidate any association, evidenced by filing written notice of such determination with the court, shall operate to stay or dissolve any or all actions or attachments instituted or levied within thirty days next preceding the taking of possession of such association by the commissioner, and pending the process of liquidation as herein provided no attachment or execution shall be levied or lien created upon any of the property of such association".

[6-9] To us it is evident from the provisions of the law herein quoted that there are two separate and distinct processes involved in the intervention of the commissioner in the affairs of a building and loan association when he determines to liquidate one. First, he may take over control of the

association, whereupon such association may seek to enjoin him from liquidation proceedings and require him to return its business, assets and property. Second, he may liquidate the association only when, by judicial decree, he is authorized so to do. A mere reading of the eighth paragraph of section 13.16 makes it clear that while the commissioner is merely "in possession" of the business of the association he may enjoin only those writs of execution issued in actions commenced within thirty days prior to the date of his taking possession. Concededly, the Terry action does not come within this provision of the statute. The prohibition of the statute against the levy of attachment or execution or the creation of any lien upon any of the property of the association arises and exists only pending the process of "liquidation", when the same is authorized by the statute. Manifestly, in the case of Pacific States the commissioner has done nothing toward liquidation, nor was he authorized to "liquidate" the affairs of the association until determination of the judicial proceedings contemplated by the Building and Loan Association Act. The holders of the judgment in the Terry action being creditors of the association and being without the pale of the thirty-day prohibition period aforesaid, their right to execution upon the judgment obtained by them against the association remains unimpaired and unchanged until there is a judicial determination of the proceedings instituted by the association challenging the validity and justification of the taking over of its business by the commissioner. Until Judicial approval of his action in taking over the business, assets and property of the association is obtained by the commissioner, the right of action against the association by creditors remains exactly the same as if the association's business were being conducted by it in the usual and ordinary course, subject only to the thirty-day stay against actions or attachments heretofore set forth.

[10] We find authority for our holding in this regard in the interpretation placed by the Supreme Court on the former California Bank Act (Stats.1895, p. 175), which provided for a procedure identical with the procedure set forth in the present Building and Loan Association Act, save and except that the injunction suit under the Bank Act was brought by the attorney general instead of by the building and loan association. The injunction suit under the Bank Act, however, was for the same purpose as the similar proceeding authorized by the Building and Loan Association Act, viz., to determine whether the taking of possession was justified and liquidation should be allowed. That a creditor was entitled to pursue his claim to judgment and execution as well during the period that the banking institution was in "possession" of the commissioner and prior to a judicial declaration as provided in the act, was the holding in Lanz v. Fresno Loan & Savings Bank, 125 Cal. 456, 58 P. 63; and Argues v. Union Savings Bank, 133 Cal. 139, 65 P. 307. See, also, West Virginia Utilities Co. v. Dura Glass Mfg. Co., 99 W.Va. 193, 128 S.E. 86; Britten v. Sheridan Oil Co., 205 Iowa 147, 217 N.W. 800; Marshall v. Wabash R. R., 201 Mich. 167, 167 N.W. 19, 22, 8 A.L.R. 435; Johnson v. Garner, D.C., 233 F. 756, 777; Waggy v. Jane Lew Lbr. Co., 69 W.Va. 666, 72 S.E. 778. Clark on Receivers, 2d Ed., 1929, p. 836, states the rule as follows: "The chancery court does not by the appointment of a receiver get such control of the assets of the partnership as to enable it to prevent the firm's creditors from proceeding at law to judgment and execution and levy upon the assets. * * * (Citing cases) * * * The reason for such a ruling is that, up to the decree of dissolution, the proceedings were within the control of the parties and suit might at any time be discontinued. After the decree of dissolution, creditors may be enjoined because then the court provides a mode of collecting the claims."

[11] We therefore hold that only upon judicial determination by the Superior Court in favor of the commissioner in the aforesaid injunction suit prescribed by the statute, does the building and loan association go into liquidation, and that until such judicial determination throwing the association into liquidation at the discretion and upon the order of the commissioner, the association is not protected from the suits of creditors nor from the levy of executions obtained as in the Terry case with which we are here concerned.

The demurrer interposed by respondent court is overruled. Upon a consideration of the merits of the cause as presented by the petition and answer thereto, and for the reasons hereinbefore stated, the alternative writ heretofore issued is discharged and the peremptory writ prayed for is denied.

YORK, P. J., and DORAN, J., concurred.

47 Cal.App.2d 341

PEOPLE v. FREMONT.

Cr. 1764.

District Court of Appeal, Third District, California.

Oct. 15, 1941.

Hearing Denied Nov. 13, 1941.

1. Indictment and Information ⇐87(2)

An indictment charging statutory rape was not fatally defective for failure to allege the exact dates on which defendant's acts occurred. Pen.Code, § 261, subd. 1; § 955.

2. Indictment and Information ⇐132(2, 3)

Under statute, the prosecution is not required to elect between different offenses or counts set forth in indictment or information, but defendant may be convicted of any number of offenses charged. Pen.Code, § 954.

3. Criminal law ⇐678(2)

Where indictment charged different offenses in different counts, defendant could not compel prosecution to make an election with respect to acts upon which it would rely for conviction before any evidence was presented. Pen.Code, § 954.

4. Criminal law ⇐678(1)

Under rule respecting election where indictment charges a single act and two or more acts are disclosed by evidence, the right to compel an election arises when it appears from the people's opening statement or the evidence that more acts have been or will be testified to than have been charged.

5. Criminal law ⇐678(2), 1168(2)

Where indictment charged different offenses in different counts, and defendant's motion to compel prosecution to elect the alleged acts upon which it would rely for conviction was made before opening statement for prosecution and before introduction of evidence, motion was made "prematurely", and failure to compel an election was not prejudicial, especially in view of defendant's failure to renew motion and statements of district attorney respecting election. Pen. Code, § 954.

See Words and Phrases, Permanent Edition, for all other definitions of "Premature".

6. Criminal law ⇐1141(2)

Where, on appeal, defendant conceded that evidence was sufficient, if worthy of belief, to sustain conviction, it was incumbent upon defendant to convince District Court of Appeal that no person of ordinary intelligence could have believed testimony of witnesses who appeared against defendant.

7. Criminal law ⇐1159(3)

The District Court of Appeal is bound by a verdict based on conflicting evidence.

8. Criminal law ⇐1159(4)

A question at law is presented which authorizes an appellate court in setting aside a verdict finding defendant guilty if testimony relied upon by prosecution is apparently so improbable or false as to be incredible and to amount to no evidence, and, if testimony is of such character, the court is justified in assuming that verdict was result of passion or prejudice.

9. Criminal law ⇐1159(4)

To authorize a reversal of conviction under rule permitting an appellate court to set aside a verdict finding defendant guilty if testimony relied upon by prosecution is apparently so improbable as to be incredible and to amount to no evidence, the improbability must plainly appear.

10. Criminal law ⇐1159(4)

Conclusions of a jury will be overruled on appeal from conviction only where uncorroborated testimony of complaining witness is so obviously and so inherently improbable as to leave no recourse, without self-stultification, except to reverse judgment.

11. Criminal law ⇐1159(4)

The mere fact that there are contradictions and inconsistencies in testimony, or that truth of a witness' testimony is open to suspicion, does not render such testimony "inherently improbable" within rule authorizing an appellate court to set aside a verdict finding defendant guilty.

See Words and Phrases, Permanent Edition, for all other definitions of "Inherently Improbable".

12. Criminal law ⇐1159(4)

Inconsistencies in testimony, and whether inconsistencies are such as to justify repudiation of witness' testimony in its entirety, are for the jury.

13. Criminal law ⇐1159(4)

Under rule authorizing an appellate court to set aside a verdict finding defendant guilty if testimony relied upon by prosecution is apparently so improbable or false

as to be incredible and to amount to no evidence, the test is, not whether witnesses against defendant are truthful, but whether it can be said that testimony in support of verdict is inherently untrue.

14. Criminal law ⇐1159(4)

Under rule authorizing an appellate court to set aside a verdict finding defendant guilty if testimony relied upon by prosecution is apparently so improbable or false as to be incredible and to amount to no evidence, testimony is not "inherently improbable" within rule merely because it is unusual, and a statement, to bear upon its face the brand of improbability, must involve a claim that something has been done that it would not seem possible could be done under circumstances.

15. Criminal law ⇐1159(4)

That witness for prosecution apparently was able to testify to things which would be injurious to defendant but remembered nothing else was for the jury's consideration and should have been urged in final argument by defendant.

16. Criminal law ⇐1159(4)

In prosecution for statutory rape, testimony of prosecuting witnesses was not so inherently improbable as to be unworthy of belief or show that verdict finding defendant guilty was result of passion or prejudice by jury. Pen.Code, § 261, subd. 1.

17. Rape ⇐49(1)

Failure of prosecuting witness to make a complaint is evidence against a claim of unwillingness, as regards prosecution for rape, but it is not necessarily conclusive.

18. Rape ⇐13

Want of consent is not an element of "statutory rape". Pen.Code, § 261, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Statutory Rape".

19. Rape ⇐52(1)

In prosecution for statutory rape, the fact that prosecuting witnesses failed to make complaint respecting defendant's acts had little weight or relevancy although such fact could be considered by jury in connection with credibility of witnesses. Pen.Code, § 261, subd. 1.

20. Criminal law ⇐1178

Where defendant appealed from judgment and order denying motion for new trial, and order was not mentioned in defendant's briefs, District Court of Appeal would assume that defendant abandoned order as grounds for appeal.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Raleigh M. Fremont was convicted of statutory rape, and he appeals.

Affirmed.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

An indictment was found against appellant, which consisted of three charges of statutory rape. For obvious reasons, the real names of the prosecuting witnesses do not appear in this opinion. Three of said charges were alleged to have been committed upon Jane Doe; two of said charges upon Elsie Roe; five of said charges upon Mary Black; and five charges of violation of section 288 of the Penal Code in connection with the person of said Mary Black. The jury found him guilty upon all charges of rape except count IV, being one of the offenses involving Elsie Roe. He was found not guilty upon said count IV, and also upon all charges of violation of said section 288. His motions for arrest of judgment and new trial were denied, and he was thereupon sentenced to state prison upon three counts which the judgment provided should run consecutively, and as to the remainder of the charges, the terms should run concurrently. The appeal is taken from the order denying a new trial and the judgment.

The trial of the action consumed sixteen days, and the record thereof is spread over fourteen hundred pages of transcript.

It is first contended by appellant that "the indictment under which defendant was tried, and each and every count thereof, is fatally defective, and fails to charge a public offense or offenses". More specifically, it is urged that "the time when each or any of said alleged acts of rape and lewd and lascivious conduct is alleged to have occurred is not stated, nor can said time be ascertained from said indictment, nor from any count thereof". Section 955 of the Penal Code reads as follows: "The precise time at which the offense was committed need not be stated in the indictment or

information, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense."

It is conceded by appellant that the time is not a material ingredient in the offense. In connection with this point counsel for appellant made the following statement in open court, at the commencement of the trial: "There were two cases I believe which were cited by Mr. McPherson, and I concede that they were the law of the case, in which the expression was used by the Appellate and Supreme Court, that where the indictment alleges that the offense was committed within a certain period of time, and that was within the limitation prescribed by law, which within the extreme situation would be three years, that as far as the demurrer was concerned, or the motion to quash, or the motion to dismiss, it would not lie because of the fact that in cases involving a crime of rape or lewd and lascivious conduct particularly, that the matter of time in the indictment or information was not entirely material and was not subject to demurrer;"

[1] Thus counsel practically concedes that there is little or no merit in the demurrer. We are satisfied that the indictment, in the matter of charging the time of the commission of the offense, complies substantially with the section quoted, and that the demurrer was properly overruled.

It is next urged by appellant that: "The District Attorney failed to elect the specific acts upon which he relied for a conviction of defendant on each of the fifteen counts of the indictment, and the trial court failed to instruct the jury on the doctrine of election and their duties in that regard." At the commencement of the trial, and in open court, appellant moved for an order directing the district attorney to "elect on what specific date and time he relies for a conviction on counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of the Indictment * * *". Count 15 named a specific date; the dates named in the other counts are as follows: Count I—"in the month of June, 1939"; count II—"in the month of June, 1939, and subsequent to the time referred to in Count I"; count III—"in the month of June, 1939, and subsequent to the time referred to in Counts I and II"; count IV—"in the month of April, 1938"; count V—"in the month of May, 1938"; count VI—"on and between the dates of July 4, 1939, and March 24, 1940"; count VII—"on and between the dates of July 4, 1939, and March 24, 1940, at a time subsequent to the time referred to in Count VI"; count VIII—"on and between the dates of July 4, 1939, and March 24, 1940, at a time subsequent to the time referred to in Counts VI and VII"; count IX—"on and between the dates of July 4, 1939, and March 24, 1940, at a time subsequent to the time referred to in Counts VI, VII and VIII"; count X—"on and between the dates of July 4, 1939, and March 24, 1940, at a time subsequent to the time referred to in Counts VI, VII, VIII and IX"; count XI—"on and between the dates of July 4, 1939, and March 24, 1940"; count XII—"on and between the dates of July 4, 1939, and March 24, 1940, at a time subsequent to the time referred to in Count XI"; count XIII—"on and between the dates of July 4, 1939, and March 24, 1940, at a time subsequent to the time referred to in Counts XI and XII"; count XIV—"on and between the dates of July 4, 1939, and March 24, 1940, at a time subsequent to the time referred to in Counts XI, XII and XIII". The district attorney thereupon replied: "We have no objection to making an election at this time; we rely upon a date certain; speaking of Count No. 1, on a date certain in June of 1939; as to Count No. 2, rely upon a date certain in June of 1939; Count 3, we rely upon a date certain in June of 1939; in Count 4, we rely upon a date certain in April of 1938; in Count 5, we rely upon a date certain in May of 1938; in Count 6, we rely upon a date certain between the days of July 4th, 1939, and March 24th of 1940; the same is true of Count 7, Count 8, Count 9, Count 10, Count 11, Count 12 and Count 13 and Count 14 and Count 15."

[2, 3] In criminal procedure there were formerly two elections which the court might require the People to make: one, between two or more counts of an indictment or information, and the other, arising out of proof, where the indictment charges but a single act and two or more are disclosed by the evidence. The former right of election existed prior to the enactment of our codes. Under section 954 of the Penal Code, "the prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged". As stated in 14 Cal.Jur. page 69, section 53: "If it is legally incumbent upon the People to make an election before

any evidence is presented, there would be no efficacy in charging different offenses."

[4, 5] Appellant's right of election therefore cannot be predicated upon the first method mentioned. As to the second method, the right to compel an election arises when it appears from the People's opening statement, or the evidence, or otherwise, that more acts have been, or will be testified to than have been charged. The motion to compel an election was made prior to any of such occasions. It was not thereafter renewed. At the time it was made, only the information was before the court. There was therefore nothing before the court upon which the motion could be predicated. The motion was made prematurely. Even if it were made at the proper time, we can see no prejudice resulting from the failure of the court to compel an election. Furthermore, the statement volunteered by the district attorney was sufficient under the circumstances.

[6, 7] The second contention of appellant is that the evidence is insufficient to support the verdict, in that "the evidence of the prosecuting witnesses was so inherently improbable and unworthy of belief as to challenge one's credulity". In other words, appellant tacitly concedes that the evidence in the record is sufficient, *if it was worthy of belief*. It is incumbent upon appellant to convince this court that no person of ordinary and average intelligence could have believed the testimony of one or more of the three girls who appeared against him. Otherwise, the case would merely present the ordinary situation where there is a conflict in the evidence, and we would be bound by the verdict.

Appellant is a man sixty-one years of age. He was engaged in mining a number of years prior to the trial. His residence was at Yankee Hill, Butte county. Taking up the charges in the order in which they appear in the indictment, we now consider the first three counts, on which defendant was found guilty. Jane Doe testified that she was sixteen years of age. Her father was dead and she lived with her mother and four other children, two boys and two other girls. She was seventeen years of age just before the trial. She had known appellant about a year, and had met him through a schoolmate by the name of Mary Walker. He came over to see her in his tan-colored Pontiac automobile. After driving the two girls to Chico to see a show, he took Mary home first. At about midnight he was driving along the road with Jane, when he stopped. He then proceeded, while in the car, to remove her pants and accomplished an act of sexual intercourse. After the act was completed, appellant injected from a tube a jelly-like substance, which, he assured the girl, would prevent any harm. On the following night appellant again had intercourse with Jane Doe under practically the same circumstances. She testified that the tube mentioned was taken from a compartment of his car. Thereafter, and from July, 1939, to March, 1940, the witness testified that appellant accomplished some thirty-five similar acts. During that time appellant gave her a number of gifts, such as sweaters, candy and money.

Taking up the next two counts—IV and V—Elsie Roe was seventeen years of age, and lived with her family in Thermalito, Butte county. One night (as she testified), appellant met her at a dance and asked her to go to a show. He later took the family to a show, and in April, 1938, started regularly to take Elsie out. In April, 1938, she went to a mine with appellant. He took her into a cabin in which there was a daybed. There he started loving her, put her on the bed and had sexual intercourse with her. After he was through he went through the same procedure as with Jane Doe. He procured a tube and made an injection in the same manner, telling her that "he did not want me to have a baby, and that would prevent it". In May, 1938, Elsie, while riding with appellant in his car, drank liquor from a flask. She testified that she "passed out", and when she regained consciousness, appellant was having intercourse with her. She was intoxicated, and made no objection. After it was over, appellant went through the same proceeding with his tube. Appellant presented her with money, dresses, a watch and a ring. Appellant offered in evidence a certain letter written by Elsie to her own father, which accused him of having committed incest upon her since she was 11½ years of age. She testified that she wrote this letter to her father under the guidance and command of appellant, who wished to have this done in order to clear himself—that the date of writing this letter to her father was June 24, 1938, and it was written in an apple orchard. "Q. Calling your attention to the 24th of June, 1938, are you able to refresh your recollection as to where you were and what you did on that day? A. Yes, Mr. Fremont and I started to Para-

dise on that day, and that is the day we stopped at the apple orchard, and he made me write that letter to my father that I testified to yesterday; and it was on that day that he went up—after he had told me what to write and wanted me to copy the letter—while he was gone up to get Dorothy ———. That was the day he went after Dorothy ——— and I wrote the letter to my father." She further testified that there were numerous nude swimming parties which were engaged in by herself and one Dorothy ——— and others, at which appellant was present, but during which appellant did not disrobe. That appellant took nude pictures of the witness and her friend. It should be noted here that in a letter to Elsie the appellant threatened to send these nude pictures to her father if she did anything further about the investigation of appellant. This, we take it, is substantial corroboration of guilt. In this letter appellant also demanded the return of all his presents, claiming that Elsie was turning against him. Witness Williams, who worked on appellant's automobile at various times, testified that he occasionally cleaned out the pockets, and found therein a package of Kotex, a bottle of Listerine and a tube of Certain. The latter was identified by other witnesses as a jelly-like substance, which appellant always described as a contraceptive.

A physician testified in May, 1940, that he had examined all three girls, and that the hymen of each had been ruptured. He fixed the time of rupture, in respect to Mary Black, at from two months to a year prior to his examination. As to the two older girls, he testified that they had the same development as that of a married woman, indicating numerous acts of intercourse.

The third girl mentioned in the indictment is Mary Black, nine years of age, a pupil in the fourth grade, and a sister of Jane. She testified to six acts of intercourse with appellant, all committed while she was in his automobile. Appellant took her out in his automobile numerous times, and gave her clothes and candy. She testified to the use by appellant of a tube, in the same manner as the other two complaining witnesses. Appellant told her not to tell anyone.

[8-14] Is the evidence of the prosecution so palpably false and incredible that it cannot afford a basis for the verdict? The general rule governing the situation is stated in 8 Cal.Jur., 590, section 582, as follows: "A question at law is presented which authorizes an appellate court in setting aside a verdict, if the testimony relied upon by the prosecution is apparently so improbable or false as to be incredible and to amount to no evidence at all. If it is of this character, the court is justified in assuming that the verdict obtained was the result of passion or prejudice rather than of a calm and dispassionate consideration of the evidence. To authorize a reversal under this rule, the improbability must appear very plainly. It has been said that the conclusions of the jury will be overruled only where the uncorroborated testimony of the complaining witness is so obviously and so inherently improbable as to leave no recourse, without self-stultification, except to reverse the judgment. The mere fact that there are contradictions and inconsistencies in the testimony of a witness, or that the truth of his evidence is open to suspicion, does not render it inherently improbable within the meaning of the rule. It is for the jury to consider such inconsistencies and determine whether they were such as to justify the repudiation of the testimony of the witness in its entirety. The test is not whether the witness is truthful, but whether it can be said the testimony in support of the verdict is inherently untrue. Nor is testimony inherently improbable merely because it is unusual or out of the ordinary. A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable, per se, must involve a claim that something has been done that it would not seem possible could be done under the circumstances described."

Appellant first takes up the case of Mary Black. He makes the serious charge that the testimony "not only shows that she completely changes her story as testified to before the Grand Jury, but clearly, convincingly and unerringly pointed to a situation of a young girl efficiently coached by someone to accuse the defendant of many heinous offenses against this young girl in order to destroy him forever". We have examined the portion of the record relied upon by appellant. We find nothing but the ordinary confusion in the mind of a nine-year-old child resulting from several days of one of the most severe and searching cross-examinations that have come under our observation. True, the child could not, at times, give exact dates, nor could

she define many of the words used by counsel on both sides. And yet, upon the salient facts, she seldom faltered or contradicted herself.

[15] Appellant next attacks the testimony of Jane Doe. He contends that the witness denied her own handwriting on a postcard. He points out her "excellent recital of things that would be injurious to defendant, but remembering nothing else". Such matters were for the consideration of the jury, and should properly be urged in the final argument. We cannot say that the entire testimony is unworthy of belief.

The last witness was Elsie Roe. The chief attack in this case is made against the character of the prosecutrix. The evidence shows that she had made charges of illicit relations between herself and her father, and she admitted on the witness stand that they were mere fabrications. If we had been upon the jury we doubt if we would have accepted the word of this witness. And yet we cannot say that her story is inherently improbable and utterly unworthy of any credence whatever.

Appellant took the stand in his own behalf and denied all the charges, stating that he always treated the three girls as his own daughters.

[16] Considering the record as a whole, we find a striking similarity in the method of approach upon the part of appellant in each case, and almost identical technique thereafter. The testimony of the garage attendant as to the finding of the various articles in the pocket of appellant's car, corroborates the story of each prosecuting witness. There are not only numerous acts, but they were committed upon three different girls. It is hardly conceivable that all three were deliberately falsifying. No charge is made that there is any evidence of a conspiracy. Neither is there any substantial evidence of a motive upon the part of any girl to avenge herself. Nor does it appear that there was any malice which would prompt a girl to fabricate such facts. It is true that a charge of this character is apt to arouse, in the minds of the jurors, intense indignation against the defendant, and that this might lead, even though the evidence is legally insufficient or inherently improbable, to a verdict based upon passion or prejudice. People v. Harden, 24 Cal.App. 522, 141 P. 1075. We do not, however, regard the case in that category. There is no sufficient showing that the jury arrived at their verdicts in any manner other than by a calm and dispassionate consideration of the evidence.

[17-19] Appellant points out certain facts which he states show the falsity of the account given by each complaining witness. He relies strongly upon the failure of any of them to make a complaint. The evidence strongly indicates that they made no objection to the acts of appellant. The jury may reasonably have so found. The charge is that of statutory rape, under the provisions of section 261, subdivision 1 of the Penal Code. It is true that failure to make a complaint is strong evidence against a claim of unwillingness, but it is not necessarily conclusive. 22 Cal.Jur. p. 385, sec. 32. Furthermore, the rule is predicated upon cases where rape by force and violence is charged. "It is natural that a woman violently assaulted and outraged should, at the earliest moment practicable, make *complaint of her injury,* and her omission to do so, * * * would be regarded as strong evidence against her claim that she was an unwilling victim." People v. Wilmot, 139 Cal. 103-105, 72 P. 838, 839. Want of consent is not an element in the crime charged. 22 Cal.Jur. p. 375, sec. 22. Hence it follows that failure to make complaint has little weight or relevancy in a case of this character, although it is a fact which the jury may consider in connection with the credibility of the witness.

We do not deem it necessary to discuss the many cases cited by appellant. They all vary as to the facts, and are of no particular value as a precedent, except upon the legal principles laid down in each. As to appellant's statement of those principles, there can be no issue. Our summary of the law pertaining to this second contention, found in 8 Cal.Jur. page 590, section 582, appears in his brief under the designation of the "general rule".

[20] Although defendant has appealed both from the judgment and order denying motion for new trial we find the latter ground is not mentioned in his briefs, and assume that he virtually abandoned that ground on this appeal.

The judgment and order are affirmed.

47 Cal.App.2d 308

WINSETTE v. WINSETTE.

Civ. 13148.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1941.

1. Bastards ⇐3

The presumption that one born in wedlock is the legitimate issue of the mother's husband is not conclusive. Civ.Code, §§ 193, 194.

2. Bastards ⇐3

The presumption of legitimacy of a child born in lawful wedlock can be disputed only by husband or wife, or by the descendant of one or both of them. Civ.Code, § 195.

3. Bastards ⇐6

In action to establish that defendant was plaintiff's father, neither the presumption of legitimacy arising from birth in lawful wedlock nor defendant's testimony was conclusive upon trial court in face of contradictory proof. Civ.Code, §§ 193–195.

4. Appeal and error ⇐907(2)

In absence of record on defendant's appeal, District Court of Appeal was bound to assume that plaintiff introduced competent evidence in support of trial court's finding in her favor.

5. Trial ⇐388(4)

Where evidence respecting an issue was uncontradicted, a finding upon such evidence was unnecessary.

6. Appeal and error ⇐1071(6)

In action to establish that defendant was plaintiff's father, a finding that during certain months plaintiff's mother had no sexual intercourse with her spouse was, in effect, a finding adverse to defendant's affirmative defense alleging that mother was the wife of a third party with whom she connubially consorted during period while she was having intercourse with defendant, and hence failure to make a finding on affirmative defense was not reversible error. Civ. Code, §§ 193–195.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Mercedes Yolanda Winsette against Frederick Winsette to establish that defendant was plaintiff's father. From an adverse judgment, defendant appeals.

Affirmed.

C. B. Conlin and L. J. Seay, both of Los Angeles, for appellant.

Edward J. Owen and Edwin F. Franke, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

This appeal is upon the judgment roll.

Having attained to the age of eighteen months, plaintiff, through the guardianship of her mother, Natalie Fernandez, sought by this action to establish the fatherhood of defendant.

The complaint alleges, and the court has determined that during the period of about four and one-half months following January 22, 1938, Natalie "at various and sundry times" had sexual intercourse with defendant and with no other man; that, as a result of such intercourse, Natalie gave birth to plaintiff on December 13, 1938; that defendant is plaintiff's father although he was never the husband of Natalie. The answer denies all the allegations of the complaint and *affirmatively declares that during the period of Natalie's immoral errancy, she was the wife of one Mike Fernandez with whom she connubially consorted.*

Defendant demands a reversal of the judgment upon the grounds that the court failed to make a finding upon his affirmative defense and that plaintiff having been born in wedlock is presumed to be the legitimate issue of the mother's husband. Civ. Code, secs. 193, 194.

[1, 2] There are three answers to this contention: (1) Such presumption is not conclusive; (2) the presumption of legitimacy of a child can be disputed only by the husband or wife or by the descendant of one or both of them (Civ.Code, sec. 195); (3) the court found that Natalie "had no sexual relations with any person other than defendant" during the period of her illicit amours with him.

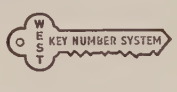
[3-5] Defendant had the benefit of the presumptions (Civ.Code, secs. 193, 194) as well as his own testimony. But neither was conclusive upon the trial court in the face of contradictory proof. In the absence of the record, we must assume that plaintiff introduced competent evidence in support of the court's finding. If the mother

had no sexual commerce with her legal husband during the season of her abode with defendant, then the alleged affirmative defense fails with its utterance. Obviously, no proof was offered of Natalie's cohabitation with her former spouse. From this it follows that a finding upon plaintiff's uncontradicted evidence was unnecessary. Cordanyo v. Kelsey, 28 Cal.App. 9, 14, 151 P. 391, 398.

[6] The facts established are such that no finding in support of the affirmative defense could have been made. That issue is so utterly irreconcilable with the fact that, during the months mentioned, Natalie had no sexual intercourse with her spouse that it is substantially a finding adverse to defendant's affirmative defense. Bell v. Adams, 150 Cal. 772, 90 P. 118; Eastman v. Piper, 68 Cal.App. 554, 569, 229 P. 1002.

The judgment is affirmed.

WOOD and McCOMB, JJ., concurred in the judgment.



47 Cal.App.2d 275

COATES v. MAGUIRE OIL & REFINING CORPORATION et al.

Civ. 13295.

District Court of Appeal, Second District, Division 2, California.

Oct. 10, 1941.

Rehearing Denied Nov. 7, 1941.

Hearing Denied Dec. 5, 1941.

1. Bankruptcy ⇐36

An order of bankruptcy referee, having jurisdiction of estate of bankrupt mortgagee, made upon stipulation between bankruptcy trustee and mortgagor, without notice to mortgagor's creditors, extending term of agreement, secured by chattel mortgage, of mortgagor to purchase crude oil, was inadmissible in action by bankruptcy referee to foreclose the chattel mortgage for purpose of showing extension of lien of chattel mortgage, where state, which was claiming tax lien superior to the chattel mortgage, objected to the introduction thereof, since the order was not binding upon the state. St. 1923, p. 572, § 4, as amended by St.1931, p. 109.

2. Bankruptcy ⇐36

Order of bankruptcy referee, having jurisdiction of estate of bankrupt mortgagee, made upon stipulation between bankruptcy trustee and mortgagor, without notice to mortgagor's creditors extending term of agreement, secured by chattel mortgage, was not binding upon the state which claimed a tax lien superior to the chattel mortgage, notwithstanding the state had filed a wholly unrelated claim in the bankruptcy proceeding. St.1923, p. 572, § 4, as amended by St. 1931, p. 109.

3. Bankruptcy ⇐36

Bankruptcy court vested with jurisdiction of estate of bankrupt mortgagee did not have jurisdiction to adjudicate, without notice and hearing to creditor of mortgagor, whose property was not an asset of bankrupt nor within jurisdiction of bankruptcy court, matter affecting rights of mortgagor's creditors.

4. Constitutional law ⇐309(1)

Notice and hearing is required to constitute "due process of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

5. Constitutional law ⇐306

"Due process of law" is required in a bankruptcy court as well as in a court of general jurisdiction.

6. Bankruptcy ⇐36

The fact that one is a party to bankruptcy proceeding as such does not make one a party to a special proceeding had therein.

7. Chattel mortgages ⇐157(2)

In action by trustee of bankrupt mortgagee to foreclose chattel mortgage wherein the state claimed a tax lien superior to chattel mortgage, evidence of agreement extending chattel mortgage lien was inadmissible over objection of the state, where agreement was not recorded and agreement which was secured by the chattel mortgage provided an exclusive method for extending term of chattel mortgage lien, but there was no evidence indicating that such procedure had been followed. St.1923, p. 572, § 4, as amended by St.1931, p. 109.

8. Chattel mortgages ⇐157(2)

In action by trustee of bankrupt mortgagee to foreclose chattel mortgage, wherein state claimed tax lien superior to the chattel mortgage and question was presented

whether lien of chattel mortgage had ceased to exist when tax lien attached, documents pertaining to possession taken by or given to trustee were inadmissible. St.1923, p. 572, § 4, as amended by St.1931, p. 109.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by B. A. Coates, trustee in bankruptcy of the estate of the Sunshine Oil Company, Limited, against Maguire Oil & Refining Company and others, wherein the State of California claimed a tax lien. From an adverse judgment, the State of California appeals.

Reversed.

Hearing denied; CURTIS, J., dissenting.

Earl Warren, Atty. Gen., and H. H. Linney and Burdette J. Daniels, Deputy Attys. Gen., for appellant.

Raphael Dechter, of Los Angeles, for respondent.

HANSON, Justice pro tem.

This appeal presents the question whether a tax lien created by statute against the property of a distributor of gasoline takes precedence over the lien of a chattel mortgage thereon, where the tax accrued and became a lien subsequent to the recording of the chattel mortgage. A further question is whether the lien of the chattel mortgage had ceased to exist when the tax lien attached. If it had it is obvious that no question as to superiority of lien is involved, and hence we shall first address our attention to a determination of that pivotal point.

We cull from the record the following facts which we regard as material to a decision: On April 2, 1938, the Sunshine Oil Company, Ltd. (hereinafter referred to as Sunshine or mortgagee), now bankrupt (of which respondent here is trustee in bankruptcy), entered into an agreement with Buena Vista Supply Company (hereinafter referred to as Buena Vista), the predecessor in interest of the defendant Maguire Oil and Refining Corporation (hereinafter referred to as "Maguire" or "mortgagor"), by the terms of which Buena Vista was to purchase daily from Sunshine a minimum of 2000 barrels of crude oil, with exceptions not here material, for a period of one year from and after the completion by Buena Vista of a certain topping plant. The agreement, which by its terms required the buyer to execute a chattel mortgage on the topping plant when it was completed to secure the performance of the agreement, further recited that if Buena Vista should fail to comply with its agreement to purchase daily a minimum of 2000 barrels of crude oil owing to causes beyond its control, that then the time for complete performance should be extended accordingly by the number of days it was in default, provided prompt notice was given of the nature and reason for the default. The topping plant was completed on or about July 20, 1938, and immediately delivery of crude oil began in accordance with the contract.

Pursuant to the terms of the contract, Maguire, as the successor of Buena Vista, then executed a chattel mortgage in favor of Sunshine, which was duly recorded. Counsel for the state contends that the agreement was not annexed to the mortgage when it was recorded, but this is denied by respondent. From the record we are unable to determine what the fact is, and accordingly will assume that the agreement was annexed to the mortgage. The mortgage recites that it is "security for the performance of all obligations set forth and contained in a certain agreement made and executed on the 2nd day of April, 1938, by and between * * * Sunshine * * *, therein designated as 'seller', and the Buena Vista * * *, therein designated as 'buyer' * * *". As it is clear from the record that the topping plant was completed on or about July 20, 1938, and that delivery of crude oil from the mortgagee (seller) to the mortgagor (buyer) began on or about the same date, it is likewise clear that the lien of the chattel mortgage terminated by its terms on July 20, 1939, unless it can be said, as respondent contends, that it was validly extended beyond that date.

On November 3, 1939, the trustee in bankruptcy filed in the court below a "complaint to foreclose chattel mortgage", naming as defendants therein Maguire, Buena Vista and the State of California. The complaint is in the usual form, setting forth the pertinent provisions of the agreement and the chattel mortgage, except that there is no reference to the provision in the agreement that deals with the termination of the lien of the chattel mortgage or its extention. The breach charged against the mortgagor (in Count I) was that between September 16 and October 12, 1939, it had not paid for crude oil of a value of $13,769.-68 delivered under the agreement, nor had

it paid rent as therein provided on October 15 nor on November 15, 1939, in the amount of $100 due on each of those dates. The complaint proceeded to allege that the defendants claimed an interest or lien upon the mortgaged property but that such claim was inferior "to the claim of plaintiff herein sued upon". The second count set forth the provision in the agreement for extending the term, and alleged that the mortgagor had notified the mortgagee of various shutdowns caused by reasons beyond its control; that such shutdowns totaled 67 days, and by reason thereof and by the terms of the agreement the term was extended 67 days beyond July 20, 1939 [i. e., to September 30, 1939], and that by written agreement executed on September 30, 1939, the mortgagee and mortgagor had extended the term to November 1, 1939. The complaint went on to allege that notwithstanding the mortgagee had at all times during the term and the extended term been willing to deliver the minimum number of barrels which the mortgagor was obligated to take under the agreement, the mortgagor had failed so to do, to the damage of the mortgagee in the sum of $25,000.

To the complaint the defendant State of California answered, admitting it claimed an interest and lien upon the property; that the claim and lien arose by virtue of taxes due it from Maguire pursuant to the provisions of the Motor Fuel License Tax Act[1]; that the taxes accruing as of December, 1, 1939, were in the sum of $5,873.18 "and are a prior lien to any interest of the plaintiff herein".

Parenthetically, it should be stated that shortly after this action was instituted, respondent, under a stipulation made with the State, deposited in the registry of the court the sum of $5,873.18, this being the amount of tax claimed by the State, to abide the judgment in the case.

On the trial the only evidence offered by plaintiff to sustain its claim made in the second count, that the term had been extended beyond July 20, 1939, was certain documents, only two of which bore on that question. The State objected to the admission of all the documents. As the objection was vital if well taken, we shall now discuss the question of the admissibility of the documents.

[1, 2] The first document offered was an order of the referee in bankruptcy having jurisdiction of the estate of the bankrupt Sunshine. This order, made upon a stipulation between the trustee in bankruptcy of Sunshine and Maguire without notice to creditors, found and determined that in the year period, July 20, 1938-July 20, 1939, there had been suspensions of deliveries for cause under the agreement, and that the effective term of the agreement was accordingly extended to September 30, 1939. The order does not purport, unless it be by implication, to extend the lien of the chattel mortgage. The State objected to the introduction of the document upon the grounds, among others, that it was hearsay and not binding upon the State. The objection was overruled, seemingly upon the theory that as there had been a judicial hearing the order was res adjudicata and binding upon all persons. The ruling was erroneous.

[3-6] The fact that the bankruptcy court which made the order had adjudicated Sunshine a bankrupt and by the adjudication was vested with the estate of the bankrupt, did not invest the court with jurisdiction to adjudicate without notice and hearing to a creditor of the mortgagor who was not the bankrupt and whose property was not an asset of the bankrupt nor within the jurisdiction of that court. Even if the bankrupt had been the mortgagor instead of the mortgagee and the mortgaged property had been in possession of the bankrupt on adjudication, still the court could not have affected the lien without notice and hearing to the lienholders. In a case where a chattel mortgagor was adjudicated a bankrupt on the ground that the mortgage

[1] The statute, so far as material here, reads: "License taxes herein required to be paid shall be payable in monthly installments to the state controller for the month ending April 30, 1931, and each and every calendar month thereafter. The license tax shall be a lien upon all property of the distributor, attaching at the time of delivery or distribution subject to said license tax, having the effect of an execution duty levied against all property of the distributor, and remaining until the license tax is paid, or the property sold in payment thereof. The amount of such license tax for each month shall be paid on or before the first day of the second calendar month thereafter, and if not paid prior thereto, shall become delinquent at five o'clock in the afternoon of said day, and ten per cent penalty shall be added thereto for delinquency." St.1923, p. 572, § 4, as amended by St.1931, p. 109.

constituted a preference to the mortgagee, it was held that the adjudication was not res adjudicata where the mortgagee sought to prove his claim in the bankruptcy proceedings as a secured creditor. Hussey v. Richardson-Roberts Dry Goods Co., 8 Cir., 148 F. 598. The reason for the rule is obvious. Nothing short of notice and hearing is due process, and due process is required in a bankruptcy court as well as in a court of general jurisdiction. It is unnecessary to refer to the cases on the subject in detail, but see In re De Fatta, D.C., 10 F.Supp. 375; In re Platteville Foundry & Machine Co., D.C., 147 F. 828; 7 C.J. § 307, note 33; 8 C.J.S., Bankruptcy, §§ 262, 311, notes 81, 82. In the instant case the order of the referee in bankruptcy did not purport to extend the lien of the chattel mortgage; and even if it had, the bankruptcy court would have been without jurisdiction to do so. The fact that the State had filed a wholly unrelated claim in the bankruptcy proceedings is of no moment. Likewise the fact that one is a party to bankruptcy proceedings as such does not make one a party to a special proceeding had therein. The claim of lien of the State of California was not claimed by, through or under the bankrupt. It was a claim of lien adverse to the bankrupt and the mortgagor and was derived from statute.

[7] The only other item of evidence offered to prove an extension of the lien of the chattel mortgage was a written agreement entered into on September 30, 1939, between the trustee in bankruptcy and Maguire, purporting to extend the term beyond September 30, 1939, to and including October 31, 1939. The agreement was not recorded. The apt objection to it by the State should have been sustained. The agreement which was secured by the chattel mortgage provided an exclusive method by which the term of the lien of the chattel mortgage might be extended so as to bind other creditors of the mortgagor. There is not a scintilla of evidence to indicate that the procedure therein provided was followed. It was not until after the lien of the mortgage had lapsed that an endeavor was made to breathe life into the dead lien.

[8] Other documents received, such as Exhibits 10 and 11, pertaining to a "possession" taken by or given to the trustee, were inadmissible under the issues as made by the pleadings. Their receipt in evidence was error.

Count 2 sought damages for breach of the agreement. Whether under the terms of the agreement it may be said that the chattel mortgage was intended to secure the mortgagee for any "damages" that might ensue we have no occasion to determine now. But see Hayashi v. Pacific Fruit Exchange, 43 Cal.App. 677, 186 P. 174.

Inasmuch as the plaintiff failed to establish by competent evidence the existence of its chattel lien after July 20, 1939, and it being conceded at the trial that the State had a lien, the court should have awarded the fund in the registry to the State.

From what has been said it follows that the point here decided determines the case, and so we have no occasion to discuss the other contentions which have been urged.

Judgment reversed.

WOOD, Acting P. J., and McCOMB, J., concurred.



47 Cal.App.2d 310

CAMPBELL v. CITY OF LOS ANGELES et al.

Civ. 13174.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1941.

1. Municipal corporations ⇐216(2)

The Los Angeles city board of civil service commissioners has no power to suspend its rule, prohibiting restoration of any person separated from city's service for over three years to register of eligibles for his previous position, and order his restoration thereto. Los Angeles City Charter, §§ 71, 76, 102.

2. Municipal corporations ⇐216(2)

Rules created by Los Angeles city board of civil service commissioners for its government, as authorized by city charter, have same force as charter provisions so long as they are applied within scope contemplated by charter. Los Angeles City Charter, §§ 71, 76, 102.

3. Municipal corporations ⇐216(2)

After adoption of rules by Los Angeles city board of civil service commissioners for its government, board's power to modify such rules may be exercised only in conformity with mode prescribed by city charter. Los Angeles City Charter, §§ 71, 76, 102.

4. Municipal corporations ⇐216(2)

Where the genius of a city charter is such that rules created by board of civil service commissioners must be followed with same strict conformity as charter provisions, the board may not arbitrarily suspend a rule at any time, without following forms prescribed by charter, in order to accommodate one claiming to be aggrieved by such rule.

5. Municipal corporations ⇐178

As Los Angeles city civil service commission's appointment of concrete foreman of city bureau of engineering nine years after appointee's voluntary resignation as such foreman was void as in violation of commission's rule inhibiting restoration of any person separated from city's service for over three years to register of eligibles for his previous position, it was duty of city board of public works to discontinue such appointee's employment promptly on discovering illegality. Los Angeles City Charter, §§ 71, 76, 102.

6. Municipal corporations ⇐170, 1021

City charter provisions and statutes, requiring that claims be filed as conditions precedent to maintenance of actions against municipalities or their agents, are "mandatory".

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

7. Municipal corporations ⇐178

When Los Angeles city board of civil service commissioners sustained discharge of civil service employee by board of public works after filing of his application for investigation of grounds of discharge, matter became functus officio, as board had exhausted its powers in premises. Los Angeles City Charter, § 112(a).

8. Municipal corporations ⇐218(11)

The section of Los Angeles city charter, authorizing city board of civil service commissioners to reinstate discharged civil service employee voluntarily, without formal action, or on his application for investigation of grounds of discharge, is basis for departmental procedure and does not authorize discharged employee to demand reinstatement. Los Angeles City Charter, § 112(a).

9. Municipal corporations ⇐46

When a new provision is added to city charter, it must be presumed that changes in city's organic law were intended in particulars indicated by amendment or added section.

10. Mandamus ⇐14(1)

A discharged city civil service employee, failing to present written demand for reinstatement to Los Angeles city civil service commission within 90 days after his discharge, as required by city charter, is not entitled to writ of mandate compelling his reinstatement. Los Angeles City Charter, § 112½.

11. Municipal corporations ⇐8

Penalties prescribed for failure to act in accordance with legislative provisions, as of city charters, are "mandatory", and substitutes are unavailing.

12. Mandamus ⇐143(2)

A discharged city civil service employee, failing to file with Los Angeles civil service commission a written demand for reinstatement within time required by city charter after his discharge and permitting 15 months to intervene thereafter before instituting proceeding for writ of mandate to compel his reinstatement, without suggesting any excuse justifying delay or alleging that he was encouraged to believe that he would be reinstated or dissuaded from resorting to legal action by promises or conduct of respondents during such time, was barred by "laches" from seeking such relief. Los Angeles City Charter, § 112½.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

13. Mandamus ⇐143(2)

One seeking writ of mandate to compel his reinstatement to civil service position, from which he has been discharged, must proceed with diligence.

14. Mandamus ⇐143(2)

A delay of 15 months after city civil service employee's discharge before he instituted proceeding for writ of mandate to compel his reinstatement was so long as to deprive him of all rights to equitable consideration.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Jack Campbell against the City of Los Angeles and others for a writ of mandate to compel reinstatement of petitioner in the civil service position of concrete foreman of the city bureau of engineering. From a judgment denying the writ, petitioner appeals.

Affirmed.

Adolph H. Levy and Maurice Levy, Jr., both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and John F. Feldmeier and Louis A. Babior, Deputy City Attys., all of Los Angeles, for respondents.

MOORE, Presiding Justice.

This appeal follows judgment after order sustaining demurrer without leave to amend.

The action arose upon a petition for a writ of mandate. On June 14, 1926, petitioner resigned as concrete foreman of the bureau of engineering, city of Los Angeles. April 25, 1935, he filed his request for reinstatement with the civil service commission. April 29, 1935, pursuant to said request and the recommendation of the city engineer and the board of public works, petitioner's name was restored by the commission to the register of eligibles for the position he had formerly occupied. Nine years elapsed from the date of his resignation to the date of his restoration to the civil service list. Four and one-half years later, on November 21, 1939, petitioner was discharged on the ground that he had been illegally restored to the eligible list and that, therefore, his appointment May 10, 1935, was illegal as in violation of section 3, rule 12 of the rules of the board of the civil service commission.

On November 24, 1939, pursuant to the provisions of 112(a) of the city charter, he filed his application with the commissioners for an investigation of the grounds of his discharge. Twenty-five days later the commissioners sustained the discharge. In attempting to follow the provisions of section 112½ of the charter (new section, 1937) 91 days after his discharge, to-wit, on February 20, 1940, petitioner filed his demand for reinstatement with the commissioners. Eight days later the board advised him that it had no authority to re-open a proceeding for the discharge of an employee on which it had taken action under section 112(a). Fifteen months after his discharge, that is, on April 3, 1941, his petition for a writ of mandate was filed and an alternative writ was thereupon issued.

[1-3] Petitioner had been by his voluntary resignation separated from the service for nine years. In spite of his long absence from the service, he was restored to the eligible list and to his former position. This was in violation of the rule which inhibits restoration to the register of eligibles of "any person who has been separated from the service of the city for more than three years." Sec. 3, Rule 12, Civil Service Rules.

Petitioner now contends that the last cited rule can be ignored and that the board has the power to suspend that rule and order restoration. There is no authority for the exercise of such power. The selectees, under civil service of defendant city are chosen by the civil service department which is under the control of a board of five commissioners. Sec. 71, City Charter. The board has power to create rules for its own government. Rules so created have the same force as charter provisions so long as they are applied within the scope contemplated by the charter. Bruce v. Civil Service Board of Oakland, 6 Cal.App. 2d 633, 637, 45 P.2d 419; Mitchell v. McKevitt, 128 Cal.App. 458, 17 P.2d 789; 5 R.C.L. 611. After their adoption, the board's power to modify them may be exercised only in conformity with the prescribed mode. Charter, secs. 76, 102; Heard v. Board, 39 Cal.App.2d 685, 104 P.2d 47; Nash v. City of Los Angeles, 78 Cal.App. 516, 248 P. 689. Not a word in the charter suggests the investment of the board with the power to suspend a rule. But, on the contrary, all rules and changes thereof must be adopted or made by a resolution of the members, recorded in the minutes, attested, and promulgated in the official paper (secs. 76, 102, Charter) and become effective only after the lapse of 30 days following their publication.

[4, 5] Where the genius of a city charter is such that rules created by the board of civil service commissioners are to be followed with the same strict conformity as are "charter provisions" there is no justification in authority or in reason to hold that the board may, at any time, arbitrarily and without following the forms prescribed by the charter, suspend a rule in order to accommodate one claiming to be ag-

grieved. Otherwise the long-cherished principle of universal application of the law would be cast into the discard. Since petitioner's appointment violated the rules relating to the civil service and was, therefore, void, it was the duty of the board of public works to discontinue his employment promptly upon discovering its illegality. Palmer v. Board of Education, 276 N.Y. 222, 11 N.E.2d 887; People ex rel. Hannan v. Board of Health, 153 N.Y. 513, 47 N.E. 785; Pinion v. State Personnel Board, 29 Cal.App.2d 314, 84 P.2d 185.

[6] As to whether petitioner proceeded as required by the charter after his dismissal, the record discloses that his "demand for reinstatement" was filed 91 days after his discharge. Thus did he fail to act within the law as contained in section 112½ which allows 90 days to file such demand. Charter provisions and statutes which require that claims be filed as conditions precedent to the maintenance of actions against municipalities or their agents are mandatory. Whitely v. Superior Court, 18 Cal.2d 75, 113 P.2d 449; Continental Ins. Co. v. City of Los Angeles, 92 Cal. App. 585, 268 P. 920; Crescent Wharf Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028; White-Satra v. City of Los Angeles, 14 Cal.App.2d 688, 58 P.2d 933; Spencer v. Calipatria, 9 Cal.App.2d 267, 49 P.2d 320.

[7] Petitioner contends that he complied with the purpose and object of section 112½; also that he substantially complied with the formalities thereby prescribed by his filing within five days after his discharge, in accordance with section 112(a) his written application on November 24, 1939 for an "investigation of the grounds of his discharge". Subsequent to the filing of such application, on December 26, 1939, the board of civil service commissioners sustained the discharge whereupon the matter became functus officio. The board had exhausted its powers in the premises.

[8-11] Section 112(a) was not authority for petitioner to demand his reinstatement. This section provides for a proceeding by which the board may, without formal action, voluntarily reinstate a discharged employee upon its determination that the reasons for the discharge were insufficient and that the discharged employee is qualified for his position, or the person so removed may ask for an investigation of the grounds of his discharge and the board may order him reinstated. In other words, the section is the basis for departmental procedure. On the other hand, section 112½ was the only authority under which petitioner could have made his demand for reinstatement which "must be presented in writing within ninety days". If a discharged employee could satisfy the requirement of section 112½ by doing acts prescribed by section 112(a) then the addition in 1937 of section 112½ was a futility. When a new provision is added to a charter, it must be presumed that a change in the city's organic law was intended in those particulars indicated by the amendment or added section. Loew's Inc. v. Byram, 11 Cal.2d 746, 82 P.2d 1; People v. Weitzel, 201 Cal. 116, 255 P. 792, 52 A.L.R. 811; Pierce v. Riley, 21 Cal.App.2d 513, 70 P.2d 206; Estate of Garthwaite, 131 Cal. App. 321, 21 P.2d 465. Since petitioner was required to proceed in accordance with section 112½ he must suffer the consequences of his own folly in not presenting his written demand for reinstatement within the specified period. When penalties are prescribed for him who fails to act in accordance with legislative provisions, the latter are mandatory. Substitutes are unavailing. Whitely v. Superior Court, 18 Cal.2d 75, 113 P.2d 449.

[12-14] Petitioner is barred by laches by reason of his very declarations. Not only did he ignore the requirements of section 112½ but his long delay in instituting this action magnifies his lack of diligence. He was discharged November 21, 1939. Although the civil service commission sustained the discharge 25 days later, it was not until 91 days after his discharge that he filed a demand for reinstatement. Moreover, he permitted fifteen months to intervene after his discharge before he instituted this proceeding. No excuse is suggested in justification of this long delay; no allegation that during the fifteen months he had been encouraged to believe that he would be reinstated or that he was dissuaded from resorting to legal action by any promises or conduct of respondents. Unless facts be alleged which constitute a sound excuse for a delay of fifteen months, such delay in commencing the action is absolutely indefensible. One must proceed with diligence who would compel his reinstatement to a civil service position from which he has been discharged. Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 680, 62 P.2d 1047. A delay of fifteen months after his discharge is so long as to

deprive petitioner of all rights to equitable consideration. Irwin v. City of Los Angeles, 3 Cal.App.2d 495, 39 P.2d 851; United States ex rel Arant v. Lane, 249 U.S. 367, 39 S.Ct. 293, 63 L.Ed. 650; Rotherham v. Grece, 183 A. 291, 14 N.J.Misc. 164; Insley v. Shanahan, 173 Misc. 33, 17 N.Y.S.2d 25, 27; Newbury v. Civil Service Commission of the City of Los Angeles, 42 Cal.App.2d 258, 108 P.2d 745.

The judgment is affirmed.

WOOD and McCOMB, JJ., concurred.



47 Cal.App.2d 269

ENOS v. MURTAUGH et al.

Civ. 12560.

District Court of Appeal, Second District, Division 1, California.

Oct. 10, 1941.

1. Adverse possession ⇐114(1)

Evidence justified finding that plaintiff had failed to establish a title to realty by prescription, as against plaintiff's mother who was named in deed as grantee. Code Civ.Proc. § 749.

2. Adverse possession ⇐58

The possession necessary to support a claim of title by prescription must be "adverse", that is, hostile to the claim of the true owner, and must operate as an ouster of the holder of the legal title.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Possession".

3. Adverse possession ⇐85(1)

The burden is upon one claiming a title by prescription to show that his occupancy was hostile and not in subordination to the legal title.

4. Adverse possession ⇐16(1)

Although actual residence upon the property is not always essential to establish "adverse possession", there must be a subjection to the will of the claimant, manifested in some appropriate manner.

5. Adverse possession ⇐37

Where plaintiff's mother was in actual occupancy of premises in which plaintiff claimed a title by prescription, and it was at all times known to plaintiff that she held legal title thereto, acts of plaintiff in paying for lot, building the house, living on the premises with his mother for a short period, and paying the taxes did not establish "adverse possession".

6. Appeal and error ⇐1040(4)
Pleading ⇐35

In action to quiet title and determine adverse claims to realty, where plaintiff sought to establish a title by prescription, a paragraph in complaint which charged that a deed to the realty was issued to plaintiff's mother by mistake, standing alone, stated no cause of action and constituted mere "surplusage", and hence plaintiff suffered no prejudice from action of trial court in sustaining an "oral demurrer" to such paragraph. Code Civ.Proc. § 749.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Herman I. Enos against Lawrence R. Murtaugh, etc., and others to quiet title and determine adverse claims to certain real property. From an adverse judgment, the plaintiff appeals.

Affirmed.

Sloan Pitzer, of Pasadena, for appellant.

J. H. O'Connor, Co. Counsel, and Earl O. Lippold, Deputy Co. Counsel, both of Los Angeles, for respondent Los Angeles County.

WHITE, Justice.

Plaintiff brought an action under section 749 of the Code of Civil Procedure to quiet title and determine adverse claims to certain real property, alleging that for more than twenty years he had been in actual, exclusive and adverse possession thereof, had continuously paid all taxes thereon, and claimed to own the same in fee "against the whole world". He further alleged that he purchased the property in 1916; that by the mistake of the seller the deed to the property vested title in Ida M. Enos, mother of plaintiff; that a mortgage on the property executed by Ida

M. Enos to the defendant County of Los Angeles was void and of no effect. The trial court, after hearing the evidence, made its findings of fact and conclusions of law adverse to plaintiff's contentions. From the judgment that plaintiff take nothing he prosecutes this appeal.

The grounds of appeal are stated to be that the findings and judgment are contrary to the law and the evidence; that the trial court erred in adopting the theory that it was necessary to a recovery that plaintiff have lived on the property all of the twenty years; and that the trial court also erred in sustaining an oral demurrer to that portion of his complaint which charged that record title was put in the name of his mother through the mistake of the seller.

The facts disclosed by the record are substantially as follows: In 1916 plaintiff's mother, Ida M. Enos, entered into a contract to purchase from Janss Investment Company the real property in question, the same being a residence lot in Wilmar. In 1920 a grant deed was executed and delivered, in which she was named as sole grantee. A receipt for this deed, signed "Ida M. Enos, by Herman I. Enos", was introduced in evidence. The signature thereon was acknowledged as his by the plaintiff. The plaintiff testified that he furnished the purchase money. In 1917 a house was built on the property and plaintiff and his mother lived there together for several months until the plaintiff married. In 1935, assertedly without the knowledge of plaintiff, his mother executed a mortgage to the defendant County of Los Angeles for the sum of $35 for aid given her in the past and sums to be furnished in the future. The total amount alleged to have been furnished up to the time of her death in September, 1937, was $749.19. Upon the death of his mother plaintiff petitioned for letters of administration and listed the property in question as part of her estate in the petition, in the inventory, and also in his final account and petition for discharge. After his discharge and the appointment of a successor administrator, he filed the present action. The successor administrator, named as a defendant, filed no answer and did not appear in the action.

The plaintiff testified that after the lot was purchased a house was built on the property at his expense and that he and his mother lived there. His testimony as to his "adverse possession" thereafter is as follows:

"Q. By the Court: How long did you continue to reside in that home? A. Well, off and on for clear up to date.

"Q. And who resided there at the time that you state in 1917? A. My mother and myself and no one else.

"Q. How long did you both continue to reside there? A. Well, my mother lived in the house all of her life up until the time she passed away, which was September.

"Q. How long did you continue to reside there? A. Well, I was married in October 22, 1917, and I was up on the desert up until about 1920 and then I returned and built a house of my own but the house—

"Q. Where did you build that one? A. Right next to the same property.

"Q. By Mr. Pitzer: On the same lot, wasn't it? * * * A. Not on the same lot.

"Q. It is on an adjoining lot? A. That is right.

"Q. And did you ever reside in the house with your mother thereafter? A. No; I don't believe I did. I continued to pay all of the bills.

"The Court: I did not ask you that. 'I continued to pay all of the bills' will be stricken. All right. Proceed. Frankly, I don't see any case at all now, not after those statements. How are you going to prove adverse possession when you did not live there?

"Mr. Pitzer: Well, I knew that he did live there.

"Q. By Mr. Pitzer: You did not live in the house at all? A. Not that little house. Mother lived there and we were back and forth. Occasionally I would live there in the house and maybe overnight and my wife and I have lived there for, oh, I don't know, two or three months at a time, but I built my own house and my wife and I went to ours right next door * * *".

Upon the same subject, plaintiff's wife testified as follows:

"Q. By the Court: Did you ever live in the house on lot 10 that was Mrs. Enos' house? A. Yes, I did.

"Q. How long a time did you live there? A. Well, I lived there from October 22,

1917, when we were first married, for almost a year.

"Q. And thereafter did you live there at all? A. Yes; I lived there every summer following that until we built in 1920.

"Q. After 1920 did you ever live there? * * *

"Q. By the Court: I am asking did you ever live there? A. Well, at times. * * *

"Q. By the Court: Did you ever reside in that house after 1920? A. Well * * * yes, I did.

"Q. All right, when was it? A. Well, I don't know as I could specify the date but there were times, oh, several days at a time I would be there.

"Q. Over how long a period of time? A. Well, for the whole 20 years. * * *

"Q. By Mr. Pitzer: The whole 20 years? A. A day or two at a time.

"Q. Now how long was she sick when you took care of her? A. Seven years.

"Q. Seven years. Who took care of her? A. Oh, at times she took care of herself.

"Q. Well, when she could not, who took care of her? A. I did. * * *

"Q. By the Court: Did you keep house in your house during that same time too? A. Yes. * * *"

The plaintiff testified that he paid all taxes and assessments on the property from the time of its purchase up to the present. In this connection it appeared that most of such payments were made by check payable to his mother, who in turn disbursed the funds. The tax bills were in the name of his mother, who claimed ownership of the lot in property statements made to the county assessor. When his mother sought county aid, plaintiff made a property statement at the request of the department of charities, in which he did not claim ownership of the property. It also appeared that in December, 1934, plaintiff received from his mother a grant deed to the westerly fifty feet of the property. He testified that at the time he received his deed he knew that the record title to the property was in his mother.

[1-5] Upon the foregoing evidence, the trial court was fully justified in concluding that plaintiff had failed to establish a title by prescription. The possession necessary to support such a claim must be "adverse", that is, hostile to the claim of the true owner, and must operate as an ouster of the holder of the legal title; and the burden was upon the plaintiff to show that his occupancy was hostile and not in subordination to the legal title. 1 Am.Jur. 872, 873; Janke v. McMahon, 21 Cal.App. 781, 133 P. 21; Pacific Gas & Electric Co. v. Crockett Land & Cattle Co., 70 Cal.App. 283, 233 P. 370; Dreyer v. Cole, 210 Cal. 339, 292 P. 123; Brown v. Bachelder, 214 Cal. 753, 7 P.2d 1027. It is true, as stated by appellant, that actual residence upon the property is not always essential. Webber v. Clarke, 74 Cal. 11, 15, 15 P. 431. But, as is stated in the last-cited case, there must be a subjection to the will and dominion of the claimant, manifested in some appropriate manner. In the case at bar, the plaintiff's mother was in actual occupancy of the premises, and it was at all times known to plaintiff that she held the legal title thereto. The acts of the plaintiff in paying for the lot, building the house, living on the premises with his mother for a short period, and paying the taxes, were, in the circumstances, entirely consistent with her title and claim of ownership. As above noted, the taxes were in fact paid by the mother, with funds furnished by the plaintiff. He also gave her money to pay other bills. In other words, he was supporting his mother, as he was bound to do. There is no evidence that at any time the fact that he claimed adversely was communicated to his mother, nor is there any evidence to warrant a conclusion that his mother's occupancy of the premises was other than by virtue of her own legal title. On the contrary, the evidence, as hereinbefore narrated, points directly to the opposite conclusion. In this connection, the fact that plaintiff accepted a deed from his mother of the westerly fifty feet of the property is not without significance. As to the claim that the trial court erroneously held that it was necessary for plaintiff actually to reside on the premises for the entire twenty years, it appears to us rather that the trial court correctly took the view that in the circumstances, and considering the relation of the parties, no other exercise of dominion by plaintiff being shown, and the property being occupied exclusively by the holder of the legal title for practically the entire statutory period, there was no manifestation of possession by plaintiff, adverse or otherwise.

[6] Appellant suffered no prejudice from the action of the trial court in sustaining an "oral demurrer" to the paragraph of his complaint which charged that the deed was issued to his mother by mistake. That paragraph reads as follows: "That by the mistake of the Janss Investment Company, a corporation, and Janss Company, a corporation, the corporations from whom the property was purchased, the title to said property was described in said deed as vested in Ida M. Enos, a widow." In effect, the court's ruling was to strike the paragraph, which, standing alone, stated no cause of action and constituted mere surplusage in a cause of action to establish a title by prescription. No facts were alleged showing how the mistake occurred, or why it was not discovered, or explaining or justifying the delay in seeking relief therefrom. The evidence at the trial overwhelmingly demonstrated that the mistake, if any, in the execution of the conveyance, was known to and acquiesced in by plaintiff over a long period of years.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.



47 Cal.App.2d 329

Ex parte CARDELLA.

Cr. 1780.

District Court of Appeal, Third District, California.

Oct. 14, 1941.

1. Contempt ⇐40, 66(6)

Proceedings in contempt are in their nature criminal in character and record of court upon which party is adjudged guilty of contempt must show affirmatively upon its face the facts on which the judicial action is based and on which jurisdiction depended to enable the appellate court to determine whether contempt has in fact been committed.

2. Contempt ⇐54(4), 63(4)

The facts constituting contempt must be stated in some appropriate form, either in an affidavit in the case of a constructive contempt, or in the order adjudging contempt, in case of a direct contempt.

3. Contempt ⇐24

Disobedience of an order of court is not "contempt" where it is due to the inability to comply with the order and such inability is not due to voluntary and fraudulent conduct of the contemner.

See Words and Phrases, Permanent Edition, for all other definitions of "Contempt".

4. Contempt ⇐64

It is an essential of an adjudication of contempt for failure to comply with order of court, that it appear in the commitment that the party found guilty had the ability to perform.

5. Divorce ⇐269(13)

Where order, denying motion for modification of divorce decree, provided that if payment was not made as previously ordered, defendant was adjudged in contempt of court, "as the court finds that he has the present ability to pay and orders him to pay" a certain amount immediately, and ordered defendant confined in jail until payment of such amount, the order was insufficient as contempt order, since there was no finding of fact on which to base ruling that defendant had present ability to pay.

6. Contempt ⇐66(7)

The question whether defendant has present ability to pay an amount required by divorce decree is one of fact within province of trial court, in determining whether failure to pay constitutes contempt.

7. Contempt ⇐66(7)

No intendments or presumptions can, as in the case of an ordinary judgment, be indulged in by appellate court in favor of upholding adjudication of contempt.

Habeas corpus proceeding by Alfred Cardella.

Writ granted and petitioner discharged.

R. R. Sischo, of Merced, for petitioner.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Chas. R. Garry, of San Francisco, Amicus Curiae for respondent.

TUTTLE, Justice.

Petitioner seeks release from confinement in the county jail through habeas corpus.

In answer to the writ, the sheriff filed his return, which shows that the authority for detaining petitioner is based upon the following order of the court:

"The court orders motion for modification of the divorce decree denied, both as to the custody of the child and the amount of the monthly payments, and further orders that if payment is not made as previously ordered by the court, that defendant is adjudged in contempt of court, as the court finds that he has the present ability to pay and orders him to pay the amount of $185.00 immediately; $105.00 on account of counsel fees, and $80.00 delinquent payments on the $60.00 per month alimony. Defendant is ordered confined in the Merced County Jail until the amount of $185.00 is paid."

The contention of petitioner is that the foregoing commitment is wholly insufficient, in that the court fails to find the facts which are the basis of the finding that "he (petitioner) has the present ability to pay". Petitioner urges that the language quoted is, in reality, a mere conclusion.

[1] The record of the hearing which resulted in the order is not before us. In 5 Cal.Jur., pp. 952, 953, § 48, it is said:

"Since proceedings in contempt are in their nature criminal in character, and the court exercises but a special and limited jurisdiction in such matters, the record of the court upon which the party is adjudged guilty of contempt should show affirmatively upon its face the facts upon which the judicial action is based and upon which jurisdiction depended, the purpose of the requirement being to enable the appellate court to determine by an inspection of the record, whether a contempt has in fact been committed. No presumptions and intendments will be indulged in favor of the order, and the charge and finding thereon, and the judgment of the court, are to be strictly construed in favor of the accused."

[2] In the same volume, page 937, § 37, it is stated:

"The facts constituting the contempt must be stated in some appropriate form, either in an affidavit in the case of a constructive contempt, or in the order adjudging contempt, in the case of a direct contempt."

[3, 4] The affidavit, if there was one, is not in the record. Thus, we have for consideration the commitment alone, which constitutes the judgment. Also, from the same volume, pages 948, 949, § 44, we quote the following:

"Disobedience of an order of court is not contempt where it is due to the inability of the accused to comply with the order and such inability is not due to voluntary and fraudulent conduct on the part of the contemner. Accordingly, it is an essential of an adjudication of contempt that it appear in the commitment that the party found guilty had the ability to perform."

[5-7] From the foregoing statement of the law governing the question at issue, we are of the opinion that the commitment fails to state sufficient facts to enable this court to say whether or not the lower court was justified in making the order. That question is one of fact, within the province of the trial court. However, no intendments or presumptions can, as in the case of an ordinary judgment, be indulged in by us in favor of upholding the adjudication. In Re Meyer, 131 Cal.App. 41, 20 P. 2d 732, 733, the identical point was presented. There, the court held that a finding that "petitioner has had and now has the ability to comply with said order of the court made October 6, 1932", was "more of a conclusion than a finding". The court states:

"There is no record of the testimony taken at the contempt hearing before us, and it therefore becomes necessary for us to look to the findings and to the face of the order for the necessary support of the judgment. Merritt v. Superior Court, 93 Cal.App. 177, 269 P. 547. From the findings it does not appear affirmatively that petitioner did have the ability, at the time of the hearing of the order to show cause on the contempt proceedings, to comply with the order, and the lack of such affirmative finding of ability to pay deprives the trial court of jurisdiction to find petitioner in contempt or to commit him in punishment thereof."

The writ is granted and petitioner discharged.

THOMPSON, Acting P. J., and ROSS, J. pro tem., concurred.

47 Cal.App.2d 352

WARDEN v. WYANDOTTE SAV. BANK.

Civ. 13251.

District Court of Appeal, Second District, Division 1, California.

Oct. 16, 1941.

1. Appeal and error ⇐110

An order denying a motion for new trial is not an "appealable order".

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

2. Records ⇐9(13¼)

In action to quiet title to realty registered under Torrens Act, which realty was conveyed to plaintiff by former owner whose bankruptcy trustee had conveyed the realty to defendant by deed which was recorded but not registered, evidence showed that if plaintiff did not purchase realty with actual knowledge of conveyance to defendant, circumstances were such as to put plaintiff upon notice of prior conveyance, especially in view of inadequacy of consideration which plaintiff gave to former owner. Gen.Laws 1937, Act 8589.

3. Records ⇐9(13¼)

In action to quiet title to realty registered under Torrens Act, which realty was conveyed to plaintiff by former owner whose bankruptcy trustee had conveyed the realty to defendant by deed which was recorded but not registered, evidence that plaintiff was put upon notice of prior conveyance and that plaintiff gave inadequate consideration for the realty showed that plaintiff was not a "bona fide purchaser for value" without notice so as to be entitled to relief as against defendant. Gen.Laws 1937, Act 8589.

See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide Purchaser for Value".

4. Records ⇐9(3)

The Torrens Act was intended to protect only bona fide purchasers for value without notice. Gen.Laws 1937, Act 8589, § 39.

5. Records ⇐9(13¼)

In action to quiet title to realty registered under Torrens Act, which realty was conveyed to plaintiff by former owner whose bankruptcy trustee had conveyed the realty to defendant by deed which was recorded but not registered, defendant's evidence as to prior unregistered conveyance was not inadmissible on ground that it was irrelevant, since the Torrens Act does not restrict right of alienation and while act provides that transfers not filed with registrar may be defeated, act does not attempt to invalidate unregistered transfers, and at least as between the parties conveyance is valid whether or not it was registered under the act. Gen. Laws 1937, Act 8589.

6. Bankruptcy ⇐265
Estoppel ⇐27(2)
Records ⇐9(13¼)

In determining right to relief in action to quiet title to realty conveyed to plaintiff by former owner whose bankruptcy trustee conveyed realty to defendant by deed which was recorded but not registered under Torrens Act, after conveyance of property by trustee, bankrupt would be "estopped" to claim any title to realty and plaintiff, as bankrupt's grantee, could be in no better position, and conveyance to defendant being valid, subsequent conveyance by bankrupt conveyed nothing. Gen.Laws 1937, Act 8589.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

7. Bankruptcy ⇐151

A bankruptcy trustee in Michigan by failure to file in California where bankrupt's realty was recorded under Torrens Act a certified copy of decree of adjudication did not "waive" all claim to the realty by virtue of Bankruptcy Act provision that certified copy of decree shall be so filed, since purpose of the provision is merely to give notice of trustee's title and filing of such notice adds nothing to trustee's title. Gen. Laws 1937, Act 8589; Bankr.Act § 47, sub. c, 11 U.S.C.A. § 75, sub. c.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

8. Evidence ⇐347

The statute permitting judicial record of the United States to be proved by production of certified copy thereof does not require that a copy of such a record be exemplified. Code Civ.Proc. § 1905.

9. Records ⇐9(13¼)

Where trustee in bankruptcy conveyed bankrupt's realty registered under Torrens Act by deed which was recorded but not reg-

istered, and thereafter bankrupt quitclaimed the realty, title to which had been transferred to the state for delinquent taxes, by deed which was registered under the act, title to realty was properly quieted in bankruptcy trustee's grantee, in view of facts that neither bankrupt nor his grantee redeemed the realty from sale for delinquent taxes and that realty was redeemed by trustee's grantee who was never reimbursed therefor by bankrupt's grantee. Gen.Laws 1937, Act 8589.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by C. P. Warden against the Wyandotte Savings Bank to quiet title to realty, wherein defendant filed a cross-complaint. From a judgment for defendant and from an order denying a motion for new trial, plaintiff appeals.

Judgment affirmed and appeal from order dismissed.

J. Everett Brown, of Los Angeles, for appellant.

Cosgrove & O'Neil and J. J. Brandlin, all of Los Angeles, for respondent.

DORAN, Justice.

[1] The plaintiff and cross-defendant appeals from a judgment in favor of defendant and cross-complainant rendered in an action to quiet title to real property registered under the Torrens Act. Stats. 1915, p. 1932, Deering's General Laws, Act 8589. Plaintiff also attempts to appeal from an order denying a motion for a new trial, from which there is of course no appeal.

Defendant is a Michigan banking corporation, and its claim to the property in question was based upon a deed to the property executed December 22, 1934, wherein the Union Guardian Trust Company, a Michigan corporation, as trustee in bankruptcy for Abraham M. Koploy, conveyed the said property to defendant. At the time of the conveyance in question the said Abraham M. Koploy was the registered owner of the property by virtue of a certificate of title under the Torrens Act. However, Koploy had been adjudged a bankrupt in the United States District Court for the Eastern District of Michigan. The deed in question was recorded in the office of the recorder of Los Angeles county, California, in 1936, but was not registered pursuant to the Torrens Act.

Plaintiff's claim to the property was based upon a deed executed June 10, 1938, by Koploy personally, quitclaiming the property in question to plaintiff. This deed was registered under the Torrens Act, but it does not appear that a certificate of title was issued thereon.

It should be noted that the certificate of title showing Koploy as the owner of the property was cancelled August 28, 1937, title having been transferred to the state of California pursuant to a tax collector's deed for delinquent taxes. The conveyance to plaintiff by Koploy appears to have been made for a consideration of $10 and the assumption by plaintiff of the delinquent taxes.

The trial court found defendant to be the sole and absolute owner of the property, and that the claims of plaintiff were unfounded, that defendant had paid all taxes, penalties and interest on October 6, 1938, in the total sum of $154.71, and that plaintiff had not reimbursed or offered to reimburse defendant for the payment of the taxes; and the court accordingly gave judgment quieting title in defendant.

At the trial plaintiff introduced in evidence the cancelled certificate showing title in Koploy, the subsequent certificate showing title in the state and the deed of Koploy, thereafter executed and registered, quitclaiming Koploy's interest in the property to plaintiff. Upon this evidence plaintiff rested. Over objection of plaintiff, defendant then introduced in evidence the deed above mentioned, from the trustee in bankruptcy to defendant, the decree of the federal district court adjudicating Koploy a bankrupt, together with the order approving the appointment of the trustee, certificates showing that defendant had paid the delinquent taxes on October 6, 1938, and a letter written by plaintiff to Koploy, without date, but apparently written after plaintiff received the deed from Koploy.

It appears from the evidence that plaintiff specialized in the buying of property sold for taxes. The letter above referred to, as introduced in evidence, bears the heading "Warden—Tax Deeds—Delinquent Street Bond Liens", and reads as follows: "Mr. A. M. Koploy, Dear Sir:

In running title on the lots I received a deed from you I find a deed to the Wyandotte Savings Bank of your City. I have written them twice requesting a reply to which they have not answered. Will you please tell me their connection and if they have given you a deed will you please forward same so that it may be recorded. Will you also please give me the status of undivided 4/70 interest in Lots 2-3, F. W. Gibson Tract, El Monte. Thanking you in advance, I am Resp. C. P. Warden."

On the bottom of this letter there appears the reply written by Koploy, as follows: "It is possible that the Wyandotte Savings Bank have a deed to this property as at the time I went through bankruptcy I turned over to them a number of properties. As I am not on especially good terms with them I would rather you would take the matter up with them direct. A. M. Koploy."

There was evidence that plaintiff had consulted the map books in the county assessor's office with regard to the property in question, before he consummated the deal with Koploy. It was stipulated at the trial that the assessor's map books show the map of a tract on the left-hand page, while on the right-hand page, immediately opposite, appears the name of the party to whom the property is assessed; and that in the case of the property here in question the assessor's books showed that the property was assessed to defendant. There was also evidence that in the statement of identity accompanying the deed to plaintiff, Koploy had described himself as "the former owner" of the property.

There was evidence that the property in question was worth from $600 to $800 and plaintiff conceded it was worth $400.

[2, 3] It would appear, therefore, that there was sufficient evidence from which the trial court might have inferred that plaintiff purchased the property with actual knowledge of the prior conveyance to defendant. In any event, the evidence would support a finding that the circumstances were such as to put plaintiff upon notice of the prior conveyance. Moreover, the evidence indicates that the consideration for the deed from Koploy to plaintiff was inadequate, when viewed in the light of the evidence as to value of the property. The evidence furnishes sufficient justification for holding that plaintiff was not a bona fide purchaser for value, without notice.

[4] "The recording laws were not enacted to protect those whose ignorance of the title is deliberate and intentional, nor does a mere nominal consideration satisfy the requirement that a valuable consideration must be paid. Their purpose is to protect those who honestly believe they are acquiring a good title, and who invest some substantial sum in reliance on that belief." Beach v. Faust, 2 Cal.2d 290, 292, 293, 40 P.2d 822, 823, Id., Cal.App., 31 P.2d 1060. It should be noted that section 39 of the Torrens Act reads as follows: "No unregistered estate, interest, power, right, claim, contract, or trust shall prevail against the title of a registered owner *taking bona fide for a valuable consideration,* or of any person *bona fide* claiming through or under him." (Italics added.) It would appear, therefore, that the Torrens Act was intended to protect only bona fide purchasers for value, without notice.

[5, 6] Plaintiff, appellant, takes the position that the documents introduced by him established a prima facie case in his favor and that, since the property was registered under the Torrens Act, the evidence introduced by defendant, respondent, as to the prior unregistered conveyance was therefore immaterial and irrelevant and the court erred in admitting the same. But it cannot be held that the recorded conveyance of the property from the trustee in bankruptcy to respondent was of no effect merely because it was not registered under the Torrens Act. "There is nothing in the act that restricts the right of alienation. The act does provide that transfers not filed with the registrar may be defeated, but in nowise attempts to make any unregistered transfer as of no effect." Carlson v. Carlson, 124 Cal. App. 207, 209, 210, 12 P.2d 165, 166. And, at least as between the parties, the conveyance is valid whether or not it was registered under the Torrens Act. Fawell v. Loop Building Co., 46 Cal.App.2d 426, 116 P.2d 88, and cases cited. After the conveyance of the property by his trustee in bankruptcy, the bankrupt, Koploy, under the circumstances here presented, would be estopped to claim any title to the property, and plaintiff, as Koploy's grantee, could be in no better position than Koploy himself. Moreover, the conveyance to respondent being a valid

one, it follows that when Koploy quitclaimed his interest in the property to appellant, Koploy at that time had no interest to convey.

[7] Appellant contends that the trustee in bankruptcy by his failure to file in the county of Los Angeles within thirty days, or at all, a certified copy of the decree of adjudication, waived all claim to this property in the bankruptcy proceedings, by virtue of section 75, subdivision c, U.S.Code Title 11, 11 U.S.C.A. § 75, sub. c, which provides that a certified copy of the decree shall be so filed. There is no merit to appellant's contention. As clearly indicated in Beach v. Faust, supra, the purpose of this section is merely to give notice of the trustee's title; and the filing of such a notice adds nothing to the trustee's title. See Southern Dairies v. Banks, 4 Cir., 92 F.2d 282, certiorari denied, Banks v. Southern Dairies, 302 U.S. 761, 58 S.Ct. 368, 82 L.Ed. 590. As already pointed out, the circumstances here presented are sufficient under which to hold that appellant was either put upon notice of the prior conveyance to respondent or had actual notice thereof, regardless of whether the trustee had filed a certified copy of the decree in the county recorder's office.

[8] There is no merit to appellant's contention that the trial court erred in admitting into evidence certified copies of records of the United States District Court, eastern district of Michigan. As indicated by the trial court at the time the documents were received in evidence, section 1905 of the Code of Civil Procedure permits a judicial record of the United States to be proved by the production of a certified copy thereof. There is no requirement that a copy of such a record be exemplified.

[9] The record here presented fully justifies and supports the judgment of the trial court quieting title to the property in respondent. Moreover, the finding of the court that plaintiff had no title or right to the property may be justified on another ground than that specifically pointed out upon this appeal, i. e.: That at the time Koploy conveyed his interest in the property to plaintiff title was in the state; and the record reveals that neither Koploy nor plaintiff redeemed the property from the sale for delinquent taxes, whereas it is established that the property was so redeemed by defendant and that plaintiff never reimbursed defendant therefor. The findings of fact made by the trial court would indicate that this latter ground was that on which the court based its judgment.

For the foregoing reasons the judgment is affirmed. The appeal from the order denying the motion for new trial is dismissed.

YORK, P. J., and WHITE, J., concurred.



47 Cal.App.2d 335

LINCOLN v. AVERILL.

Civ. 6570.

District Court of Appeal, Third District, California.

Oct. 15, 1941.

Hearing Denied Dec. 11, 1941.

1. Appeal and error ⇐931(1)

On appeal, all reasonable inferences are to be indulged to support findings and verdict.

2. Appeal and error ⇐931(1)

On appeal, it cannot be presumed that trial court in making findings ignored rules for determining sufficiency of evidence.

3. Appeal and error ⇐931(6)

On appeal, it cannot be presumed that trial court allowed itself to be influenced by evidence which was stricken out.

4. Appeal and error ⇐931(6)

On appeal where findings are amply sustained by competent evidence, it will be presumed that trial court disregarded incompetent evidence admitted over objection.

5. Appeal and error ⇐931(1)

Where it is necessary to establish certain facts that the evidence be clear and convincing, it will be presumed on appeal in support of finding of such fact that trial court was governed by such considerations in weighing the evidence.

6. Appeal and error ⇐930(2)

On appeal, it must be presumed in support of a verdict that the jury decided the

case upon the theory adopted by the parties and that they followed the instructions and found the facts to be such as to justify their verdict in the light of the law laid down in the instructions.

7. Appeal and error ⇐931(1)

Where record on appeal is silent on the subject, it will be presumed that the proceedings in respect to the preparation and filing of findings were regular.

8. Appeal and error ⇐931(9)

In the absence of a contrary showing, it will be presumed on appeal that appellant waived service upon him of proposed findings.

9. Appeal and error ⇐931(1)

Where findings and judgment are filed on the same day, it will be presumed the findings were first filed.

10. Appeal and error ⇐931(1)

A reviewing court in reviewing trial court's findings will give them a liberal construction in support of the judgment, since all presumptions are in favor of the trial court's findings

11. Appeal and error ⇐931(1)

In reviewing trial court's findings, any uncertainties are to receive such construction as will uphold rather than defeat the judgment, as will give them effect rather than destroy them.

12. Appeal and error ⇐931(1)

On appeal, all findings are to be read together and must be reconciled to prevent any conflict on material points, if such reconciliation is possible.

13. Appeal and error ⇐931(1)

Where the facts found are such as might authorize different inferences therefrom, it will be presumed on appeal that the inference made by the trial court was one that would uphold rather than defeat the judgment.

14. Appeal and error ⇐996

Where facts found are such as might authorize different inferences therefrom, the reviewing court will not draw from such facts any inference of fact contrary to that which might have been drawn by the trial court for the purpose of rendering its judgment.

15. Appeal and error ⇐544(2)

On appeal from judgment roll, inquiry is limited to consideration of whether complaint states facts sufficient to constitute a cause of action, whether findings are within the issues, whether the judgment is supported by findings, and whether reversible error appears on face of record, and no question arises as to the sufficiency of evidence to support findings or a nonsuit, or rulings made during taking of evidence.

16. Appeal and error ⇐544(2)

On appeal from judgment roll, reviewing court cannot consider the pendency of another action based on the same cause of action.

17. Appeal and error ⇐907(3)

On appeal from judgment roll, findings of the trial court are conclusive unless contradicted by other findings or unless obviously outside of the issues.

18. Appeal and error ⇐544(2)

On appeal from judgment roll, reviewing court cannot consider the trial court's omission to make findings.

19. Pleading ⇐8(4)

Where cross-complaint, seeking cancellation of note and chattel mortgage, alleged that client on advice of his attorney executed note and chattel mortgage on certain hay in favor of attorney in order better to protect client's ownership, that attorney stated that if and when client desired return of note and mortgage he would deliver possession of note and release mortgage, that thereafter client sold hay to a third party and attorney released mortgage, that no consideration was given for execution and delivery of note and mortgage, cross-complaint stated facts disclosing that there was no consideration for note and mortgage and was not insufficient on ground that allegations that instruments were not supported by consideration, were mere "conclusions of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

20. Appeal and error ⇐193(9)

Where no demurrer was filed against cross-complaint in trial court, objection that the cross-complaint failed to state a cause of action could not be raised on appeal on judgment roll.

21. Chattel mortgages ⇐255

Where detailed facts in findings showed that alleged mortgagor received no consideration for note and chattel mortgage, findings supported judgment denying recovery on the note even if the specific finding that

mortgagor received no consideration were disregarded.

22. Appeal and error ⇐544(2)

The omission of the trial court to make findings on material issues was not ground for reversal on appeal on judgment roll alone.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action on a note by Walter Gould Lincoln against Roger Averill, wherein defendant filed a cross-complaint. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

Walter Gould Lincoln, of Los Angeles, for appellant.

Barcroft & Barcroft, of Madera, D. E. Peckinpah and L. N. Barber, both of Fresno, and Neice & Crane, of Los Angeles, for respondent.

TUTTLE, Justice.

This action was brought to recover the sum of $9,000 alleged to be due upon a promissory note executed by defendant. The latter filed a cross-complaint to annul said note, upon the ground that it was without consideration. Findings were made in favor of defendant, and judgment was entered that said note and a chattel mortgage given to secure the same were invalid, and it was ordered that said instruments be canceled. The appeal is from said judgment, and it is before us upon the judgment roll alone.

[1-14] At the outset it must be borne in mind that:

"All reasonable inferences are to be indulged to support the findings and verdict. It cannot be presumed upon appeal that a trial court in making its findings ignored the rules for determining the sufficiency of the evidence. Nor will it be presumed that the trial court allowed itself to be influenced by evidence which was stricken out. And where the findings are amply sustained by competent evidence, it will be presumed that the trial court disregarded incompetent evidence admitted over objection. When it is necessary to establish certain facts, such as fraud and undue influence, that the evidence be clear and convincing, it will be presumed, in support of a finding of such fact, that the trial court was governed by these considerations in weighing the evidence. So, too, in support of a verdict it must be presumed that the jury decided the case upon the theory adopted by the parties, and that they followed the instructions and found the facts to be such as to justify their verdict in the light of the law laid down in the instructions. * * * When the record is silent upon the subject, it will be presumed that the proceedings in respect to the preparation and filing of findings were regular. In the absence of a contrary showing, it will be presumed that the appellant waived service upon him of proposed findings. And where the findings and judgment are filed upon the same day, it will be presumed the findings were first filed.

* * *

"Since all presumptions are in favor of the findings of the trial court, an appellate court in reviewing the findings will give them a liberal construction in support of the judgment. Any uncertainties in the findings are to receive such construction as will uphold rather than defeat the judgment, as will give them effect rather than destroy them. All the findings are to be read together and must be reconciled to prevent any conflict upon material points, if such reconciliation is possible. * * * And whenever the facts found are such as might authorize different inferences therefrom, it will be presumed that the inference made by the trial court was one that will uphold rather than defeat the judgment. In such case the appellate court will not draw from those facts any inference of fact contrary to that which might have been drawn by the trial court for the purpose of rendering its judgment." 2 Cal.Jur., pp. 870, 871, 872, 873, secs. 510, 511.

[15-18] Also, the scope of our inquiry on an appeal from the judgment roll alone is definitely limited, and "the only question presented for review is whether or not the findings support the judgment; or, more accurately, the only questions to be considered are: (1) Did the complaint state facts sufficient to constitute a cause of action? (2) Are the findings within the issues? (3) Is the judgment supported by the findings? And (4) Does reversible error appear on the face of the record? No question arises as to the sufficiency of the evidence to support the findings, or a nonsuit, or rulings made during the taking of evidence. The appellate court cannot in such case consider the pendency of another action based on the same cause of action.

The findings made are conclusive, unless contradicted by other findings, or unless obviously outside of the issues; and the appellate court cannot consider the omission to make findings." 2 Cal.Jur., p. 691, sec. 396.

The complaint alleges that the chattel mortgage has become valueless, and the only relief sought is a money judgment. The cross-complaint alleges, and the trial court found, that the note and mortgage were executed under the following circumstances:

"That from 1933 until on or about February 27, 1939, cross-defendant was employed and retained by cross-complainant as cross-complainant's attorney, counsellor and legal adviser, and that cross-defendant occupied this relation to cross-complainant prior to and at the time of the execution of the promissory note and chattel mortgage hereinafter mentioned, and subsequent thereto until on or about February 27, 1939, and was cross-complainant's sole and only attorney, counsellor and legal adviser in connection with the execution and delivery of said note and chattel mortgage.

"That on or about November 10, 1937, plaintiff was the owner and in possession of approximately 1200 tons of alfalfa hay located in the County of Madera, State of California, and on or about said date cross-defendant as the attorney for cross-complainant advised and stated to cross-complainant that cross-complainant would be better protected in his ownership and possession of said hay if cross-complainant would execute and deliver to cross-defendant his promissory note in the sum of $9,000.00, payable one year from date, and would also execute and deliver to cross-defendant a chattel mortgage upon said hay purporting to secure said note.

"That at said time cross-defendant stated to cross-complainant that if and when cross-complainant desired the return of said promissory note and/or chattel mortgage, cross-defendant would deliver to cross-complainant possession of the same and if and when cross-complainant desired the release of said hay from said chattel mortgage, cross-defendant would release the same.

"* * * That thereafter cross-complainant sold said hay to third parties and cross-defendant released the same from the lien of said chattel mortgage, as he had agreed to do.

"That cross-defendant has never given to cross-complainant any consideration for the execution and delivery by cross-complainant to him of said promissory note and chattel mortgage and cross-complainant has never received any consideration therefor and each of said instruments always has been and is unsupported by any consideration."

[19, 20] It is first contended by appellant that the cross-complaint fails to state a cause of action. Appellant takes the position that the averment that cross-complainant never received any consideration for the instruments, and that each of said instruments is unsupported by any consideration, is a mere conclusion of law. If these were the only allegations, there might be some plausibility to the contention. We find, however, that *facts* are set forth from which it appears, or could reasonably be inferred, that there was no consideration. The finding under attack, therefore, adds little or nothing to the cause of action which the *facts* alleged plainly set forth. The point is without merit. Other objections are made to the cross-complaint, which are in the nature of a special demurrer. No demurrer of any character was filed against said pleading. Furthermore, such objections cannot be raised under the rule stated in 2 Cal.Jur., page 691.

[21] It is next contended that the judgment is not supported by the findings. It is said that the finding to the effect that defendant received no consideration, must be disregarded. This is the same argument which we considered in connection with the sufficiency of the cross-complaint. The facts which show entire want of consideration are detailed in the findings. If the finding under attack was entirely omitted, the findings would be sufficient. Another contention under this heading is that the findings are inconsistent. Four instances of such alleged inconsistency are pointed out. We have examined them and find no conflict in the findings which cannot be reconciled in support of the judgment.

[22] It is finally urged that there are no findings upon various material allegations of the pleadings. The omission of the court to make findings upon such issues is not a ground for reversal where the appeal is based upon the judgment roll alone. Hook v. Los Angeles Ry. Co., 129 Cal. 180, 61 P. 912.

We find no reversible error in the record.

The judgment is affirmed.

PULLEN, P. J., and THOMPSON, J., concurred.

47 Cal.App.2d 331

PEOPLE v. DAVIS.

Cr. 3497.

District Court of Appeal, Second District, Division 1, California.

Oct. 15, 1941.

Hearing Denied Nov. 13, 1941.

1. Criminal law ⇐448(7)

In prosecution for keeping a place for purpose of recording bets on result of horse race, admission of testimony of police officer, who did not witness the placing of any bet with accused, that certain notations appearing on slip of paper found in possession of accused at time of his arrest represented amount of bet placed with accused and initial of bettor, was error, since the testimony was pure surmise and expression of mere "opinion" upon part of the officer on matter not the subject of expert testimony. Pen.Code, § 337a, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Opinion".

2. Criminal law ⇐409

In prosecution for keeping a place for purpose of recording bets on result of any horse race, wherein corpus delicti was not established, extrajudicial statements of accused made following his arrest were inadmissible and could not be considered in aid of judgment of conviction. Pen.Code, § 337a, subd. 2.

3. Criminal law ⇐535(2)

In prosecution for keeping a place for purpose of recording bets on result of any horse race, although the corpus delicti need not be established by proof beyond a reasonable doubt, there must nevertheless be a prima facie showing thereof. Pen.Code, § 337a, subd. 2.

4. Criminal law ⇐563

Generally, the term "corpus delicti" means, when applied to any particular offense, that the specific crime charged has been committed by someone.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

5. Gaming ⇐98(5)

Evidence was insufficient to establish corpus delicti and to sustain conviction for violating statute relating to the keeping or occupancy of a place with books, papers, etc., for purpose of recording bets on result of any horse race. Pen.Code, § 337a, subd. 2.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Wayne Alvin Davis was convicted of violating provision of Penal Code relating to the keeping or occupancy of a place with books, papers, devices, or paraphernalia for purpose of recording or registering bets or wagers on result of any horse race, and he appeals.

Reversed.

Horace H. Appel, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the district attorney defendant was accused in count 1 of a violation of subdivision 2 of section 337a of the Penal Code, which denounces as a crime the keeping or occupancy of a place with books, papers, devices or paraphernalia for the purpose of recording or registering bets or wagers upon the result of any horse race. Count 2 charged a violation of subdivision 4 of the same section, which makes it unlawful for any person to record or register a bet or bets upon the outcome of a horse race. A jury trial was waived and the issues submitted by stipulation upon the transcript of the testimony received at the preliminary examination and the testimony given at the trial by the defendant in his own behalf. The defendant was acquitted of the charge contained in count 2 and was adjudged guilty of the crime charged in the first count, whereupon the court sentenced him to a term of nine months in the county jail. This appeal is from the judgment of conviction.

The sole question raised is that the evidence is insufficient to support the judgment. Briefly, the facts are that defendant and his wife for some fifteen years had been conducting a barber and beauty shop on West Sixth street in the city of Los Angeles. On the afternoon of March 26, 1941, a police officer of said city entered defendant's place of business. At that time defendant was rendering barber service to a customer in the first chair. The officer testified that he saw defendant leave

his customer, go into a telephone booth, come back and start working again. The officer walked over and asked the defendant for a shoe shine, and was informed that the shine boy was out. At that time a radio announced the results of the fifth race at Bay Meadows race track. Defendant wrote the announced winners and the amounts paid by such winners on the sport page of a Los Angeles newspaper. The telephone again rang in the nearby booth, defendant answered it, returned, and taking a paper from the pocket of his barber's smock, wrote some notations thereon and put the paper back into his pocket. Thereupon the officer placed the defendant under arrest.

After testifying that for approximately two years he had had "experience in arresting numerous persons during that time for bookmaking"; that he had testified in court as to the results of his investigations, and that he was familiar with the manner in which bookmaking was commonly conducted in Los Angeles county, the police officer was permitted, over defendant's objection, to testify as to what was meant by the notations which appeared on the slip of paper withdrawn by the defendant from his pocket. In this respect we quote the following from the reporter's transcript:

"Q. Now, officer, after the first horse, Black Mark, on People's Exhibit A, is the name or number '1W1P' and then two initials. What do those notations indicate? A. '1W' represents 'One to Win'; '1P' it represents 'One to Place', and the initials represent the initials of the person placing the bet.

"Q. Then on the second line there is a name. What is that name? A. Justicea.

"Q. And is that a horse? A. Yes, running in the second race at Bay Meadows.

"Q. And after the name, '1W', after it? What does that designate? A. One to win."

[1] From the foregoing it will be noted that the officer was not asked as to the custom or manner in which alleged bookmakers operated, but was permitted to testify to the meaning of certain numerals and letters. This testimony, in the form here presented, should not have been admitted. It was pure surmise and but the expression of a mere opinion upon the part of the witness on a matter not the subject of expert testimony. What the numerals and letters meant was known only to the person who made them, and to permit the officer to testify that they represented the amount of a bet placed with the defendant and the initial of the bettor, was error. This is especially true in view of the fact that the officer did not witness the placing of any bet with the defendant. The defendant, testifying in his own behalf, stated that he made the notations on the sport page of the newspaper the night before his arrest. Concerning the circumstances in connection therewith, the defendant testified: "Well, some friends of mine—my wife and I pick them out all the time, and pick them out the way we like them, and sometimes we play them and sometimes we do not. There is a couple here that I wrote down here that I did not know whether I was going to play or not, and I didn't put anything after it. The ones that have '1W' and '1P', that is the way I wanted to play them."

[2] Respondent seeks to support the judgment with evidence of conversations and statements made to the officer by defendant following his arrest. But such evidence was inadmissible, because it is at once apparent from the testimony herein narrated that the corpus delicti was not established. Hence the extra-judicial statements of the defendant cannot be considered in aid of the judgment of conviction. People v. Newman, 37 Cal.App.2d 627, 99 P.2d 1067. Appropriate and timely objections to the introduction of such evidence were made and were followed by motions to strike.

[3-5] While it is true that proof beyond a reasonable doubt need not be offered to establish the corpus delicti, there must nevertheless be a prima facie showing thereof. Generally speaking, the term corpus delicti means, when applied to any particular offense, that the specific crime charged has been committed by someone. The material, competent and admissible evidence offered in the instant case to prove that a crime was committed falls far short of the quantum required to prove, even prima facie, the commission of the crime charged in the information. To hold otherwise would do violence to reason and challenge common sense.

The judgment is reversed.

YORK, P. J., and DORAN, J., concurred.

47 Cal.App.2d 326

HOWELL et al. v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 6620.

District Court of Appeal, Third District, California.

Oct. 14, 1941.

Hearing Denied Dec. 11, 1941.

1. Workmen's compensation ⇐920

Where logger, because of weather conditions, could work only eight months of each year, an award of benefits for logger's death computed by taking logger's total yearly earnings and dividing them by eight was proper. St.1937, p. 279, § 4453(c, d).

2. Workmen's compensation ⇐816

Under subdivision of labor code respecting manner of computing average weekly earnings where other statutory methods of arriving at such earnings cannot reasonably be applied, considerable discretion is vested in the Industrial Accident Commission in deciding what method of computing average weekly earnings should be adopted. St.1937, p. 279, § 4453(d).

3. Workmen's compensation ⇐1935

On proceedings to annul award of Industrial Accident Commission computing death benefits for death of logger, who could work only eight months of each year because of weather conditions, by taking logger's total yearly earnings and dividing them by eight, District Court of Appeal was bound to assume that commission gave due consideration to logger's actual earnings and that commission followed the course prescribed by subdivision of labor code respecting manner of computing average weekly earnings where other statutory methods of arriving at such earnings cannot reasonably be applied. St.1937, p. 279, § 4453(d).

4. Workmen's compensation ⇐816

The District Court of Appeal is bound to give a liberal construction to subdivisions of labor code respecting manner of computing average weekly earnings if earnings are at an irregular rate or where other statutory methods of arriving at such earnings cannot reasonably be applied. St.1937, pp. 265, 279, §§ 3202, 4453(c, d).

Original proceedings by G. W. Howell and others, petitioners, against the Industrial Accident Commission of the State of California and others to annul an award of the commission.

Award affirmed.

R. P. Wisecarver, of San Francisco, for petitioners.

E. A. Corten, of San Francisco, for respondents.

TUTTLE, Justice.

Petition to annul an award of Industrial Accident Commission, fixing the amount of death benefit due the widow and minor children of Ernest F. Ensley. The sole question presented is the method or basis of computation used by the Commission in arriving at the weekly disability indemnity and the total death benefit. The right to raise such question in this proceeding is not in dispute.

Ensley was killed while employed by petitioners Howell & Howell. He was a logger, and by reason of weather conditions existing in Plumas county, was only able to work some eight months of each year. In making the award, the Commission took the total yearly earnings of decedent, and divided them by eight. It is the contention of petitioners that such earnings should be divided by twelve. The Commission found that the average monthly wage was $146.87, resulting in a death benefit of $5,860.20, payable at the rate of $20.93 a week. The theory of petitioners, if it prevailed, would reduce the weekly benefits to $13.95 per week, and the total benefits to $3,905.54.

[1] We think that the Commission was vested with jurisdiction to make the award, under the provisions of section 4453, subdivisions (c) and (d) of the Labor Code, St.1937, p. 279, which set forth the manner of computing average weekly earnings in a case of this character. Those subdivisions of the section read as follows:

"(c) If the earnings are at an irregular rate, such as piecework or on a commission basis, or are specified to be by the week, month, or other period, then the average weekly earnings mentioned in subdivision (a) above shall be taken as ninety-five per cent of the actual weekly earnings averaged for such period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay.

"(d) Where the employment is for less than thirty hours per week, or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied, the average weekly earnings shall be taken at ninety-five per cent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments."

[2, 3] Under the latter subdivision of the section, considerable discretion is vested in the Commission in deciding what method of computing average weekly earnings should be adopted. Aetna Life Ins. Co. v. Industrial Accident Comm., 130 Cal. App. 488, 30 P.2d 372. We can see no abuse of discretion in the adoption of the method prescribed in subdivision (d), and must assume that the Commission followed that course.

The Commission may well have concluded that the other methods of computation fixed by the statute could not, under the peculiar circumstances of the case, be reasonably and fairly applied, and that therefore they were authorized to base the benefits upon the average weekly *earning capacity* of the employee *at the time of his death*, and in so doing, we must assume they gave due consideration to his actual earnings. In other words, proof of his actual weekly earnings furnished evidence of his earning capacity at the time of the injury.

Petitioners contend: "It was an employment that was isolated; there was no other employment at the times when he could not work by reason of weather conditions, and his total earning capacity was represented by the money which he could earn during the year at those times when he worked."

Petitioners rely upon the case of Sugars v. Ohio Match Co., 53 Idaho 408, 23 P.2d 743, an Idaho case. The court there adopted the method of computation urged by petitioners. It appears, however, that the section of the Idaho act upon which that case turns, uses the actual earnings for twelve months, as a basis for fixing the award. The pertinent section reads as follows: "Average weekly wages shall be computed in such a manner as is best calculated to give the average weekly earnings of the workman *during the twelve months preceding his injury.*" (Italics added.) Code Idaho 1932, § 43-1118.

[4] Finally, we are required, under section 3202 of the Labor Code, to give a liberal construction to the sections mentioned. Liberally construing the law, we believe that the Commission was permitted to adopt the course pursued here.

The Commission having jurisdiction to make the award, it is ordered that said award be affirmed.

ROSS, Justice pro tem., and THOMPSON, Acting P. J., concurred.



47 Cal.App.2d 377

LACHMUND et al. v. JOHNSON.

Civ. 6754.

District Court of Appeal, Third District, California.

Oct. 18, 1941.

1. Taxation ⇐695

The right of redemption of property sold for taxes comes entirely from statute and is subject to all conditions therein imposed. St.1939, pp. 1352, 1353, §§ 4256–4263, and p. 1345, § 4101.5, as amended by St.1941, p. 2467.

2. Taxation ⇐695

The Legislature may fix the terms upon which an owner of property sold for taxes may be entitled to have his property restored to him. St.1939, pp. 1352, 1353, §§ 4256–4263, and p. 1345, § 4101.5, as amended by St.1941, p. 2467.

3. Taxation ⇐695

It is the policy of the state to give a delinquent taxpayer every reasonable opportunity to redeem his property and to make his burdens as light as possible.

4. Taxation ⇐696, 710

Although realty is carried on assessment rolls and is currently taxed while being redeemed under the ten-year plan, payments under such plan are not a "redemption" until completed and are but compensation for use of realty, and, until comple-

tion of payments, the realty is unredeemed, and provisions of statute respecting redemption of tax-deeded property sold to the state on or before July 6, 1940, are applicable to realty. St.1939, pp. 1352, 1353, §§ 4256–4263, and p. 1345, § 4101.5, as amended by St.1941, p. 2467.

See Words and Phrases, Permanent Edition, for all other definitions of "Redemption".

5. Taxation ⇐709(1)

Where taxpayers having property upon which taxes were allowed to become delinquent in 1932 and subsequent years for $8,439.58, including penalties, commenced following the ten-year payment plan of redemption in December, 1936, and had paid $7,035.31 under such plan, taxpayers were entitled to redeem property upon tendering $2,670.20 to county auditor within 90-day period provided by statute respecting redemption of tax-deeded property sold to the state on or before July 6, 1940. St.1939, pp. 1350, 1352, 1353, 1356, §§ 4223, 4256–4263, 4336, and p. 1345, § 4101.5, as amended by St.1941, p. 2467.

Original mandamus proceedings by Agusta Waldenmeier Lachmund and others against Fred H. Johnson, etc., to compel respondent county auditor to accept a sum tendered in full payment of all taxes necessary to redeem petitioners' property.

Petition granted and peremptory writ issued.

Ralph H. Lachmund, of San Francisco, for petitioners.

R. M. Dunne, Dist. Atty., and Chester E. Watson, Asst. Dist. Atty., both of Stockton, for respondent.

ROSS, Justice pro tem.

This is an original application for a writ of mandate.

Petitioners own property in Stockton, San Joaquin county, upon which taxes were allowed to become delinquent in 1932, 1933, 1934 and 1935, for a total amount of $8,439.58, including penalties.

Commencing in December, 1936, petitioners have duly followed the ten-year payment plan of redemption now covered by sections 4256 to 4263 inclusive, Revenue and Taxation Code, St.1939, pp. 1352, 1353, and have paid a total of $7,035.31 under said plan of payment.

The 1941 legislature enacted the present section 4101.5 of the Revenue and Taxation Code, St.1941, p. 2467, as urgency legislation, to take effect immediately. The bill was approved by the governor June 28, 1941, and was filed with the secretary of state July 1, 1941. It provides:

"If tax-sold or tax-deeded property was sold to the state on or before July 6, 1940, and is redeemed on or before 90 days after this section becomes effective, the amount necessary to redeem the property is the amount of sold taxes, with interest on the amount of sold taxes at 5 per cent per year computed beginning the day the property was sold to the state to the time of redemption, but in no event computed beyond three years from the day the property was sold to the state.

"No other interest, costs, delinquent penalties, or redemption penalties accruing before 90 days after this section takes effect need be paid under such redemption.

"The amount necessary to redeem under this section shall not constitute the 'redemption amount' within the meaning of Section 4216."

The reasons for the urgency and immediate effectiveness of the statute are given as follows: "Due to the widespread depression, out of which we are just beginning to emerge, many taxpayers have been unable to pay their taxes, or to redeem their property from sale to the state for delinquency. By permitting redemption without penalties, many taxpayers will be able to redeem their property, restore the same to the tax rolls and thereby add needed revenue for the operation and maintenance of government."

Within the ninety-day period petitioners tendered to the respondent county auditor of San Joaquin county the sum of $2,670.20 for redemption of their property. This sum was determined by adding interest at 5 per cent per year for three years to the total amount of "sold taxes" above mentioned, to-wit: $8,439.58. This interest is $1,265.93, making a total of $9,705.51, sold taxes plus interest. From this was deducted the $7,035.31 paid under the ten-year payment plan, leaving the $2,670.20 which was tendered to the auditor.

Respondent auditor contends that the provisions of section 4101.5, Revenue and Taxation Code, are inconsistent with the ten-year plan, and that there is no authori-

ty for allowing credits for amounts paid under said ten-year plan to a person desiring now to come within the provisions of section 4101.5. He points out that under the ten-year plan the property is kept on the assessment rolls and that the expressed intent of the legislature to return property to the assessment rolls does not apply to property which is being redeemed by the ten-year plan.

[1, 2] It is undoubtedly true that "the right of redemption comes entirely from the statute, and it is subject to all the limitations and conditions therein imposed" (Quinn v. Kenney, 47 Cal. 147, at 150), and that it is "competent for the Legislature to fix the precise terms upon which the owner may be entitled to have his property restored to him". Andreson Co. v. Los Angeles County, 55 Cal.App. 585, at 587, 203 P. 1040, 1041.

[3] It must be also remembered that it is the policy of this state to give the delinquent taxpayer every reasonable opportunity to redeem his property, and to make his burdens as light as possible, and that this policy is in the public interest. Hotchkiss v. Hansberger, 15 Cal.App. 603, at 612, 115 P. 957; Buck v. Canty, 162 Cal. 226, at 231, 121 P. 924; Dougery v. Bettencourt, 214 Cal. 455, 6 P.2d 499; Anglo California National Bank v. Leland, 9 Cal. 2d 347, 70 P.2d 937.

[4] Although the property is carried on the assessment rolls and is currently taxed while being redeemed under the ten-year plan the payments under it are not a redemption until completed and are but compensation for the use of the real estate (sec. 4223, Rev. and Tax.Code). Until completion, therefore, the property is unredeemed, and the provisions of section 4101.5 as enacted in 1941 are applicable to it.

Section 4336, Revenue and Taxation Code, provides: "When property is redeemed on which delinquent taxes have been paid in installments, there shall be credited on the amount necessary to redeem the total amount of back taxes previously paid, without an allowance for interest on it. The credit shall be allowed after computation of the amount necessary to redeem."

[5] It appears, therefore, that petitioners have a right now to redeem their property under section 4101.5 and by section 4336 are entitled to credit for the amounts, without interest thereon, which they have paid heretofore under the ten-year plan.

The petition is granted, and it is ordered that a peremptory writ of mandate issue to respondent requiring him to accept the sum of $2,670.20 in full payment of all taxes necessary to redeem the property of petitioners.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.



47 Cal.App.2d 360

LEFF v. KNEWBOW.

Civ. 12616.

District Court of Appeal, Second District, Division 1, California.

Oct. 17, 1941.

1. Release ⇐29(1)

In determining effect of instrument releasing plaintiff's claims against one defendant executed during pendency of plaintiff's appeal from a judgment in favor of such defendant and another and from judgment against a third defendant in so far as it failed to award plaintiff amount for which he brought the action, the judgment against the third defendant was a "final judgment" at time of execution of release, as to the amount for which plaintiff obtained judgment, but the judgment in favor of the other defendants could not become a "final judgment" until disposition of the appeal, and the plaintiff's claims against such defendants still existed at time of execution of release.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

2. Release ⇐29(1)

A payment to a plaintiff made by one tort-feasor, however small, in settlement of a joint claim against all, operates to release all the tort-feasors.

3. Appeal and error ⇐1008(1)

Where plaintiff executed instrument releasing the plaintiff's claims against releasee who was a defendant in three actions brought

by plaintiff, including an action based on alleged fraudulent representations of three defendants jointly, whether plaintiff intended to release the releasee from plaintiff's claim against him in the fraud action so that all of the defendants therein were released was a "question of fact" for the trial court.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

4. Release ⇐29(1)

Where plaintiff executed instrument releasing plaintiff's claims against releasee who was a defendant in three actions brought by the plaintiff, including an action based on alleged fraudulent representations of three defendants jointly, and plaintiff executed a request for dismissal of plaintiff's appeal from judgment in the fraud action, so far as releasee was concerned, the plaintiff released any claim against releasee in the fraud action and the effect thereof was to satisfy alleged joint claim, and to release another defendant in the fraud action against whom judgment had been entered, from any liability on the claim or on the judgment.

5. Appeal and error ⇐907(3)

On appeal on judgment roll alone, findings of trial court are to receive such a construction as will uphold rather than defeat its judgment, and whenever, from the facts found by it, other facts may be inferred which will support the judgment, such inference will be deemed to have been made.

6. Release ⇐29(1)

Where release executed by plaintiff was found to be supported by consideration received in satisfaction of an injury sustained as result of alleged fraudulent representations of three defendants jointly, including the releasee, the other defendants were released from liability on the claims regardless of whether the releasee was a guilty party, or even claimed to be.

7. Release ⇐29(1)

Where plaintiff executed release in satisfaction of injury resulting from alleged fraudulent representation of three defendants jointly, he was "estopped" to deny liability of the party expressly released, from whom satisfaction was received, and likewise, if a claim has been made on which there was a possible liability, even if the person released was not in fact responsible, since an injured person is entitled to but one satisfaction.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

8. Appeal and error ⇐544(2, 3)

On appeal on judgment roll alone, the District Court of Appeal was limited to questions of whether findings made supported the judgment and whether reversible error appeared on face of the record.

9. Appeal and error ⇐901

On appeal on judgment roll alone, the appellant had the burden of showing that error existed.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Nathan Leff against William Knewbow to renew a judgment in favor of plaintiff against the defendant. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

Sidney Snyder and Leonard Comegys, both of Los Angeles, for appellant.

Thomas W. Cochran, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

This is an appeal by plaintiff, Nathan Leff, from a judgment for the defendant, William Knewbow, in an action brought by plaintiff to renew a judgment in the sum of $10,000 in his favor against said defendant William Knewbow, dated June 14, 1934.

Such prior judgment was rendered in an action brought by plaintiff against said defendant William Knewbow and two other defendants, based on the alleged fraudulent representations of said three defendants jointly in obtaining from plaintiff the sum of $50,000. Trial was had on the issues raised in such former action and it resulted in judgment that said two other defendants, Glen Behymer and S. Victor Cohen, were not guilty of any fraud, but that said defendant Knewbow had made certain fraudulent representations by which plaintiff was damaged in the sum of $10,000. Such action was No. 312252 of the files of the superior court of Los Angeles county. Plaintiff appealed the judgment in such action against defendant Knewbow in so far as said judgment failed to give him a recovery of $50,000, and he appealed the judgment against him and in favor of the

defendants Behymer and Cohen as to each and every part of such judgment. Written stipulations were thereafter filed by said parties from time to time, extending the time for plaintiff to prepare, serve and file his proposed bill of exceptions; the last stipulation extended such time to July 1, 1935. Prior to May 11, 1935, plaintiff Leff had obtained a judgment in the sum of approximately $10,000 in another action against said defendant Behymer on a contract of guaranty, which judgment was appealed by such defendant Behymer and said appeal was pending on May 11, 1935, said action being No. 310,652 of the files of the superior court of Los Angeles county.

Plaintiff Leff also had pending on said date and prior thereto, an action against said defendant Behymer on a *contract of guaranty* alleged to have been given plaintiff by such defendant for the sum of $50,000, being the same $50,000 described in said fraud action, said action being No. 378715 of the files of the superior court of Los Angeles county.

Prior to said May 11, 1935, plaintiff and said defendant Behymer, against whom the judgment of $10,000 and the action based on the contract of guaranty of $50,000 were pending, had been negotiating a possible settlement of their differences and finally reached an agreement, on or about said May 11, 1935, as a result of which the defendant Behymer in said two contract actions paid to plaintiff the sum of $7,500, and plaintiff, through his attorneys, concurrently with the execution of a release, executed and delivered to such defendant Behymer a dismissal with prejudice of the action based on the alleged guaranty of said $50,000, and a satisfaction of said judgment of $10,000, and a request for the dismissal of the appeal of said fraud action so far as such defendant Behymer was concerned.

Defendant Knewbow pleaded such release and such payment and dismissals in his answer filed in the present case as a satisfaction and discharge of the obligation of the judgment sued upon.

The release so given is in words and figures as follows:

"Release

"In consideration of the payment by Glen Behymer, first party herein, to Nathan Leff, second party herein, of the sum of Seventy-five Hundred Dollars ($7,500.00), receipt of which is hereby acknowledged by second party:

"It is agreed as follows:

"1. Second party concurrently herewith shall execute and deliver to first party herein full and complete satisfaction of judgment in that action in the Superior Court of Los Angeles County, State of California, entitled Nathan Leff v. Glen Behymer, et al., being numbered 310652 which action is now pending on appeal in the District Court of Appeal, Second Appellate District, being numbered therein Civil 10048, and in this connection both parties agree that said appeal may be dismissed, and each party to pay their own costs therein.

"2. Second party shall execute and deliver to first party a dismissal with prejudice of that certain action now pending in the said Superior Court entitled Nathan Leff v. Glen Behymer, being numbered 378715, and in this connection first party waives any claims for costs.

"3. Second party hereby acknowledges, states and declares that he has no claim or claims of any kind or nature against first party, and that if any such claim or claims or demands, or causes of action exist of whatsoever kind or nature, they may be and the same are hereby waived, relinquished, satisfied and cancelled from the beginning of the world to this day.

"4. First party hereby acknowledges, states and declares that he has no claim or claims of any kind or nature against second party, and that if any such claim or claims or demands, or causes of action exist of whatsoever kind or nature, they may be and the same are hereby waived, relinquished, satisfied and cancelled from the beginning of the world to this day.

"5. Said parties mutually release each other from any claims or judgments for costs in the above mentioned, or any other actions.

"Dated: May 11, 1935.

"Glen Behymer,
"First Party.
"Nathan Leff,
"Second party."

The trial court found that said release was a general release of all claims of plaintiff as against such other defendant Behymer in the fraud case and that plaintiff's judgment was fully paid and satisfied as against defendant Knewbow and that defendant Knewbow was relieved of any fur-

ther liability, and that said defendant was entitled to a judgment for his costs. It is from the judgment entered on such findings that plaintiff has appealed.

[1, 2] It is undoubtedly true, in view of the fact that plaintiff's appeal from his judgment against the defendant Knewbow was limited to error being shown on the appeal that would entitle him to more than $10,000, that it was for all practical purposes final as to such amount, but in our opinion the finality of such judgment is immaterial inasmuch as it is based on an alleged claim of joint tortious injury.

The judgment in favor of such other defendants was not final until the disposition of the appeal, and plaintiff Leff's claim against such two other defendants still existed at the time such settlement was made. The appeal was taken in an attempt to ultimately establish that claim. The settlement with the defendant Behymer and his release from every claim plaintiff had against such defendant Behymer is for the payment to him of said sum of $7,500. It is true that there were other considerations for said payment, but a payment to a plaintiff made by one tort feasor, however large or small, in settlement of a joint claim against all operates to release all (Chetwood v. California Nat. Bank, 113 Cal. 414, 45 P. 704), and his declaration in the release that he has no claims against such defendant Behymer is merely inconsistent with the finding of the trial court that such writing was a general release of the claims of plaintiff against such defendant Behymer in the fraud case.

[3] This is an appeal on the judgment roll. We believe it was a question of fact for the trial court whether or not plaintiff intended to release defendant Behymer from plaintiff's claim against him in the fraud case. The release is certainly broad enough on its face, in view of what was done under it, to say that such defendant Behymer was in fact released from all claims of plaintiff against him in the fraud action. The trial court found as facts, "that the payment of the sum of $7,500.00 by Glen Behymer to plaintiff Nathan Leff was given and received in consideration of the satisfaction" of the judgment in action No. 310652, for dismissal with prejudice of action No. 378715, "and for dismissal of plaintiff's appeal as to the said Glen Behymer in the fraud action No. 312,-252, without the segregation or apportionment of any part of the said sum of $7,-500.00 to any of said actions separately".

[4, 5] Appellant in his closing brief admits that there was a conflict in the evidence upon which the trial court based its findings that a part of the $7,500 so paid was consideration for the dismissal of the appeal. However, it was through such appeal that plaintiff intended eventually to get back into the trial court in the fraud action and so enforce his alleged joint claim, and when he gave such defendant Behymer the "Request for Dismissal of Appeal" in the fraud action as to such defendant, addressed to the court in which the appeal was pending, he thereby released whatever claim he had against defendant Behymer in such fraud case, and the effect thereof, in our opinion, was to satisfy such alleged joint claim and to release the defendant Knewbow from all liability thereon and from the judgment rendered against defendant Knewbow on such claim, and we must assume that he intended such result and that the trial court so inferred.

"* * * in the instant case, the appeal has been taken on the judgment roll alone, and it is the rule especially applicable to such an appeal, that 'findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon, and whenever, from the facts found by it, other facts may be inferred which will support the judgment, such inference will be deemed to have been made'." Goldberg v. List, 11 Cal.2d 389, 394, 79 P.2d 1087, 1090, 116 A.L.R. 900, citing Anglo-California Trust Co. v. Oakland Rys., 193 Cal. 451, 460, 225 P. 452.

[6, 7] The release having been found to be supported by a consideration received in satisfaction of the alleged joint injury, it is immaterial whether or not the releasee was a guilty party, or even claimed to be, and since a person injured is entitled to but one satisfaction, the releaser is held to be estopped to deny the liability of the party expressly relieved, from whom satisfaction was received, and likewise, if a claim has been made on which there is a possible liability, even if the person released was not in fact responsible. See Hawber v. Raley, 92 Cal.App. 701, 705, 268 P. 943; also, Tompkins v. Clay Street R. R. Co., 66 Cal. 163, 167, 4 P. 1165.

[8, 9] On this appeal we are limited to the question of whether or not the findings

made support the judgment and whether or not reversible error appears on the face of the record, and the burden is upon appellant to show that error exists (Platner v. Vincent, 194 Cal. 436, 229 P. 24), and in our opinion such showing has not been made.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.



47 Cal.App.2d 369

WALLACE et al. v. WHITMORE.

Civ. 6631.

District Court of Appeal, Third District, California.

Oct. 18, 1941.

1. Easements ⇐5, 9(1)

Where testimony showed that defendant and her predecessors in title used private roadway across plaintiffs' land frequently for twenty-five years for hauling and for driving sheep and cattle to public road, that roadway was clearly visible and followed course described without material variation during all of that period, and that it was so used without interference, opposition, or protest by plaintiffs or their predecessors in title, plaintiffs and their predecessors were charged with knowledge of manner in which roadway was used, and in absence of evidence to the contrary that testimony furnished adequate proof that roadway was used with a claim of right and not by permission as a mere neighborly convenience.

2. Easements ⇐36(3)

Evidence that defendant and her predecessors in title used private roadway across plaintiffs' land frequently for twenty-five years for hauling and for driving sheep and cattle to public road, that roadway was clearly visible and followed course described without material variation during all of that period, and that it was so used without interference, opposition, or protest by plaintiffs or their predecessors in title until about time suit to quiet title was commenced supported findings and judgment quieting title to easement of roadway in defendant by adverse possession.

3. Easements ⇐36(3)

Title to an easement for the use of a private roadway must be established by clear and satisfactory evidence that it was used for more than the statutory period of five years openly, notoriously, visibly, continuously, and without protest, opposition, or denial of right to do so.

4. Easements ⇐36(1, 3)

Clear and satisfactory evidence of the use of a private roadway for more than the statutory period of five years openly, notoriously, visibly, continuously and without protest, opposition, or denial of right to do so raises a presumption that roadway was used with an adverse claim of right and creates a prima facie title to the easement by prescription, and in absence of evidence of permissive use, that evidence is sufficient to sustain a judgment quieting title to the easement.

5. Easements ⇐36(1)

A presumption that the use of an easement was under a claim of right and adverse arises from an undisputed use for the established period of prescription, and the party alleging that the use has been by virtue of a license or permission has the burden of proving that fact by affirmative evidence.

6. Easements ⇐36(1)

Where an open and uninterrupted use of an easement for a sufficient length of time to create the presumption of a grant is shown, and the other party relies on the fact that those acts or any part of them were permissive, that party must by sufficient proof rebut that presumption, and if he does not the presumption stands as sufficient proof and establishes the right.

7. Easements ⇐36(1, 3)

Proof of the open, continuous, uninterrupted, and unopposed use of a private right of way for a long period of years beyond the statutory requirement establishes a prima facie right to title to the easement by adverse possession, and the owner of the land must rebut that evidence by substantial proof that the use was merely permissive as an accommodation to an adjacent property owner.

8. Easements ⇐61(9)

Evidence was sufficient to support trial court's findings with respect to the center

line of the course of a private roadway to the easement of which defendant acquired title by adverse possession.

9. Appeal and error ⇐1152

Where trial court found that private roadway to the easement of which defendant acquired title by adverse possession was fourteen and one half feet wide instead of fourteen feet and two inches wide as alleged in defendant's cross-complaint, judgment quieting title in defendant would be modified so as to subtract two inches in the width of the roadway from either side of the center line.

10. Easements ⇐36(3)

Evidence regarding tracks of vehicles and a gateway in a wire fence was sufficient to charge plaintiffs as purchasers of their ranch in August, 1937, with notice of the existence of an easement of a private roadway which defendant acquired across plaintiffs' land by adverse possession.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Suit to quiet title by O. S. Wallace and others against Ruth S. Whitmore, wherein defendant filed a cross-complaint alleging title to an easement of a private roadway across a portion of plaintiffs' property by adverse possession. From a judgment quieting title to the easement in defendant, plaintiffs appeal.

Judgment modified and as modified affirmed.

Clark, Nichols & Eltse, of Berkeley, for appellants.

Tinning & DeLap, of Martinez, for respondent.

THOMPSON, Acting Presiding Justice.

The plaintiffs have appealed from a judgment quieting title in the defendant and cross-complainant, Ruth S. Whitmore, to an easement of a private roadway across a portion of the property of plaintiff, acquired by adverse use thereof.

The appellants assert that the findings and judgment are not supported by the evidence for the reason that it was not affirmatively shown that the use of the roadway was not merely permissive as a neighborly accommodation; that the evidence fails to show a reasonably definite course of travel over the roadway and that the appellant had no actual notice of the asserted adverse possession.

The appellants brought suit to quiet title to twenty acres of fruit land situated about a mile from the town of Walnut Creek in Contra Costa County. The respondent owns 130 acres of farm land adjacent to the land of appellants on the south thereof. The appellants purchased their orchard ranch from T. J. Wisecarver August 7, 1937. The respondent's ranch was a part of the Baker tract which was purchased by Garfield Stow, the father of respondent, and acquired at his death by distribution to his wife, Elmira G. Stow and conveyed to the respondent, Ruth S. Whitmore, February 14, 1934. The San Miguel public road extends north and south along the easterly border of appellants' ranch to the town of Walnut Creek. To reach this public road from the premises of respondent it was necessary to cross a narrow strip of appellants' land for a distance of about thirty feet. A wire fence intervened between the land of the respective parties to this appeal. For nearly forty years the respondent and her predecessors in title hauled at will produce and machinery from their premises along a fairly well-defined private road across the thirty-foot strip of appellants' land to the San Miguel public road. That private road was used whenever it was necessary or desirable without protest or opposition on the part of appellants or their predecessors in title. There is no evidence that a formal request was ever made for the use of the roadway. In 1926, Mr. Jones, a tenant of Baker, from whom the respondent's title was derived, constructed a gate across the private roadway in the fence intervening between the properties of the respective parties. This gate was built by and maintained for the benefit of the tenant to enclose his cattle and sheep. Later the gate was usually left open and became dilapidated. The private roadway was never cultivated nor were crops of any sort produced thereon. There is evidence that the roadway was plowed in the cultivation of appellants' land. That fact is disputed, although it may be true that in cultivating appellants' land a disc was sometimes run across the road. There is evidence that Mr. Jensen, a tenant of appellants, disced across the roadway in the spring of 1937. Wild grass sometimes grew along that roadway, although it appears that wheel tracks were always visible thereon. It is not disputed that no contro-

versy ever occurred regarding the unobstructed use of the roadway until just before the suit for quieting title was commenced in April, 1938.

In her cross-complaint the respondent alleged title to an easement in the private roadway by adverse possession, which roadway was particularly described and which she asserted was fourteen feet and two inches in width. The court found that the cross-complainant acquired title by adverse possession of the easement for the private roadway described in her pleading, and that it had been so used by her and her predecessors in title for more than twenty-five years openly, notoriously, adversely, peaceably and continuously under a claim of right. The center line of the said roadway was specifically described, but the court found that she was entitled to an easement for the use of said roadway "fourteen and one-half feet in width". Judgment was accordingly rendered in her favor quieting title in the respondent, Ruth S. Whitmore, to the easement in said roadway. From that judgment this appeal was perfected.

[1, 2] The findings and judgment quieting title in the respondent, Ruth S. Whitmore, to the private roadway described in the cross-complaint by adverse possession is adequately supported by the evidence. The testimony satisfactorily shows that the respondent and her predecessors in title used the roadway across the appellants' land frequently for a period of twenty-five years, whenever they had occasion to do so, for hauling farm produce, machinery and supplies to or from their ranch and for driving sheep and cattle to the San Miguel public roadway; that said private way was clearly visible on the surface of the ground and followed the course described in the cross-complaint without material variation during all of said period of time; that it was so used by the respondent and her predecessors in title during all of that time without interference, opposition or protest on the part of the appellants or their predecessors in title until about the time this suit to quiet title was commenced, and that the respondent thereby acquired title thereto by openly, notoriously and adversely using the roadway continuously for a long period of years without protest or opposition and with a claim of right so to do. The acts and conduct of the respective parties charged the appellants and their predecessors in title with knowledge of the manner in which the roadway was used. Pollard v. Rebman, 162 Cal. 633, 124 P. 235; Syers v. Dodd, 120 Cal.App. 444, 8 P.2d 157. The facts adduced, in the absence of evidence to the contrary, furnish adequate proof that the road was used with a claim of right to do so and upon the contrary that it was not used by permission of the appellants and their predecessors in title as a mere neighborly convenience.

[3-6] It is true that title to an easement for the use of a private roadway must be established by clear and satisfactory evidence that it was used for more than the statutory period of five years openly, notoriously, visibly, continuously and without protest, opposition or denial of right to do so. But clear and satisfactory evidence of the use of the road in that manner creates a prima facie title to the easement by prescription. Such evidence raises a presumption that the road is used with an adverse claim of right to do so, and in the absence of evidence of mere permissive use of the road, it will be sufficient upon which to sustain a judgment quieting title to the easement therein. In the case of Ricioli v. Lynch, 65 Cal.App. 53, 223 P. 88, 90, the court quotes with approval from the case of Fleming v. Howard, 150 Cal. 28, 30, 87 P. 908, language supporting the previous statement of principle, as follows:

"'Under these circumstances it will be presumed that the use was under a claim of right and adverse, and a prima facie title by prescription is thereby established. * * "A presumption that the use was under a claim of right and adverse arises from an undisputed use of an easement for the established period of prescription; and the burden is upon the party alleging that the use has been by virtue of a license or permission, to prove that fact by affirmative evidence. * * * Where an open and uninterrupted use of an easement for a sufficient length of time to create the presumption of a grant is shown, if the other party relies on the fact that these acts or any part of them were permissive, it is incumbent on such party, by sufficient proof, to rebut such presumption of a non-appearing grant; otherwise the presumption stands as sufficient proof, and establishes the right." Jones on Easements, § 186.'"

The preceding quotation announces the unquestionable rule in California regarding that principle of law. Numerous authorities so hold. Fleming v. Howard, supra;

Gray v. Magee, 133 Cal.App. 653, 662, 24 P.2d 948; Pacific Gas & Electric Co. v. Crockett L. & C. Co., 70 Cal.App. 283, 290, 233 P. 370; Redemeyer v. Carroll, 21 Cal.App.2d 217, 68 P.2d 739; Wells v. Dias, 57 Cal.App. 670, 207 P. 913; Lemos v. Farmin, 128 Cal.App. 195, 17 P.2d 148; Ricioli v. Lynch, supra; Matthiessen v. Grand, 92 Cal.App. 504, 268 P. 675; San Juan Gold Co. v. San Juan Ridge Mutual Water Ass'n, 34 Cal.App.2d 159, 93 P.2d 582; Jones on Easements, § 186; 1 Cal.Jur. 636, § 95; 17 Am.Jur. 981, § 72.

[7] We find no language in Clarke v. Clarke, 133 Cal. 667, 66 P. 10; Lyons v. Schwartz, 40 Cal.App.2d 60, 104 P.2d 383, or any of the other cases relied upon by the appellants to refute the foregoing declaration of principle to the effect that proof of the open, continuous, uninterrupted and unopposed use of a private right of way for a long period of years beyond the statutory requirement establishes a prima facie right to title to the easement by adverse possession which requires the owner of the land to rebut that evidence by substantial proof that the use was merely permissive as an accommodation to an adjacent property owner.

[8] There is no merit in appellants' contention that the evidence fails to show the location and course of the asserted roadway. The cross-complaint specifically alleges the exact course of the center line of that roadway, which, it was claimed, existed and that it was fourteen feet and two inches in width. The evidence is that the tracks of the vehicles which traveled the roadway were always plainly visible. There is no substantial evidence of a variance from that course during many years of the use thereof. The course of the roadway was surveyed by Clyde Laird, a civil engineer. His description of the roadway was incorporated in the cross-complaint. The respective attorneys stipulated to his testimony in that regard, as follows:

"His testimony will be that the center line of this roadway is as described in our cross-complaint and in this diagram, and that there were wheel tracks; that that is the center line of the wheel tracks that are there at present and that the distance between the gate post on the west end which is still in place and the hole where the gate post was on the east end, which he says he has found, and has marked on the diagram, is fourteen feet two inches."

[9] The foregoing evidence furnishes ample proof to support the finding of the court with respect to the center line of the course of the roadway. It is true that the court found the roadway to be fourteen and a half feet in width, instead of fourteen feet and two inches in width, as alleged in the cross-complaint. The judgment should, therefore, be modified so as to subtract two inches in the width of the road from either side of the center line thereof.

[10] There is sufficient evidence to charge appellants, as purchasers of their ranch in August, 1937, with notice of the existence of the easement to the private roadway in question. There is evidence, although a conflict exists in that regard, that tracks of the vehicles which traveled the road were always visible to the time it was surveyed just before the trial of the case, and that there was a gateway in the wire fence at that point. It is said in Pollard v. Rebman, supra [162 Cal. 633, 124 P. 237], in that regard:

"The purchase was made for Mrs. Pollard by S. B. Abbott, her father. Neither he nor his daughter knew anything of the conveyance of the right of way, or of Rebman's claim thereunder. Abbott and Mrs. Pollard both examined the premises before purchasing, but neither of them saw the gate or observed any marks on the ground indicating any use of the said way. The gate was plainly visible, and the mere fact that they did not observe it would not exempt them from its effect as notice of the existence of the easement, if it was sufficient to constitute notice thereof. If the marks of use of the way were then plainly visible, they would be chargeable with notice of them also."

Mr. Jensen, a neighbor, who farmed the ranch for the appellants and their predecessor in title, Mr. Wisecarver, for a period of eleven years since 1927, testified, with respect to the visible tracks along the roadway:

"You could see tracks going in there. The Court: Well, I say, you could see tracks that somebody had gone across there? A. Yes."

Mr. Jones, who farmed the land of the respondent for her predecessor in title, and who constructed the gate in 1922, testified,

as did Mr. Palmer, to the continuous use of the roadway and to the fact that tracks of vehicles were visible along its course. Jones testified that it never was plowed over. This furnishes adequate evidence of visible tracks to charge the appellants with notice of the existence of the private right of way.

The judgment is modified to conform to the stipulated evidence by reducing the width of the easement to the roadway to seven feet and one inch on either side of the center line of the roadway as described in the cross-complaint and judgment. As so modified, the judgment is affirmed, respondent to recover her costs on appeal.

ROSS, J. pro tem., and TUTTLE, J., concurred.



47 Cal.App.2d 298

HART v. PRUDENTIAL INS. CO. OF AMERICA.

Civ. 13093.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1941.

1. Insurance ⇐665(8)

In beneficiary's action to recover upon policy insuring life of daughter, evidence supported finding that beneficiary gave truthful answers to soliciting agent's questions with respect to insured's physical condition, but that due to agent's fraud insured's state of health was misrepresented in application, as respects availability to insurer of defense of fraud.

2. Insurance ⇐665(3)

In beneficiary's action to recover upon policy insuring life of beneficiary's daughter, conflicting evidence supported finding that, when policy was delivered, copy of application was not attached, as respects availability to insurer of defense of fraud based on alleged false statements by beneficiary with respect to insured's health made in order to procure policy.

3. Appeal and error ⇐1011(1)

The trial court's finding, based on conflicting evidence, must prevail.

4. Insurance ⇐379(5)

Where application for policy insuring life of beneficiary's daughter, due to fraud of soliciting agent, misrepresented insured's physical condition, beneficiary's failure to read policy would not preclude recovery based on beneficiary's ignorance of fraud by which policy was procured, where copy of application was not attached to policy delivered to beneficiary.

5. Insurance ⇐379(5)

Judgment against insurer on policy insuring life of beneficiary's daughter was supported by findings that beneficiary had truthfully answered soliciting agent's questions with respect to insured's physical condition, but that soliciting agent erroneously transcribed answers so that answers contained in application did not disclose diseases of insured, and that application had been signed by beneficiary without reading it in reliance upon soliciting agent's representation that he had correctly transcribed answers.

6. Insurance ⇐379(7)

Where, by reason of fraud, mistake, or negligence of a soliciting agent or general agent of insurer, truthful answers respecting state of health of insured, given at time of application for life insurance, have been incorrectly entered by agent in form used for reporting state of health, the insurer is "estopped" from setting up falsity of such answers as defense to action on policy, notwithstanding any stipulation in application to effect that such agent is not agent of insurer.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Action by Myrtle R. Hart against the Prudential Insurance Company of America to recover on a policy of life insurance. From a judgment in favor of plaintiff, defendant appeals.

Judgment affirmed.

Walker, Adams, Duque & Smith, of Los Angeles (Henry Duque and Mark E. True, both of Los Angeles, of counsel), for appellant.

James C. Hollingsworth, of Ventura (Henderson & Churchill and E. Perry Churchill, all of Ventura, of counsel), for respondent.

MOORE, Presiding Justice.

Plaintiff commenced this action to recover on an insurance policy issued by defendant. Defendant filed its cross-complaint demanding rescission of the policy on the ground of fraud. Plaintiff recovered the sum of $500, the face amount of the policy. From the judgment defendant appeals.

The court found as facts that on October 10, 1938, one Beaty, a solicitor of defendant, called at plaintiff's home to solicit her to purchase a policy of insurance on the life of her daughter, Laura Jene. Finally yielding to Beaty's entreaties plaintiff signed an application for a "Twenty Year Payment Life Weekly Premium Industrial Policy". In answering questions contained in the application, which were propounded to her by Beaty, plaintiff stated that her daughter had suffered from diabetes; that sugar had developed in her urine and that Laura Jene was then receiving medical treatment; and that daily sugar tests demonstrated that at that time the daughter's condition was much improved; that she was gaining and was practically sugar-free; that Laura Jene had had a case of scarletina; had suffered a tonsillectomy, and had been treated in a hospital for a tooth extraction. The answers so given by plaintiff were all incorrectly entered in the application by Mr. Beaty as a result of which it was made to appear that Laura Jene's health was good; that she had suffered no illness; that she had not been confined in a hospital and that she had never suffered from diabetes.

Because of plaintiff's desire hastily to depart from her home at the time of making the application, in full reliance upon the statement of Beaty that her answers were correctly reported, plaintiff signed the application without ascertaining that the information with respect to Laura Jene's health was incorrectly entered in the application. The document was thereupon forwarded to the home office of defendant. In due course the policy designating plaintiff as beneficiary was received by Beaty who delivered it to plaintiff. Contrary to the custom of defendant, a copy of the application was not attached to the policy at the time of its delivery to plaintiff, September 29, 1939, Laura Jene departed this life as a result of a diabetic coma. Proof of death having been filed with defendant, payment of the policy was refused upon the hypothesis that plaintiff had fraudulently misstated her daughter's physical condition in making the application for the policy. Defendant demands a reversal of the judgment upon two grounds: (1) That recovery cannot be had upon a policy of insurance when issued in reliance upon false representations set forth in the application if the representation was material to the risk; (2) one who applies for insurance is presumed to have knowledge of the false statements contained in the copy of the application attached to the policy and cannot recover thereon, once the true facts have been communicated to the insurer. In support of both propositions defendant must rely solely upon its own assertion that the findings are not supported by the evidence.

[1] With respect to the answers given by plaintiff to defendant's agent the evidence amply supports the court's findings. Plaintiff testified as follows: "Beaty asked then to write the application * * * he wanted to know what had been her trouble * * * I told him about it * * * in the first place she had had a tooth pulled several months previous, and then she had a case of scarletina and then after that sugar developed in the urine, * * * he wanted to know what her tests were at present * * * I told him they were practically clear * * * that she had much improved and that she was gaining and they were practically sugar free * * * she had had a tonsillectomy three years previously and we had almost lost her * * * but after she had gotten over that she had been well until the sugar turned up in the urine * * * he wanted to know how we knew * * * I said 'we had made tests.' In fact I was making tests then each day * * * the doctor had shown me how to make the tests."

[2-4] Neither was the evidence lacking in support of the findings that when the policy was delivered a copy of the application was not attached. Plaintiff testified that at the time Beaty brought the policy to her home it had no copy of the application "on the inside"; that she placed it in a cupboard where it remained undisturbed until after the daughter's demise,

and that upon its removal from the repository, no copy of the application was annexed. That there was competent and persuasive testimony in conflict with the foregoing recitals was to be expected. Defenses to such actions invariably evoke sober, contradictory proofs in rebuttal. But upon conflicting evidence, the finding of the trial court must prevail. Foster v. Warren, 39 Cal.App.2d 470, 103 P.2d 591. Appellant's arguments and authorities in support of its contention that the trial court should have determined the facts otherwise have not been overlooked. Neither are we unmindful of the obligation imposed upon the plaintiff to read her policy and to take notice of its contents. Goldstone v. Columbia Life & Trust Co., 33 Cal.App. 119, 164 P. 416; Madsen v. Maryland Casualty Co., 168 Cal. 204, 142 P. 51. But in view of the finding that a copy of the application was not attached to the policy, it were of no avail now to convince this court that any amount of reading of it would have enlightened plaintiff as to the falsity of the contents of the application.

[5, 6] The court having also found that plaintiff gave truthful answers to the questions asked her concerning the state of her daughter's health; that the answers contained in the application were erroneous in that they did not show the afflictions of Laura Jene; that the agent's representations to plaintiff that he had correctly transcribed her answers and that in reliance upon such representations plaintiff signed the application without reading it, no doubt is left that the judgment is abundantly supported. When, by reason of fraud, mistake or negligence of a soliciting agent, the truthful answers of an insured given at the time of his application have been incorrectly entered by the agent in the form used for reporting the state of the health of the assured, the insurer is estopped to set up the falsity of such answers as a defense to an action on the policy. This is equally true whether the error be committed by the general agent or by a soliciting agent. In either event he is the agent of the insurer and not of the insured, notwithstanding the application might stipulate the contrary. Pacific Employers' Ins. Co. v. Arenbrust, 85 Cal.App. 263, 266, 259 P. 121; Lyon v. United Moderns, 148 Cal. 470, 83 P. 804, 4 L.R.A.,N.S., 247, 113 Am.St.Rep. 291, 7 Ann.Cas. 672; Layton v. New York Life Ins. Co., 55 Cal.App. 202, 202 P. 958; Weiss v. Policy Holders' Life Insur. Ass'n, 132 Cal.App. 532, 533, 23 P.2d 38.

Plaintiff having been free from fraud in the procurement of the policy, it is binding upon defendant.

The judgment is affirmed.

WOOD and McCOMB, JJ., concurred.



47 Cal.App.2d 359

BANK OF AMERICA N. T. & S. A. v. SUPERIOR COURT OF SAN FRANCISCO.

Civil No. 11937.

District Court of Appeal, First District, Division 1, California.

Oct. 17, 1941.

Rehearing Denied Nov. 15, 1941.

Hearing Denied Dec. 15, 1941.

1. Executors and administrators ⇐504(7)

The statute providing for dismissal of actions for want of prosecution and similar reasons does not apply to and may not be invoked for dismissal of exceptions filed to final account of executor or administrator. Code Civ.Proc. § 583.

2. Stipulations ⇐8

A series of letters written by executor's attorneys to attorney for person filing exceptions to executor's final account constituted a written "stipulation" which "waived" executor's alleged rights to invoke statute governing dismissal of actions for want of prosecution. Code Civ.Proc. § 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Stipulation" and "Waive".

Proceeding in the matter of the petition by the Bank of America N. T. & S. A., as executor, against the Superior Court of San Francisco for alternative writ of mandate to compel dismissal of exceptions filed to executor's final account.

Petition denied.

Louis Ferrari, Keyes & Erskine, and Bacigalupi, Elkus & Salinger, all of San Francisco, for petitioner.

Francis W. Murphy, of San Francisco, for respondent.

PER CURIAM.

[1, 2] The petition for the issuance of an alternative writ of mandate is denied upon the following grounds: (1) That section 583 of the Code of Civil Procedure upon which the petition is based does not apply to and may not be invoked for the dismissal of exceptions filed to the final account of an executor or administrator; (2) that in any event under the authorities cited by respondent in opposition to the issuance of the writ, the superior court was justified in holding as it did that, even though the provisions of said section 583 could be so extended as to apply to such exceptions, the series of letters written by petitioner's attorneys to respondent's attorney, and which are attached to and made part of the petition, constituted a written stipulation waiving the rights of the executor, if any it had, to invoke the benefit of the provisions of said section.



47 Cal.App.2d 281

HIGBIE v. LOS ANGELES COUNTY.

Civ. 2790.

District Court of Appeal, Fourth District, California.

Oct. 10, 1941.

1. Municipal corporations ⇐488(5)

Plaintiff, if he ever had the right to protest the reassessment of his property in refunding proceedings because money which he had paid for redemption of property from sale for delinquent taxes and assessments under the Ten Payment Account plan representing part of original assessment on his property was not credited on reassessment in refunding proceedings, lost that right by failing to protest or contest in the manner and within the time allowed by statute. Pol. Code, §§ 3817c, 3817c2–3817c5; St.1925, p. 849, as amended; St.1933, p. 1915, as amended.

2. Evidence ⇐83(4)

Where plaintiff paid money to county under the Ten Payment Account plan for redemption of property from sale for delinquent taxes and assessments, there was a presumption, in absence of anything to the contrary, that county officials performed their duties in accordance with the law and that plaintiff's payments when made were disbursed to the very funds and taxing agencies entitled to receive them. Pol.Code, §§ 3817c, 3817c2–3817c5.

3. Taxation ⇐538

Taxes voluntarily paid cannot be recovered by the taxpayer in the absence of a statute permitting a refund.

4. Taxation ⇐537

Where plaintiff who was in default in his taxes voluntarily availed himself of Ten Payment Account plan and chose to redeem his property and pay delinquent taxes under its provisions but because of refunding proceedings instituted by city in which plaintiff's property was located, county retained in its possession most of money paid to it by plaintiff, that amount was not recoverable as taxes erroneously or illegally collected within statute. Pol.Code, §§ 3804, 3817c, 3817c2–3817c5; St.1925, p. 849, as amended; St.1933, p. 1915, as amended.

5. Statutes ⇐68

A law is a "general law" if it has a uniform operation and affords equal protection in its operation to all persons coming within the class which it purports to affect, provided the designation of a class is founded on some reasonable, natural or intrinsic classification between the persons composing it and others not embraced within it.

See Words and Phrases, Permanent Edition, for all other definitions of "General Law".

6. Constitutional law ⇐48

The legislative determination concerning what is a sufficient distinction to warrant a classification will not be overthrown unless it is palpably arbitrary.

7. Constitutional law ⇐208(1)
Taxation ⇐696

The Ten Payment Account plan for the redemption of property from sale for delinquent taxes and assessments enacted for the relief of taxpayers who are in default and are in danger of losing their property is based on a reasonable classification and is

not arbitrary and void. Pol.Code, § 3817c et seq.

8. Constitutional law ⇐143
Municipal corporations ⇐526

The Ten Payment Account plan for the redemption of property from sale for delinquent taxes and assessments is not invalid as "impairing the obligation of the contract" of holders of improvement bonds for the payment of which property is assessed, since the plan was intended to provide funds for the payment of the bonds and not to defeat their payment. Pol.Code, § 3817c et seq.; St.1925, p. 849, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Impairing Obligation of Contract".

9. Constitutional law ⇐143
Municipal corporations ⇐526

The Ten Payment Account plan for the redemption of property from sale for delinquent taxes and assessments is not invalid as "impairing the obligation of the contracts" of holders of bonds issued to refund improvement bonds for the payment of which property was assessed, where refunding proceedings resulted in the substitution of a new contract with bondholders for original contract, and substitution was made with express consent of majority of bondholders and payment in full of those not consenting. Pol.Code, § 3817c et seq.; St.1925, p. 849, as amended; St.1933, p. 1915, as amended.

10. Constitutional law ⇐154(1)

The obligation of a contract is not "impaired" in the constitutional sense where a new contract is substituted for a prior one with the consent of the contracting parties.

See Words and Phrases, Permanent Edition, for all other definitions of "Impair".

11. Taxation ⇐695

Where express statutory consideration for payments made by plaintiff to county under Ten Payment Account plan was to extend period of redemption of realty from sale for delinquent taxes and assessments and as compensation for use and occupancy of realty, and plaintiff received that consideration, fact that another governmental agency in another proceeding over which county had no control provided means for redemption and failed to give plaintiff credits on his reassessment could not affect validity of consideration for his contract under plan with county. Pol.Code, § 3817c et seq.

12. Taxation ⇐724

Where express statutory consideration for payments made by plaintiff to county under Ten Payment Account plan was to extend period of redemption of realty from sale for delinquent taxes and assessments and as compensation for use and occupancy of realty, and plaintiff received that consideration from county, plaintiff could not contend that consideration failed, that county held money in "trust" for him, and that he could recover it under the rules of common law without a statute permitting a refund. Pol.Code, § 3817c et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by G. C. Higbie against the County of Los Angeles, to recover a portion of the money paid by plaintiff to defendant under the system of redemption of property from sale for delinquent taxes and assessments under the "Ten Payment Account". From a judgment for defendant, plaintiff appeals.

Affirmed.

John Moore Robinson and Walter R. Powers, both of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, both of Los Angeles, for respondent.

MARKS, Justice.

Plaintiff brought this action on May 9, 1939, to recover a portion of the money paid by him to the defendant under the system of redemption of property from sale for delinquent taxes and assessments under what is known as the "Ten Payment Account". See §§ 3817c, 3817c2, 3817c3, 3817c4, 3817c5, Pol.Code. A demurrer to the complaint was sustained with leave to amend. Plaintiff declined to amend and a judgment was entered against him from which this appeal was taken.

Plaintiff was the owner of property in the city of Inglewood, in the county of Los Angeles, upon which the money sought to be recovered was paid under the Ten Payment Account. The property was within Acquisition Improvement District Number 3 of the city of Inglewood, formed under the Acquisition and Improvement

Act of 1925 (Stats. 1925, p. 849) as amended and was assessed to pay the bonds issued to pay the cost of the improvement.

Plaintiff regularly paid all taxes and assessments on his property for the fiscal years material here except for the fiscal year 1932–1933, which were permitted to go delinquent. Because of this delinquency his property was sold on September 2, 1933.

In April, 1934, plaintiff elected to avail himself of the Ten Payment Account Act and declared his intention to avail himself of that law and to redeem his property under its provisions. He then paid the first instalment under the redemption plan which was accepted and his conditional delinquent tax account was given number 14030. He regularly made his payments to and including the payment made on April 26, 1938. These payments totaled $469.

The total delinquency for the fiscal year 1932–1933 was $634.72, without penalties, costs and interest, which included the delinquent local assessment and a $224.02 property tax.

In April, 1938, the city of Inglewood instituted proceedings under the Assessment Bond Refunding Act of 1933 (Stats. 1933, p. 1915, as amended, Stats.1935, p. 1999, Stats.1937, p. 2370, Extra Sessions, Stats.1938, pp. 84, 92), to refund the bonds issued for Acquisition Improvement District Number Three. These proceedings were concluded and the bonds were refunded. The reassessment on plaintiff's property was credited with all payments regularly made by him on the original assessment and the reassessment was reduced by the total of those amounts. He was not given credit for those payments he had made to the County of Los Angeles under the Ten Payment Account which represented instalments on the delinquent local assessment.

While it is outside of the record it is admitted that the bondholders under the original assessment remitted over $25,000 of the amount due them and the County of Los Angeles contributed $30,925.55 in the refunding proceedings, which amounts with the refunding bonds, retired the original bonds and plaintiff's property was released from the lien created in the original proceeding. This left the $469 which plaintiff had paid under the Ten Payment Account Act still in the possession of defendant according to the allegations of the complaint, the truth of which were admitted by the demurrer. It used $224.02 of that money with which to pay the delinquent property tax, leaving a balance of $244.98 still in its possession.

Plaintiff filed his verified claim for a refund of this sum in which he set forth the ground on which he claimed a refund as follows: "Refund of taxes paid by claimant, account cancellation of special assessment district, constituting excess of payment by amount herein claimed, over all taxes and assessments owed by claimant." The claim was rejected and this action followed.

It is interesting to note that counsel for defendant frankly states that the money was not repaid to plaintiff not "because of any lack of desire on the part of the county to make these refunds, but because the county could not find legal authority to do so". It is also pointed out that the county has conducted its own refunding proceedings so that there were no overages of property owners' money remaining in the county treasury such as we have here, but that this refunding proceeding was conducted by the city of Inglewood and that the County of Los Angeles had no control over it.

Before proceeding to a consideration of the questions argued by plaintiff we should point out that the complaint is barren of any attack on the refunding proceedings and it is not alleged that plaintiff ever protested at any stage of those proceedings. (See section 3, Assessment Bond Refunding Act of 1933.) It is not alleged that there was any fraud in the refunding proceedings or that any legal attack was made upon them within the ninety days after the confirmation of the reassessment specified in section 30 of the act within which time suit may be brought to contest the refunding proceedings. We must assume that no attack can be made on those proceedings at this time.

[1] If plaintiff ever had any right to protest the reassessment of his property in the refunding proceedings because the money which he had paid under the Ten Payment Account representing part of the original assessment on his property was not credited on the reassessment in the refunding proceedings, he lost that right by failing to protest or contest in the manner and within the time allowed by the act.

Section 3817c of the Political Code establishing the Ten Payment Account and subsequent sections dealing with the same subject (with the exception of different dates) contains the following:

"No such payment, nor all of them, shall be deemed a redemption of real estate nor affect the right, title, or interest of the State thereto, but shall be deemed and considered as compensation for the use and occupancy of said real estate; provided, that if each installment of delinquent taxes and interest be paid on or before the respective dates specified in this section, and if redemption of such property shall be made, on or before the twentieth day of April, 1943, in the manner hereinafter in this section provided, the amounts previously paid under the authority of this section shall be credited on the amount to be paid for such redemption."

Section 3817h of the Political Code, passed at the special session of the legislature in 1934 (Stats. 1935, p. 18) directed that money collected under the Ten Payment Plan be disbursed on receipt in accordance with the provisions of section 3816 of the Political Code, that is to pay the costs of sale, etc., and the balance (generally speaking) to the funds and other taxing agencies entitled to it. This section was amended in 1935 (Stats.1935, p. 1066) and this provision was retained. The section was again amended in 1936 (Stats. 1937, p. 21) and this provision was again retained . It was amended in 1937 (Stats. 1937, p. 149, effective April 19, 1937) to provide that the instalments collected "may be held until redemption is completed, or may be distributed as the money is received".

[2] While there is a presumption, in the absence of anything to the contrary, that the county officials performed their duty in accordance with the law, which would support the conclusion that plaintiff's payments when made, were disbursed to the various funds and taxing agencies entitled to receive them at least up to April 19, 1937, and while counsel for defendant states, and it is not denied, that all of plaintiff's payments were so disbursed, still we have the allegations of the complaint that defendant still retains this money.

Section 15 of the Assessment Bond Refunding Act of 1933 was amended in 1938 (Extra Session Stats.1938, p. 92), by the addition, among other things, of the follow paragraph:

"In any case in which a property owner has elected to pay delinquent taxes and assessments under the provisions of the law commonly known as the ten payment plan, but has not thereby redeemed the property prior to the filing of the reassessment in the refunding proceeding, the amount paid under the ten payment plan, which has been placed in the interest and sinking fund of the district, may be credited as assessment paid in making the reassessment and only the unpaid balance of the ad valorem assessment canceled upon recordation of the reassessment, or, as an alternative, the amount paid into the interest and sinking fund under the ten payment plan may be considered as not paid upon the assessment and shall not be deducted in making the reassessment, but in that event, upon recordation of the reassessment in the refunding proceeding, the unpaid assessments shall be canceled in the usual manner and the moneys paid into the interest and sinking fund from such payments made under the ten payment plan shall be applied to and credited upon the redemption of the property from general taxes and other assessments, if any."

This amendment went into effect on March 30, 1938, and was in effect during the process of the refunding proceedings before us.

The statutes to which we have referred clearly indicate the following:

(1) That the property owner availing himself of the Ten Payment Account and making payments under it should be regarded as paying something in the nature of a rental for continued possession of his property until all instalments had been paid when the rental would be used to pay the delinquent taxes and assessments. This provision may have been put in the statute to obviate the possibility of a claim for a refund by a property owner who paid part but not all of his instalments under the Ten Payment Account and consequently lost his property.

(2) That the instalments paid under the Ten Payment Account could be used annually by the various taxing agencies entitled to receive them.

(3) That in refunding proceedings instituted after March 30, 1938, with which we are concerned here, the agency conducting the refunding proceedings could give credit in the reassessment to the property owner who had made payments under the Ten Pay-

ment Account but had not redeemed his property, for that portion of those payments representing payments on the assessments being refunded, or might apply those credits on the redemption of the taxpayers' property from the lien of general taxes or other assessments, if any there be, provided those payments have reached the treasury of the agency conducting the refunding proceedings.

These provisions of the law would seem to cover the ordinary proceeding in which the same agency collected the instalments under the Ten Payment Account and conducted the refunding proceedings. The controversy we have here arises from the fact that the instalments under the Ten Payment Account were collected by one agency and the refunding proceedings were conducted by another, and the further fact that the two agencies did not cooperate and coordinate their actions so that there would be no overage of the taxpayers' money remaining after payment of all delinquent taxes and assessments. As far as we can see each agency acted within the strict letter of the law which applied to it, acting in its separate capacity, under the peculiar facts of this case. We must, therefore, look to the general principles of the law to determine the rights of plaintiff to recover the overage remaining in the possession of defendant. There seems to be no judicial determination of this question under the statutes applicable here and the facts presented.

[3] It is the settled law in California that taxes voluntarily paid cannot be recovered by the taxpayer in the absence of a statute permitting a refund. Southern Service Co., Ltd., v. Los Angeles County, 15 Cal.2d 1, 97 P.2d 963.

[4] We are cited to no statute permitting a refund to plaintiff under the facts of this case. Certainly section 3804 of the Political Code is not such a statute. While it permits refunds in certain cases, none of its provisions is applicable to the facts here. There is no allegation that the assessments were paid more than once, nor is it claimed that any other of the provisions are applicable except the one relating to taxes erroneously or illegally collected.

It should be apparent from what we have already said that the assessments were neither erroneously nor illegally collected by the County of Los Angeles from plaintiff. He was in default in his taxes. He voluntarily availed himself of the Ten Payment Account Plan and chose to redeem his property and pay the delinquent taxes which he owed under its provisions. He does not claim any error in computation in the amounts he was required to pay under that plan. There was no irregularity of any kind in his dealings with the County of Los Angeles. The only inequity in the transactions was occasioned not by anything done by the County of Los Angeles but in the refunding proceedings conducted by the city of Inglewood. As the County of Los Angeles had no control over those proceedings it cannot be held responsible for the action of that city.

In order to bring himself without the voluntary payment of tax rule and within the provisions of section 3804 of the Political Code providing for the refund of taxes erroneously or illegally collected, he urges that the sections of the Political Code setting up the Ten Payment Account Plan and certain provisions of the Assessment Bond Refunding Act of 1933 are unconstitutional and void.

A sufficient answer to this argument should be that "one who receives a benefit from an unconstitutional law is estopped from asserting its unconstitutionality". Hershey v. Reclamation Dist. No. 108, 200 Cal. 550, at page 564, 254 P. 542 at page 547. As the questions are of considerable importance, we will not rest on this well-established rule, but will consider the several arguments of plaintiff on this phase of the case.

He argues that sections 3817c, et seq., of the Political Code are void because the legislation is special and places a greater burden on one class of taxpayers than on another.

Redemption penalties are different in character from delinquency penalties and redemption penalties may be less than delinquency penalties. Long Beach City School Dist. v. Payne, 219 Cal. 598, 28 P.2d 663; San Diego Inv. Co. v. Shaffer, 137 Cal. 323, 70 P. 179.

[5, 6] It is universally held in California that a law is general if it has a uniform operation and affords equal protection in its operation to all persons coming within the class which it purports to affect provided the designation of such class is founded on some reasonable, natural or intrinsic classification between the persons composing it and others not embraced within it; that "the legislative determination as to what is a sufficient distinction to warrant a classi-

fication will not be overthrown unless it is palpably arbitrary". In re Weisberg, 215 Cal. 624, 12 P.2d 446, 449. See, also, In re Sumida, 177 Cal. 388, 170 P. 823; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398; Coelho v. Truckell, 9 Cal.App. 2d 47, 48 P.2d 697.

[7] Here the challenged legislation is for the relief of a certain class of taxpayers, namely, those who are in default in their taxes and in a period of extended financial depression are in danger of losing their property. We believe this is a reasonable ground for classification and cannot hold the legislative decision in making such a classification arbitrary and therefore void.

[8-10] Plaintiff argues that certain parts of the legislation is void because it impaired the obligation of the contract of the bondholders. This argument is without merit. The Ten Payment Account Plan was clearly intended to provide funds for the payment of the bonds and not to defeat their payment. If this argument be directed to the refunding proceedings it is also without merit. That proceeding resulted in the substitution of a new contract with the bondholders for the original contract. This substitution was made with the express consent of a majority of the bondholders and the payment in full of those not consenting. The property owners either by expressly consenting to the refunding proceedings or by failing to protest, ratified the new contract and consented to it under the express terms of the refunding act. The obligation of a contract is not impaired where a new contract is substituted for a prior one with the consent of the contracting parties.

The following cases tend to support our conclusion that the acts in question are constitutional: City of Inglewood v. County of Los Angeles, 207 Cal. 697, 280 P. 360; Anglo California Nat. Bank v. Leland, 9 Cal. 2d 347, 70 P.2d 937; Los Angeles County v. Jones, 6 Cal.2d 695, 59 P.2d 489; San Diego County v. Hammond, 6 Cal.2d 709, 59 P.2d 478, 105 A.L.R. 1155; Los Angeles County v. Jones, 13 Cal.2d 554, 90 P.2d 802.

In the case of County of San Bernardino v. Way, 18 Cal.2d 647, 117 P.2d 354, very similar attacks to those made here, were made on the constitutionality of the Assessment Refunding Bond Act of 1935, as amended. Stats.1939, p. 1637. The arguments there made, similar to those made here, were held to be without merit, and the act was held constitutional.

[11, 12] Plaintiff urges that as the consideration for the money held by the County of Los Angeles failed, the County holds that money in trust for him so that he can recover it under the rules of the common law without a statute permitting a refund. He relies on such cases as Grimes v. Merced County, 96 Cal.App. 76, 273 P. 839, to support his argument.

In the Grimes case a water protection district was formed and $7,588 was collected from the property owners to pay the cost of the proposed improvement. The project was abandoned as the money provided was entirely inadequate to pay the cost of the improvement. Mrs. Grimes failed to pay her assessment and her property was sold. She redeemed it at a cost of $684.73 and recovered judgment for that amount, the appellate court holding that as the consideration for the payment had failed, a trust arose in her favor.

Here no such situation is apparent. The express statutory consideration for the payments made by plaintiff to the County of Los Angeles was "to extend the period of redemption of such real estate and to postpone the date of sale of such property at auction" and "as compensation for the use and occupancy of said real estate" (§ 3817c, Pol.Code) by the plaintiff. Plaintiff received those considerations from the County of Los Angeles, so the consideration for the payments did not fail. Because another governmental agency in another proceeding over which the County of Los Angeles had no control provided means for the redemption of his property and failed to give plaintiff the credits on his reassessment which he now thinks he should have received cannot affect the validity of the consideration for his contract under the Ten Payment Account with the County of Los Angeles.

As the contract between plaintiff and defendant was lawful and valid, as the payments made by plaintiff to defendant were not erroneously or illegally collected by it, as the payments made under that contract were voluntary, for a lawful purpose, and made upon a valid consideration which did not fail, the trust theory in Grimes v. Merced County, supra, cannot be invoked here.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

BILA v. YOUNG et al.

Civ. 13085.

District Court of Appeal, Second District, Division 1, California.

Oct. 10, 1941.

Rehearing Granted Nov. 7, 1941.

1. Paupers ⇐7

The entire administration of the old age security law is vested in the state social welfare board with the exception of the first application and action thereon, which is vested in board of supervisors of county of residence subject to right of appeal to be heard by state social welfare board. St.1937, p. 1009, §§ 101–103; pages 1078, 1086, §§ 2001, 2180–2182.

2. Paupers ⇐2

The old age security law does not violate Constitution by vesting in the state social welfare board a large measure of discretion in administering the law, to be exercised under the rules presented in the Welfare and Institutions Code. St.1937, p. 1009, §§ 101–103; pages 1078, 1086, §§ 2001, 2180–2182.

3. Paupers ⇐7

The discretion vested in the state social welfare board in the administration of the old age security law may not be exercised arbitrarily, capriciously, or without a factual basis sufficient to justify the action taken. St.1937, p. 1009, §§ 101–103; pages 1078, 1086, §§ 2001, 2180–2182.

4. Mandamus ⇐73(1)

A cause of action for issuance of a writ of mandamus was stated by petition alleging facts showing that petitioner had met requirements of old age security law with respect to eligibility to receive security payments, but that application therefor had been denied by county board of supervisors and state social welfare board, that all information demanded of petitioner had been supplied, and that state board had acted arbitrarily in making the granting of old age security contingent upon petitioner securing a life estate in property of which she was not the owner. St.1937, p. 1009, §§ 101–103; pages 1078, 1086, §§ 2001, 2180–2182.

5. Mandamus ⇐3(1)

In the absence of any provision for review of the decisions of the state social welfare board, mandate is the only available remedy to correct administrative abuse of discretion.

6. Paupers ⇐43(2)

Where applicant for old age security transferred to her brother for a consideration her home, the value of which was less than the maximum value of real estate she could possess under the law and still qualify and continued to live in home, paying $10 per month rent and receiving $12 per month from a tenant, applicant's eligibility was not affected by the transfer, and state social welfare board acted arbitrarily in making the grant of old age security contingent on the brother transferring the home back to applicant or granting her a life estate therein. St.1937, p. 1009, §§ 101–103; pages 1078, 1086, §§ 2001, 2180–2182; p. 1083, § 2160(g).

7. Mandamus ⇐176

Trial court, in granting petition for writ of mandate directing state social welfare board to grant petitioner aid under old age security law, acted in excess of its jurisdiction in assuming to fix the amount of the aid to be given and in fixing the date when payments should commence, since the exclusive jurisdiction thereof is vested in state social welfare board. St.1937, p. 1009, §§ 101–103; pages 1078, 1086, §§ 2001, 2180–2182.

Appeal from Superior Court, Los Angeles County; Norman A. Bailie, Judge pro tem.

Proceeding by Rosanna Bila against Archibald B. Young and others for a writ of mandate to compel defendants to pay petitioner through the Board of Supervisors of Los Angeles County monthly old age security payments. From a judgment granting peremptory writ of mandate, defendants appeal.

Reversed with directions.

Earl Warren, Atty. Gen., L. G. Campbell, Deputy Atty. Gen., and Clarence A. Linn, of San Francisco, for appellants.

Joseph K. Coady and Henry K. Elder, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Rosanna Bila, respondent here, on March 14, 1939, applied to the board of supervisors of Los Angeles county for monthly Old Age Security payments. Such application was denied December 15, 1939. Mrs. Bila appealed such deci-

sion to appellants, hereinafter called State Board. Such appeal was heard by the State Board and was denied.

Thereafter, Mrs. Bila filed her petition in the superior court of Los Angeles county for a writ of mandate to compel said State Board to pay her, through the board of supervisors of Los Angeles county, monthly Old Age Security payments in the sum of forty dollars per month from March 14, 1939, the date her application for such payment was filed with the board of supervisors. Said State Board demurred to the first amended petition and the amendment filed thereto, and answered such petition. Judgment was rendered by said court January 30, 1941, granting petitioner a peremptory writ of mandate directing said State Board to pay said petitioner, through the board of supervisors of Los Angeles county, monthly Old Age Security payments in the amount of $40 per month from October 3, 1939 (the date her application was denied), and awarding petitioner her costs. From said judgment said State Board has appealed, urging that said court erred:

1. In overruling defendants' (appellants') objections to the introduction of any evidence on the grounds, (a), of the insufficiency of the petition to state a cause of action, and, (b), that the court had no power to review the action of said board.

2. In finding that the action of the State Board was arbitrary, capricious and unreasonable.

It was stipulated that the cause might be heard on a transcript of the proceedings before the State Board on the appeal, subject to the objection of defendants that the court was without jurisdiction to hear the matter. Such transcript was marked "Petitioner's Exhibit 1", and appears on pages 43 to and including line 21 on page 105 of the Transcript on Appeal.

Such hearing was informal, as administrative hearings usually are, and consists of statements of counsel and investigators, discussions between the members of the board and with counsel. The only evidence under oath was that of Mrs. Bila, yet it appears about as clearly as it would have in a court of law that Mrs. Bila had a farm in Colorado which was sold on the open market in 1936 for $2,400; that in 1929 her husband was an invalid and that they began borrowing money from petitioner's brother, Frank Kelley. Petitioner testified that she repaid her brother $1,500 of such purchase price for money he had advanced herself and husband up to her husband's death in 1933, and that she used the balance of the money to live on, to pay expenses, and to make her home in Los Angeles livable. She testified she gave her brother $500 of the $1,500 in the early part of 1937, "and when the other amount came in July, 1938, he took that amount". It appears, also, that a Mr. Wheeler, who had been a friend of the family since 1929, had helped petitioner take care of Mr. Bila, loaned her money in small amounts at different times, as well as having paid the back taxes on the Colorado property. On September 28, 1939, after she was denied relief by the board of supervisors, Mrs. Bila transferred to her brother, Frank Kelley, her home in Los Angeles, the assessed value of which was $550, for a consideration of approximately $610, of which it appears $235.69 was used to pay an outstanding loan from the Home Owners' Loan Corporation, and $330 to pay Mr. Wheeler for money loaned by him in 1933, and services rendered in 1932. The inconsistencies in petitioner's testimony could be very well due to the fact that the witnesses were not business people, and to faulty recollection of dates and events. At one time in the first hearing, a motion was made and seconded that the appeal be denied. Such motion was put after considerable discussion, with no "aye" votes. In such discussions and before the vote was taken, a suggestion was made by Mr. Schreiber, deputy director of Los Angeles County Charities, to the effect that "if the property disposed of for $2,400 could be satisfactorily settled", and if "this brother Frank would give a life estate in that property" (the house), "the records would then be cleared". Shortly after that the motion lost was put. Directly after such vote a motion was put to the effect "that the appeal be granted * * * to the amount to which she may prove eligible", which was seconded. It seems clear that the board wished more evidence with reference to the Colorado property and wanted to ascertain if the brother would give a life estate to petitioner in the home, and, after some discussion, the meeting was continued "for information".

At the continued meeting a letter from the brother, Frank Kelley, was read, which, in effect, stated that he could not give his sister a deed to the home, as he had to borrow part of the money he paid

her and would have to sell the home to pay it back. The following then appears in the transcript:

"Acting Chairman: In other words, they didn't comply with the request of the Board at the last meeting in order to qualify.

"Mr. L. C. Schreiber, Deputy Director, Los Angeles County Charities: My recollection was that at the last meeting of the Board thirty days time would be allowed the appellant to obtain a life estate or else the appeal would have to be denied.

"Mrs. Barkwill (Member of State Board): I would like to make a motion that the appeal of Rosanna Bila be denied.

"Mrs. Emmons (Member of State Board): I second.

" (Motion is carried.) "

It is perfectly clear that the members of the Board did not question the honesty of petitioner.

1. Did the court err in overruling defendants' objection to the introduction of any evidence made on either of the stated grounds?

The first amended complaint alleges the necessary facts as to age and residence; that she was not on relief or an inmate of any public home or institution; that she was a widow and childless, and that she had made no voluntary assignment or transfer of her property for the purpose of qualifying for relief, and had no real or personal property in excess of the amounts allowed by the Act; the fact of application to the board of supervisors for Old Age Relief; the denial by such board; the fact of appeal to the State Board and its denial of relief; that petitioner is dependent on friends and charity, and has supplied all the information demanded of her in such proceedings, and has no adequate remedy at law. By the amendment she filed to such amended complaint, she alleged, in effect, that the State Board in denying such appeal acted arbitrarily and capriciously, in that said State Board "made the granting of old age security to your petitioner contingent upon your petitioner securing a life estate in certain property of which she was not the owner", which contingency, it is alleged, "was not then and is not now a requirement for the securing of old age security under the Social Welfare Act".

In the Department of Social Welfare of the state there is a board of seven members, known as the Social Welfare Board, each member appointed by the Governor for a term of four years, unless appointed to fill a vacancy. Sec. 101, Welfare and Institutions Code, St.1937, p. 1009. Such Board is required to meet once a month for the purpose of transacting business, sec. 102, and is invested with all of the duties, powers, purposes, responsibilities and jurisdiction under the Welfare Code, unless otherwise in such code expressly provided. Sec. 103.

In the Old Age Security Law (secs. 2000-2228, Welfare and Institutions Code), it is provided that subject to the provisions of said code, "every person residing in the State, if in need, shall be entitled to aid in old age from the State" (sec. 2001); that verified application for aid under such law, in the form provided by the state department of social welfare shall be filed with the board of supervisors of the county in which the applicant resides (sec. 2180), which board, directly or through an investigator, shall promptly make the necessary investigation, which is required to be completed within ninety days, the board upon receipt of report of such investigator to decide upon the amount of aid, if any (Sec. 2181).

If any applicant is dissatisfied with the decision of the board of supervisors, he shall upon filing a petition with the State Department of Social Welfare, "have the right of appeal and shall be accorded an opportunity for a fair hearing" (sec. 2182). The State Social Welfare Board shall consider the appeal, and "shall dismiss the appeal or award aid as prescribed" in such law, and the county board of supervisors shall then pay to such aged person the sum awarded, if any, payment to commence as of the first day of the month in which the application is granted, unless otherwise directed by the State Social Welfare Board in cases in which an appeal is taken, but aid shall not commence prior to date of application (Sec. 2182).

[1] It will be seen from the foregoing that the entire administration of the law is vested in the State Social Welfare Board, with the exception of the first application and action thereon, which is vested in the board of supervisors of the county of residence, subject to right of appeal to be heard by the State Social Welfare Board.

[2] In our opinion the legislature has invested in the State Board a large meas-

ure of discretion, to be exercised under the rules presented in the Welfare and Institutions Code. That the legislature may do so without violating any principle of the Constitution is the settled law of this state. See People v. Monterey Fish Products Co., 195 Cal. 548, 558, 234 P. 398; 38 A.L.R. 1186; Globe Cotton Oil Mills v. Zellerbach, 200 Cal. 276, 252 P. 1038, —Fish & Game Commission; McDonough v. Goodcell, 13 Cal.2d 741, 746, 91 P.2d 1035, 123 A.L.R. 1205,—State Insurance Commission.

[3] Such discretion "may not be exercised arbitrarily, capriciously, * * * or without a factual basis sufficient to justify" the action taken. McDonough v. Goodcell, supra.

[4] In our opinion petitioner's complaint stated a cause of action that the trial court had jurisdiction to enforce by mandamus, at least to the extent of deciding whether or not the State Board acted arbitrarily, capriciously or without a factual basis to justify such action, and that it did not err in overruling defendants' objection to the introduction of evidence under such complaint, or in awarding petitioner her costs.

[5] There is no provision in the act involved here for a review of the action of the board in the Superior Court as is provided in Deering's General Laws of California, 1937, Act 3796, section 46, in the case of certain decisions of the Board of Equalization under such Alcoholic Beverage Control Act. In the absence of such a method of review, mandate is the only possible remedy to correct administrative abuse of discretion. Drummey v. State Board of Funeral Directors and Embalmers, 13 Cal.2d 75, 82, 87 P.2d 848.

In this case the State Board is invested with certain fact-finding powers on appeal, viz., to "consider the appeal" and having done that to either, first, "dismiss the appeal" or "award aid as prescribed in this chapter" (sec. 2182, Welfare and Institutions Code). The State Board, in effect, dismissed the appeal.

Did such board act arbitrarily and "without a factual basis sufficient to justify" the action taken?

So far as the Colorado property is concerned, if petitioner had had such property at the time of her application, the value thereof, combined with the apparent value of the home she then owned, might possibly have been sufficient to have disqualified her. The evidence in the transcript shows, however, that she had disposed of such Colorado property approximately three years before that, and that the last of the purchase price was paid in 1938 and that none of it remained in her hands, or under her control, at the time of the application. She had her home place at the time the application was made, but clearly its value was far less than the maximum value of real estate she could possess under the law and still qualify. Mrs. Bila testified, in effect, that she went to the Home Owners' Loan Corporation and told them she "was unable to make any more payment. They told me briefly they would have to have their money. Mr. Wheeler made the payments." After she sold her home to her brother, Mrs. Bila continued to live in it, paying $10 per month rent. A tenant in the home paid $12 per month. The value of the use of the house was not income, and the rent paid by the tenant was not enough to affect the amount of her aid. The sale of the home was made after her application was filed and we fail to see how the transfer of the home could have affected her eligibility at all, and she could not possibly have made the transfer of her Colorado property two years before she applied for aid "for the purpose of qualifying for such aid". Sec. 2160(g), Welfare and Institutions Code.

[6] The record before us shows no factual basis for the denial by the board of petitioner's appeal, and furthermore, to make the granting of aid contingent on petitioner's obtaining either a transfer of the home back to her from her brother, or contingent on his granting petitioner a life estate in the home, was an abuse of the discretion vested in the board, something beyond their jurisdiction, and was an arbitrary action on the part of the board.

[7] We are further of the opinion that the trial court acted in excess of its jurisdiction in assuming to fix the amount of the aid to be given, and in fixing the date when payments should commence. In our opinion the legislature has vested in the board the exclusive jurisdiction to award aid, determine the amount thereof to be paid within the limits fixed, and to determine when payments should begin, and that in assuming such jurisdiction the trial court erred.

The judgment is reversed with directions to quash the writ of mandate issued and to issue another writ directing said State Board to grant petitioner's appeal and to determine the amount of aid to which she is entitled and the date payments thereof are to commence.

YORK, P. J., concurred.

DORAN, Justice (concurring).

I concur only in the judgment of reversal and direction to quash the writ. In my opinion the courts are without power to interfere with the action of the board in the circumstances here presented.



47 Cal.App.2d 315

MILTON E. GILES & CO. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 13234.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1941.

Rehearing Denied Nov. 10, 1941.

Hearing Denied Dec. 11, 1941.

1. Lis pendens ⇐22(2)

Where husband and wife filed suit against bank to determine ownership of trust properties and contemporaneously recorded a notice of lis pendens in office of county recorder, lis pendens was notice to judgment creditor of husband claiming properties by virtue of purchase at a judicial sale under execution as properties of husband, of the parties litigant as well as of the contents of the pleadings, the description of the properties and bank's claim of ownership. Civ.Code, § 863.

2. Lis pendens ⇐22(1)

Where husband and wife filed suit against bank to determine ownership of trust properties and contemporaneously recorded a notice of lis pendens in office of county recorder, and at conclusion of the litigation bank agreed to convey properties to wife or her nominee, fact that wife chose to have title of properties placed in name of her nominee did not detract from the virtue of the notice of lis pendens. Civ.Code, §§ 409, 863.

3. Fraudulent conveyances ⇐299(12)

Although transactions between husband and wife oftentimes constitute basis for justifiable suspicion of dishonesty, at the same time suspicion, if any, is not sufficient to obviate force and effect of evidence of documents and of living witnesses and especially so in absence of charges of fraud and of evidence in support thereof.

4. Husband and wife ⇐133(1)

Evidence that wife had acquired a lien upon trust properties in which she and her husband owned the beneficial interest as joint tenants as collateral for a $50,000 note executed by husband, and that she accepted a deed to the properties from bank, which was serving as trustee, and the cancellation of her indebtedness to the bank in exchange for the note, was sufficient to establish wife's separate ownership of properties, where proof was sufficient to dispel imputation of bad faith. Civ.Code, § 164.

5. Judgment ⇐235

The trial court was justified in entering judgment quieting title to land in one of the defendants, where such defendant denied claims of the plaintiff and declared affirmatively basis of her claim of ownership of the property, notwithstanding that such defendant filed no cross-complaint against her co-defendants. Code Civ.Proc. § 578.

6. Quieting title ⇐49

In quiet title action, trial court was under duty to adjudicate the whole question according to the evidence and to award each litigant the judgment for such interest as his proofs justified. Code Civ.Proc. § 578.

7. Lis pendens ⇐22(2)

Where husband and wife filed suit against bank to determine ownership of trust properties held by bank as trustee and contemporaneously recorded a notice of lis pendens in office of county recorder, from the time of filing of notice of lis pendens, the world had constructive notice that title to properties was vested in the bank and that the husband and wife claimed ownership. Code Civ.Proc. § 409.

8. Husband and wife ⇐149(2)

Fact that husband as early as 1922 caused title to lands to be vested in bank as trustee, that he dealt with the trust so openly as to have gained reputation with his judgment creditor as owner of the lands, that husband and wife conveyed the lands in trust to a title insurance company in July,

1933, and in turn received a reconveyance of that trust deed in January, 1935, evidenced circumstances sufficient to put a prudent man on inquiry as to particular ownership of the lands at time judgment creditor caused lands to be levied upon as husband's properties. Civ.Code, § 19.

9. Husband and wife ⇐149(1)

Where wife by competent evidence established her separate ownership of property which judgment creditor of husband levied upon as property of husband, the sale of the property by the marshal under execution and the subsequent deed to husband's judgment creditor as purchaser vested no interest in husband's judgment creditor. Code Civ.Proc. § 700.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Milton E. Giles & Company against the Bank of America National Trust & Savings Association, Judith C. Newberger and others to quiet title to land. From a judgment in favor of defendant Judith C. Newberger, the plaintiff appeals.

Affirmed. Appeal from order denying motion for new trial dismissed.

La Vern M. Hayes and J. K. Wilson, both of Los Angeles, for appellant.

S. W. Newman, of Los Angeles, for respondents.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment in favor of defendant Judith C. Newberger quieting her title in certain lands situate in Los Angeles county, California, and declaring her to be the lawful owner of such lands as her separate property.

Mrs. Newberger's defenses to this action were: (1) denial of plaintiff's claim of ownership, and (2) that defendant Schneirow, as trustee for Mrs. Newberger, received a deed conveying the lands and that they are her separate estate.

The history and the origin of plaintiff's asserted rights and the facts constituting the basis of the judgment appealed from are found in the findings of the court whose substance follows:

Prior to January 16, 1933, defendant George Newberger, husband of defendant Judith, was indebted to plaintiff in the sum of $16,381.46. In December, 1934, plaintiff instituted an action against Mr. Newberger causing judgment to be entered against Newberger January 9, 1935, in the sum of $19,196.07. On the 28th day of February, 1936, plaintiff caused an execution to be issued and levied upon certain real property including that of Mrs. Newberger which is that described in plaintiff's complaint here, and thereafter on the 1st day of April, 1936, pursuant to such levy the marshal of the city of Los Angeles made a judicial sale of the lands described in the notice of levy and plaintiff became the purchaser. On April 22, 1937, the marshal conveyed to plaintiff all the right, title and interest of Mr. Newberger in and to the same lands. At the sale plaintiff bid the sum of $21,026.31, the full amount of its judgment against Mr. Newberger.

Prior to 1922 the Newbergers had their separate properties. During the period from 1922 to 1939 they traded with and made loans to each other but Judith acquired and kept her property separate from that of her husband, pursuant to a written contract between the two. During the same period she acquired properties by gift from her husband and by inheritance from others. George managed the properties of Judith and they kept comprehensive and accurate books of account which reflected the property of each of them, the status of the account, the dealings had between them and the moneys due from time to time from George to Judith. All of the transactions between the Newbergers and by either of them were consummated in such manner and so entered in their books of account as truly to reflect the separate ownership of Judith in all that belonged to her separate estate.

In April, 1922, defendant bank (then named and known as the Hellman Commercial Trust and Savings Bank) acquired title to a large tract of land in Los Angeles county, situated in Hollywood Heights which was subdivided into many parcels. These were held under and pursuant to trusts No. 133 N S and No. 255 N S in the bank. In June, 1923, George Newberger acquired a large interest in both trusts. In March, 1930, the total beneficial interests in both trusts were vested in the Newbergers as joint tenants. Promptly upon their acquisition of such beneficial interests, the Newbergers hypothecated the beneficial interests to defendant bank as security for the payment of $110,000. The

following year Mr. Newberger became indebted, validly and in good faith, to his wife in a sum exceeding $90,000 as a result of their transactions together. As evidence of a portion of his debt to his wife, on April 28, 1931, George delivered to Judith his demand note in the sum of $50,000 and to secure the payment of this note he assigned his beneficial interest in the trusts to her. The note and the assignment were found to be the separate property of Mrs. Newberger.

In April, 1932, a dispute arose between the Newbergers and defendant bank as to the ownership of the lands held under the trust. Action No. 339016, superior court of Los Angeles county, California, was filed on April 20, 1932, by the Newbergers against the bank to determine the question. During the pendency of this action and on July 18, 1933, as additional security for the $50,000 due his wife, the two spouses executed and delivered to Judith as beneficiary a trust deed in favor of the National Title Insurance Company which conveyed to the grantee all of the property held under the two trusts including that involved in the present action. That trust deed was duly recorded. Judgment for plaintiffs having been entered in the last-mentioned action, subsequent negotiations resulted in the final judgment's confirming title in the bank and the right of the Newbergers to enforce the trusts. Contemporaneously with filing their action against the bank, the Newbergers caused to be filed a notice of lis pendens giving the names of the litigants and a description of the property. Prior to the final judgment the parties made a settlement terminating Judith's interest in all trusts; Judith to deliver to the bank her $50,000 note of her husband for cancellation for which the bank agreed to convey to Judith or her nominee those certain properties held in the trusts and which is the same property described in the complaint in the present action. Thereafter Mrs. Newberger nominated M. Schneirow as the person to whom the property should be conveyed. By grant deed, the bank on the 4th day of January, 1935, conveyed all of Mrs. Newberger's property to her nominee. Thereupon defendant Schneirow executed her written declaration to the effect that she held the property as trustee for Judith C. Newberger and not for herself. Neither the deed nor the declaration was ever recorded.

The transactions between the Newbergers on the one side and the bank on the other were made and consummated by George for the benefit of Judith in good faith and without intent to hinder, delay or defraud the creditors of George Newberger. Judith paid an adequate consideration for the lands conveyed to her by her surrender and cancellation of the $50,000 note and the performance of all obligations imposed by the agreement of November 15, 1934.

Contrary to appellant's contention, the evidence abundantly supports the findings. Mr. Newberger's testimony covers practically every fact found by the court. His wife had engaged in business transactions as early as 1913. From that year until 1930 she made her separate income tax returns showing her separately-owned property. During that period they had maintained books of account. Mr. Newberger employed an expert accountant to set up books of account for the two spouses in 1925. They were kept by his secretary, one Davis. All business transactions between himself and Mrs. Newberger were entered in the books between 1925 and 1931. The "Transfer Cash Journal" of George and Judith C. Newberger and the "Transfer Ledger" reflected faithfully the respective ownerships of the two spouses and their relations as debtor and creditor to each other. They showed that George was indebted to Judith on December 31, 1930, in the sum of $96,770.95. The books disclosed that at the end of each year a journal entry was made showing the condition of their accounts. The figures were recapitulated each year and this account was progressive. There is no evidence that at the time the books were set up and Judith was credited with $96,000 due her from her husband that the latter was indebted at all to any other person. While it is true that the books of account were not in evidence yet they were in the possession of the court, subjected to its scrutiny and to the inspection of appellant.

The books showed that Judith had her own properties separate from those of George and that both spouses traded extensively in securities. Entries were made daily in these records by Mr. Newberger or his secretary and those were posted by the accountant monthly. Under the account of "Capital and Net Worth" the records disclose that at the end of 1930 Mr. Newberger was worth $436,287.55; that

Mrs. Newberger's net worth at the same time was $280,027.85; that in 1928 her net worth was $168,600. The books of account show various real estate accounts, bills payable, expenses and the accounts of syndicates in which either or both of the spouses were interested.

Mr. Newberger sold securities extensively. Prior to 1931 he acted as syndicate manager for many people and the transactions ran into millions. In the books of account his note to his wife for $50,000 is entered as of April 28, 1931. That was long prior to his debt to plaintiff which is embalmed in the $19,196.07 judgment. There was no further entry with respect to the $50,000 note in the books of account after 1931.

Prior to the delivery of that note to his wife, Mr. Newberger discussed it with her and the question of giving her collateral as security. He then called at the bank and advised Vice-President Ashley of his agreement to secure his indebtedness to his wife and immediately thereafter he received the forms of the collateral assignment of beneficial interest to be executed by himself and Mrs. Newberger together with the note prepared for his signature. A copy of the note was received in evidence. After the assignment of the beneficial interest by Mr. Newberger and its acceptance by his wife April 28, 1931, he delivered the assignment to the bank and the note to Judith. Thereafter, on November 16, 1934, the note was delivered to the bank for cancellation as provided by the contract of the preceding day. While the note was not adduced at the trial, the testimony of Newberger was not contradicted in this or in any other particular. Moreover, it may reasonably be assumed that the instrument was delivered by the bank to the National Title Insurance Company to procure the release of the trust deed and a reconveyance.

Under cross-examination, Mr. Newberger further testified that his wife does not hold the lands as security for money he owes her but that it is her separate property; that on the day of the levy upon her lands, she owned her home on South Hudson street and securities of a value between $10,000 and $100,000; that he had made no payments on the $50,000 note; that he owed Mrs. Newberger in excess of that amount; that she received the property in suit in return for the note; that since its cancellation he had made no promise to pay any sum upon it; that in 1926, he deeded to her land worth $122,000 at which time he was wealthy and free from debt; and that during the same year his wife's income was $80,000 and she paid an income tax of $8,000 on her separate return.

In addition to the testimony of Mr. Newberger and the documents and books of account, defendants introduced documents showing that defendant bank was grantee of certain tracts and parcels of land in 1922. Declarations of trust were at that time executed by the bank in favor of Mr. Newberger and his co-beneficiary, one Clinch. By other documents those trusts were modified or supplemented on the 6th of March, 1930, when Mrs. Newberger with her husband became a beneficiary, Clinch having been theretofore eliminated.

[1] The assignment made by George to Judith Newberger of his entire interest in these two trusts subject to a prior assignment to the bank to secure his note for $110,000 was filed in evidence. That instrument recited the note and following the signature of Mr. Newberger is found endorsed in ink: "Note retd. to B of A 11-16-34 for cancellation as per contract of 11-16-34." These documents considered with the records in the books of account showing the erstwhile debt of George to Judith in excess of $96,000 justified the finding of the validity of the $50,000 note. Still other documents received bring the property involved in this action from its status as a part of the real estate trust into the ownership of Mrs. Newberger. After the controversy arose between the Newbergers and the bank as to the ownership of the trust properties, suit was filed by the Newbergers. Contemporaneously, notice of lis pendens was recorded in the office of the county recorder on April 20, 1932. This was notice to plaintiff of the parties litigant as well as of the contents of the pleadings, the description of the property and the bank's claim of ownership. At the conclusion of the litigation and the surrender of the $50,000 note by Mr. Newberger, the bank by a writing agreed to convey to her the property involved in this action. It was then by deed conveyed to Mrs. Newberger's nominee.

[2] That she chose to have the title of her property placed in the name of de-

fendant Schneirow did not detract from the virtue of the notice which plaintiff had of the claim of ownership of the lands in question by both the bank and the Newbergers. The very fact that Miss Schneirow is named as party defendant in the same action shows that that information was available to the plaintiff and could have been gained prior to the levy by request at the bank or by a supplemental proceeding.

From the conveyances of record and the notice of the litigation between the bank and the Newbergers, plaintiff knew at all times or by the exercise of reasonable prudence could have learned that the title of the property involved in this litigation was vested in the defendant bank until it was conveyed to Schneirow. § 863, Civ. Code. Not only did the original deed to the bank in 1922 show its ownership but in the action filed by the Newbergers against the bank (No. 339016) it was decreed that the bank was vested with a valid title to the property.

[3, 4] The claim of lack of good faith on the part of Newberger is not supported by any evidence. While such transactions between husband and wife oftentimes constitute the basis for justifiable suspicion of dishonesty, at the same time suspicion, if any, is not sufficient to obviate the force and effect of evidence of documents and of living witnesses and especially so in the absence of charges of fraud and of evidence in support thereof. The proof that at the end of 1930 she had a separate estate worth $280,027 was sufficient to dispel the imputation of bad faith.

[5, 6] Appellant contends that the judgment in favor of Judith Newberger can not be supported for the reason that she filed no cross-complaint against her co-defendants. But in view of the fact that Mrs. Newberger denied the claims of the plaintiff and declared affirmatively the basis of her claim of ownership of the property in question, the court was justified in deciding that she was the owner and entitled to the possession of the property. The court had power to render such judgment as it might from the evidence have determined with respect to all the parties of the action defining and determining their respective rights and interests in the lands described in the pleadings. It was the duty of the court to adjudicate the whole question according to the evidence and to award each litigant the judgment for such interest as his proofs justified. Code Civ.Proc. § 578; Strong v. Shatto, 201 Cal. 555, 558, 258 P. 71; Lanktree v. Lanktree, 6 Cal.2d 120, 56 P.2d 943; Cummings v. Cummings, 55 Cal.App. 433, 441, 203 P. 452.

[7] Mrs. Newberger owned the property in question in her separate right. Having acquired a lien upon it as collateral for the $50,000 note, it was an easy transition from the status of lienor to that of owner by accepting a deed to the land and the cancellation of her indebtedness to the bank in exchange for the $50,000 note. Lands acquired by a married woman are presumptively her separate property. § 164, Civ.Code. But the court was not required to rely upon a presumption to establish her separate ownership. The testimony of Mr. Newberger and the documents received as exhibits were sufficient, when believed, to have overcome a contrary presumption. If plaintiff had prior to levy first ascertained the status of the title to the lands, its course then to be followed for the purpose of making a successful levy would have brought it to the point of a direct attack upon the transfer to Judith Newberger. The fact that she had the property conveyed directly from the bank to her trustee, M. Schneirow, does not defeat or invalidate her separate ownership. Plaintiff had notice of the original acquisition of the property in question by Mr. Newberger. The filing of the action in 1932 and the recordation of the notice of lis pendens April, 1932, supplied plaintiff with the names of the parties to the action, the purpose of the law suit and a description of the property involved. From the time of the filing of such notice the world had constructive notice that title was vested in the bank and that the Newbergers claimed ownership. § 409, Code Civ.Proc.

[8] Furthermore, the fact that George Newberger as early as 1922 caused the title to the lands to be vested in the bank as trustee; that he dealt with the trust so openly as to have gained the reputation with plaintiff as owner of the land; that the two spouses conveyed the lands in trust to the National Title Insurance Company in July, 1933, and in turn received a reconveyance of that trust deed in January, 1935;—these circumstances evidenced by the public records were sufficient to put a prudent man on inquiry as to the particular ownership at the time of the

levy in 1936. Such inquiry would have led plaintiff unerringly to the discovery that the lands levied upon had been conveyed by deed to M. Schneirow in January, 1935. § 19, Civ.Code.

[9] An examination of the judgment roll in the first action filed by Newberger against the bank would have disclosed that the judgment first entered had been appealed and subsequently reversed and that thereafter the final judgment was entered holding that the title of the lands was vested in the bank. Indeed, there is no fact of value to the plaintiff with respect to the lands in question that could not have been ascertained by plaintiff's diligent inquiry. Nothing indicates that the bank would not have supplied such information as might have been sought or that Mr. Newberger was not available for supplemental examination. But regardless of whether plaintiff had notice of any of the transactions between the bank and the Newbergers, Judith Newberger by competent evidence established her separate ownership of the property which plaintiff levied upon as the property of George Newberger. Having levied upon lands in which the judgment debtor had no interest, the sale thereof by the marshal under execution and the subsequent deed to plaintiff vested no interest in plaintiff. Code Civ.Proc., § 700; Jordan v. Myres, 126 Cal. 565, 569, 58 P. 1061.

The judgment is affirmed. The appeal from the order denying motion for new trial is dismissed.

WOOD, and McCOMB, JJ., concurred.



47 Cal.App.2d 292

MAFFEO v. HOLMES et al.

Civ. 13007.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1941.

Hearing Denied Dec. 11, 1941.

1. New trial ⇐44(1)

A motion for new trial based on conduct of jurors is usually addressed to the discretion of the trial judge.

2. Trial ⇐304

The District Court of Appeal severely condemned the officious conduct of jurors who made independent investigations of the facts they had been impaneled to determine, and especially of those who volunteered their observations to their uninitiated co-laborers.

3. New trial ⇐143(2)

A verdict could not be impeached by affidavits of certain jurors that some of their number were guilty of misconduct during deliberations, such affidavits being rejected on considerations of "public policy".

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

4. New trial ⇐143(5)

The only exception to rule that verdict cannot be impeached by affidavits of jurors that some of their number were guilty of misconduct during deliberations is in case of verdicts reached by chance. Code Civ. Proc. § 657, subd. 2.

5. New trial ⇐44(1)

To allow verdicts to be defeated because of improper remarks of juror in course of deliberations upon the issues under consideration would be calculated to discourage free discussion which is deemed essential to the development of a full knowledge and a ripe judgment of the jury.

6. Appeal and error ⇐977(5)

Whether trial judge affirmatively acted on motion for new trial or passively allowed the motion to be denied did not alter rule that the order would not be disturbed in absence of a showing of an abuse of discretion in denying the motion.

7. Appeal and error ⇐933(1)

The implication to be drawn from action of the trial court in denying motion for new trial was that no prejudice was suffered by movant by alleged misconduct of jurors.

8. New trial ⇐144

The fact that the trial court received and filed affidavits of jurors relating to misconduct of certain members of the jury did not give the affidavits value of "legal proof" which, not being denied, established facts recited by them, as contended by plaintiff, since the law forbidding impeachment of verdict by such affidavits could not be defeated by action of plaintiff in filing affidavits to impeach the verdict or inaction of

trial judge, who may be assumed to have disregarded them.

See Words and Phrases, Permanent Edition, for all other definitions of "Legal Proof".

9. New trial ⇐56

In order to make evidence of misconduct of jurors during deliberations of any value to movant who seeks a new trial, it would be necessary to show that the misconduct improperly influenced the verdict.

10. Evidence ⇐82
New trial ⇐144

A juror cannot specifically establish that he reached his verdict by reason of secret evidence of the locus in quo related by an erring juror, and the jury is presumed to have done its duty in reaching a verdict. Code Civ.Proc. § 1963, subd. 15.

11. Evidence ⇐82

Presumption that jury has done its duty in reaching a verdict prevails except where proof authorized by legislature justifies the upsetting of the verdict.

12. New trial ⇐44(4)

The plaintiff was not entitled to new trial on ground of "irregularity" in proceedings of jury by which plaintiff was prevented from having a fair trial, because of filing of affidavits by jurors that some of the members of the jury were guilty of misconduct in that they made independent investigations of the facts and some of them volunteered their observations to other jurors. Code Civ. Proc. § 657, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Irregularity".

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Ruth Maffeo against Chester S. Holmes and another for wrongful death of plaintiff's minor child, who was struck by an automobile. From an adverse judgment, the plaintiff appeals.

Affirmed.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

Ira J. McDonald, of Los Angeles, for appellant.

Nourse & Jones, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment after verdict against her in this action for damages on account of the alleged wrongful death of her minor child, Teddy. Motion for a new trial seasonably made was denied by the expiration of 60 days from the date of filing of the notice of intention to make the motion. The ground specifically relied upon for the new trial was the conduct of certain jurors in visiting the scene of the accident and reporting their observations to the jury during deliberations.

Teddy had visited the public library at Crenshaw and 66th street just before the accident. The librarian on hearing a traffic noise rushed out to find one automobile and the boy's body which lay between the two street car tracks 128 feet north of 66th street. The left front fender of the automobile was buckled and the headlight was broken and "burned out". The car that collided with the child was driven by defendant Gladys. She had entered Crenshaw at Florence avenue about ten blocks south of 66th street. Her headlights were burning as she drove along the northbound car track at about 25 miles per hour. The left side of the car was about 2½ feet east of the center of the street. Having seen Teddy standing on the left rail an instant before the collision, the driver had no time to slow down. She stopped at a distance of about "one and one-half car lengths" after the collision. The police found the body lying 12 feet in the rear of the car. From the center of 55th street, no cars were ahead of Mrs. Holmes as she drove northward. The lighting was poor, only one-half of the street lamps were lighted.

Plaintiff contends that the evidence was conflicting in view of the presumption that the boy was exercising ordinary care for his own safety and of the facts that defendant drove at a speed in excess of 25 miles per hour and either her headlights did not illuminate objects at 200 feet or she did not pay sufficient attention to the terrain ahead of her. Inasmuch as the evidence was thus conflicting, she argues, it would have sustained a verdict for plaintiff and therefore the conduct of the jury was "highly important so that any improper considerations on the part of the jury were bound to tip the scales in favor of the defendant" and therefore were highly prejudicial.

[1] This contention brings us immediately to a consideration of the motion for a new trial. Such matters are usually addressed to the discretion of the trial judge. Four of the jurors deposed that jurors Frank Stell and Jennie Taylor had, during

the trial, visited the scene and reported their observations during deliberations.

According to the affidavit of Juror Williams, Stell told the jury that he had visited the scene of the accident at approximately the same hour of the day as that on which it had occurred; had driven his car along the street in the same general course driven by Mrs. Holmes; that he had alighted and made further observations with regard to lighting conditions and the position of the boy's body after the accident with reference to the cross walk; that he had observed a dark shadow approximately at the place where the boy had been struck; that in his opinion it would have been difficult for Mrs. Holmes, while driving as she did, to see the deceased if he was standing still; that Juror Jennie Taylor made similar remarks and stated that after carefully considering and observing the place of the accident and surrounding conditions she could understand how Mrs. Holmes could have driven where she drove without seeing deceased.

The affidavit of Jurors Hall and Ottun reported substantially the same facts as those reported by Williams and in addition thereto Hall averred that when, during the deliberations, a number of jurors desired the instructions of the court re-read and explained, Mr. Stell stated that he had written down the instructions in shorthand and could tell the jury exactly what had been given and thereupon read his notes of the instructions.

Plaintiff and her counsel both filed affidavits to the effect that they had no knowledge of the conduct of the jurors, Stell and Taylor, prior to the verdict. The affidavit of Mr. Maynard B. Henry is to the effect that on the 31st of March, 1940, he called upon Juror Jennie Taylor at her home for a conference; that Mrs. Taylor there stated to him that she had visited the scene of the accident and had made certain observations and that during the deliberations she had related her observations.

Appellant ardently contends that in view of the denial of her motion by operation of law, by reason of the peculiar quality of the claims which she makes, the ends of justice require that the automatic order be reviewed by this court. Citing Hughes v. De Mund, 195 Cal. 242, 233 P. 94; Dolan v. Superior Court, 47 Cal.App. 235, 190 P. 469; City of Los Angeles v. Oliver, 102 Cal.App. 299, 283 P. 298, and Code Civ. Proc., § 956.

[2-5] While we cannot too severely condemn the officious conduct of those jurors who make independent investigations of the facts they have been impaneled to determine and especially of those who volunteer their observations to their uninitiated colaborers (Higgins v. Los Angeles Gas & Elect. Corp., 159 Cal. 651, 115 P. 313, 34 L.R.A.,N.S., 717) yet this appeal must fail because of a long-established principle, to-wit, a verdict cannot be impeached by affidavits of jurors that some of their number were guilty of misconduct during the deliberations. The only exception to this rule is in the case of verdicts reached by chance. Code Civ.Proc., § 657, subd. 2. Such affidavits or testimony or extra-judicial statements offered to disclose the behavior of a juror shall be rejected upon considerations of public policy. De Garmo v. Luther T. Mayo, Inc., 4 Cal.App.2d 604, 41 P.2d 366; Kent v. Los Angeles Ry. Corp., 29 Cal.App. 2d 435, 84 P.2d 1057. To secure the freedom of jurors in the exercise of their normal function of deriving a just decision, the legislature has provided this safeguard. To allow verdicts to be defeated because of improper remarks of a juror in the course of their deliberations upon the issues under consideration would be calculated to discourage free discussion which is deemed essential to the development of a full knowledge and a ripe judgment of the jury. Metcalf v. Romano, 83 Cal.App. 508, 257 P. 114.

Since a juror is not permitted to make an affidavit of his own misconduct, after the cause has been submitted, neither reason nor morals can uphold the behavior of a juror in reporting his wayward findings to those who were not participants in his irregularities. Siemsen v. Oakland, San Leandro & Hayward Elec. Railway, 134 Cal. 494, 66 Pa. 672. The consideration by the court of such improper remarks of a juror "would defeat the very purpose of the wholesome rule adopted in the interest of public policy". Crabtree v. Western Pacific Railroad Co., 33 Cal.App.2d 35, 90 P. 2d 835, 842.

[6-8] Appellant attempts to overcome the force of section 657 by her arguments: (1) that the court did not act upon her motion for a new trial, and (2) that the court received and filed the affidavits which gives to them the value of legal proof which, not being denied, establishes the facts recited by them. Whether the trial judge affirmatively acted or passively allowed the motion to be denied does not alter the rule

that the order will not be disturbed unless it be shown that there was an abuse of discretion in denying the motion. Schultz v. Sussman, 7 Cal.App.2d 100, 102, 45 P. 2d 409. It is not shown that the jurors' misconduct prejudiced substantially the rights of plaintiff. By the denial of the motion the implication of the court's order is that no prejudice was suffered. MacPherson v. West Coast Transit Co., 94 Cal.App. 463, 468, 271 P. 509. Neither may appellant profit by having filed the affidavits which she knew were not acceptable as proof of her right to a new trial. If the law forbids the impeachment of a verdict by such affidavits the law cannot be defeated either by the action of the losing party in filing affidavits to impeach the verdict or the inaction of the trial judge who may be assumed to have disregarded them. Toomes v. Nunes, 24 Cal.App.2d 395, 399, 75 P.2d 94.

[9-11] Appellant observes that section 657 of the Code of Civil Procedure makes no mention of the false answer on voir dire as a ground for granting a new trial and that it has been held that such false answers justified such order. Williams v. Bridges, 140 Cal.App. 537, 35 P.2d 407. By analogy, she contends that the rule of expressio unius est exclusio alterius is not to be applied in the consideration of that section. But it requires no philosopher to discern that proof of the perfidy of a person in qualifying to become a juror in a case is an altogether different matter from that of opening to view the deliberations preceding a verdict. In order to make evidence of misconduct during deliberations of any value, it would be necessary to show that such misconduct improperly influenced the verdict. This cannot be done in the manner here attempted (People v. Stokes, 103 Cal. 193, 37 P. 207, 42 Am.St.Rep. 102) and for the very good reason that no juror can specifically establish that he reached his verdict by reason of secret evidence of the locus in quo related by an erring juror and not by reason of the testimony of the sworn witnesses, the arguments of counsel, the instructions of the court, or the legitimate suasions of his co-jurors. The jury must be presumed to have done its duty in reaching a verdict. Code Civ.Proc., § 1963, subd. 15. This presumption prevails except where proof authorized by the legislature justifies the upsetting of the verdict.

[12] Appellant contends that under subdivision 1 of section 657, Code of Civil Procedure, she is entitled to a new trial. That subdivision reads: "Irregularity in the proceedings of the * * * jury * * * by which either party was prevented from having a fair trial." But in the instant case no such irregularity occurred as that contemplated by the section. The irregularity relied upon is one which is not, according to the cited authorities, a ground for a new trial.

The judgment is affirmed.

WOOD, and McCOMB, JJ., concurred.



46 Cal.App.2d 775

SANTA MARIA GAS CO. v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 13127.

District Court of Appeal, Second District, Division 1, California.

Oct. 14, 1941.

Hearing Denied Nov. 17, 1941.

Workmen's compensation ⇐2040

Where the Industrial Accident Commission increased percentage of claimant's disability to 76 on the basis of evidence produced at a final hearing held before a referee who had not conducted former hearings, examination of evidence adduced at former hearings was unnecessary in the determination of the question of increasing the percentage of disability.

Proceeding in certiorari to review an order and award of the Industrial Accident Commission.

On petition for rehearing.

Petition denied.

For former opinion, see 117 P.2d 43.

LeRoy M. Edwards, of Los Angeles, C. P. Kaetzel, of San Luis Obispo, and O. C. Sattinger, of Los Angeles, for petitioner.

Everett A. Corten, Atty. for Industrial Accident Commission, of San Francisco (Eldon B. Spofford, of San Francisco, of counsel), for respondents.

PER CURIAM.

In a petition for a rehearing it is urged that the opinion heretofore filed (Santa Maria Gas Co. v. Ind. Acc. Comm., 46 Cal. App.2d 775, 117 P.2d 43) disregards petitioner's contention to the effect that the matter was disposed of by the commission after a final hearing held before a referee who had not conducted the former hearings and without the record of the evidence adduced at the former hearings having been transcribed for consideration by the commission. It is argued in that connection that the opinion of the court in Deter v. Industrial Acc. Comm., 45 Cal. App.2d 664, 116 P.2d 112, is controlling. There the court declared: "Although respondents dispute petitioner's contention that any prejudice resulted therefrom, we are not persuaded that such issue should be permitted on review *in the circumstances here presented.* To the contrary, it is our conviction that when the commission handed down a decision through the instrumentality of a referee who *had* neither heard nor read *all* of the evidence in the case, *it acted in excess of its jurisdiction.*" (Italics added.)

The issue in the Deter case was whether the injury had occurred during the course of employment and upon a petition for a rehearing the matter was disposed of without the proceedings of the first hearing having been reduced to writing and considered by the referee of the second hearing, who had not conducted the first hearing. It was there urged by respondent board, in substance, that notwithstanding such procedure, no prejudice had resulted therefrom.

There is no resemblance between the situation in the Deter case and the case at bar. Nor does the opinion in the Deter case necessarily invalidate all of the decisions of the Industrial Accident Commission made pursuant to such procedure. It should be noted that the language quoted above from the Deter case includes the expression "*in the circumstances* here presented"; moreover, the form of the verb in the expressions, "*handed* down a decision", "*had* neither heard" and "*acted* in excess" should also be noted. The subject is not treated in the abstract and a general rule applicable in all cases is not announced.

In the case at bar the action of the commission about which petitioner complains is the increase of the percentage of disability to 76. This action was based, as the record reveals, upon the evidence produced at the final hearing and an examination of the evidence adduced at the former hearings was, under the circumstances, unnecessary in the determination of such question. The evidence produced at the final hearing was sufficient, as a matter of law, to support the action of the board in fixing the rate of disability at 76 per cent.

The petition for a rehearing is denied.



47 Cal.App.2d 302

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. HAUER.

Civ. 13125.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1941.

1. Vendor and purchaser ⇐300

Where vendee of agricultural land under a conditional sales agreement, by the agreement, promised to pay a portion of the purchase price out of proceeds derived from sales of crops growing upon the land, and proceeds were assigned as security for such payment, and thereafter vendor declared a forfeiture of all of vendee's interest under the sales agreement, vendor was not entitled to the crop proceeds.

2. Vendor and purchaser ⇐301

Upon breach of any covenant by vendee of agricultural land under conditional sales agreement, vendor was entitled to affirm the contract and sue for balance of the purchase price, or to terminate the contract, retain the money paid on the purchase price and repossess the property, but the remedies were inconsistent and the election of one precluded the right to exercise the other.

3. Judgment ⇐373

The concealment from court by vendor of agricultural land of fact of its actual forfeiture of vendee's rights under conditional sales agreement constituted a "fraud" justifying an order setting aside a summary judgment granting vendor the proceeds derived from sales of crops growing upon the land, which proceeds had been assigned by

vendee as security for payment of portion of purchase price. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

4. Judgment ⇐373

Where motion to set aside judgment on ground of fraud was made under statute authorizing trial court, on motion of either party after notice to the other party, to set aside any void judgment or order, it was immaterial whether fraud was extrinsic or intrinsic. Code Civ.Proc. § 473.

5. Vendor and purchaser ⇐300

The right of vendor of agricultural land under conditional sales agreement to proceeds derived from sale of crops growing upon the land, which proceeds had been assigned by vendee as security for payment of portion of purchase price, was not determined by order granting summary judgment in favor of vendor for the proceeds, but depended wholly upon the continued existence of the sales agreement up until entry of the judgment, and, when vendor deposited in mails notice of the forfeiture of vendee's interest in sales agreement after order granting summary judgment, but prior to entry of the judgment, vendor lost its right to recover the proceeds on ground that it had elected an inconsistent remedy. Code Civ.Proc. §§ 577, 664.

6. Pleading ⇐280

The trial court did not err in permitting defendant to file a supplemental answer alleging occurrences material to the defense which had happened after commencement of the action and prior to judgment. Code Civ. Proc. § 464.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by the Security-First National Bank of Los Angeles against the Southern Citrus Association to recover one-half the net proceeds of the orange crop of A. C. Hauer pursuant to an assignment. The Association paid the moneys into the court and upon its motion A. C. Hauer was substituted as defendant. From an order vacating a summary judgment in favor of the plaintiff upon the ground of fraud in its procurement, the plaintiff appeals.

Affirmed.

Helgoe & Hart, of Los Angeles, for appellant.

Julius J. Novack, of San Bernardino (Harold R. Haberkorn, of San Bernardino, of counsel), for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from an order vacating a summary judgment which had been granted upon its demand. That judgment was vacated twelve days after its entry upon the ground of fraud in its procurement.

The factual background out of which the instant controversy arose is as follows:

February 13, 1940, plaintiff and defendant entered into an agreement whereby plaintiff sold to defendant: (1) a parcel of land situated in San Bernardino County, California, planted to oranges; (2) 75 shares of the water stock and (3) 1,100 orchard heaters, subject to the second installment of the county taxes for the fiscal year 1939–1940 and to the restrictions and easements of record, for the price of $22,340. The terms of the sale were as follows: $5,340 cash, the balance of $17,000 payable in annual installments of $1,700 on each first day of June, commencing June 1, 1941; interest at 5 per cent payable quarterly. The buyer was to pay all taxes, and assessments levied against the property and all utility charges. The agreement contained other provisions which are immaterial to the issue before us.

As security for the deferred payments on the purchase price provided by the sales agreement, defendant executed an assignment to plaintiff of one-half of the net proceeds from the sales of the crops for 1940 which "shall be considered as being applied on the last installment or installments of principal due on said agreement". The assignment was accepted by the Southern Citrus Association, the marketing agency, which duly came into the possession of the net proceeds from the sales of defendant's crop for the year 1940. Under the terms of the sales agreement plaintiff might at its option declare the entire balance of the purchase price to be immediately due and payable in the event that defendant should fail to make any payment thereby provided or to fulfill any of its obligations under the agreement.

On April 12, 1940, having conceived that defendant had not fulfilled such obligation, plaintiff exercised its option to declare the entire balance of the purchase price due and payable, and thereupon served notice upon defendant that "unless on or before April 22, 1940, you shall have paid the

amounts above declared to be due and payable, the undersigned will declare a forfeiture and termination of all your rights * * * in the property described therein and to all sums paid under the terms thereof". Such payments were not made by defendant as demanded in the notice. The orange crop was picked and marketed by the Southern Citrus Association. One-half of the net proceeds amounted to $2,120.20.

Plaintiff commenced this action June 29, 1940, against the association to recover the last mentioned sum. The association having disclaimed interest in the controversy, paid the moneys into the court and upon its motion A. C. Hauer was substituted as defendant in lieu of the Citrus Association. After Hauer had filed his answer, plaintiff moved the court for a summary judgment whereupon the defendant filed a countermotion for such judgment in his own favor. On January 6, 1941, following the hearing on the motions, the court by minute order granted plaintiff's motion and struck defendant's answer. January 8th the judgment which directed the clerk of the court to pay the funds on deposit to plaintiff was entered. But on the day after the original hearing, following the language of the sales agreement, plaintiff executed and served a notice of forfeiture of all of defendant's interest under the sales agreement and forwarded the same by mail to defendant who received it January 8th, the day of the entry of the judgment. This fact was not communicated to the court. Upon receipt of plaintiff's notice defendant filed his motion to set aside the original judgment on the ground of fraud. It was granted January 20th and the order was entered from which this appeal is taken.

In its counter motion for a summary judgment upon the original hearing, defendant alleged that the sales agreement had been terminated; that all his rights thereunder had been forfeited and that plaintiff was at that time in possession of all of the property described in the agreement. The factual basis of defendant's motion to vacate the original judgment was plaintiff's failure to inform the court, prior to the entry of the summary judgment, of the fact that its declaration of forfeiture had already been made and served. Following a hearing the order appealed from was entered.

[1, 2] Where a vendor of agricultural land under a conditional sales agreement has terminated it and has declared the forfeiture of all of the vendee's interest under the contract, the vendor is not entitled to the crop proceeds where the vendee, by the sales agreement, has promised to pay a portion of the purchase price out of the proceeds derived from the sales of crops growing upon the land described in the contract, and the proceeds have been assigned as security for such payment. Beck v. Shepherd Fruit Co., Inc., 19 Cal.App.2d 590, 66 P.2d 188. Upon the breach of any covenant by the vendees under a conditional sales agreement, plaintiffs are entitled to invoke either of two remedies: (1) to affirm the contract and sue for the balance of the purchase price, or (2) to terminate the contract, retain the money paid on the purchase price and repossess the property. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am. St.Rep. 17. These remedies are inconsistent and the election of one precludes the right to exercise the other. The vendor is not entitled to pursue both by declaring a forfeiture, retaining possession of the movable property described in the sales agreement together with cash payment already made, and by collecting future payments under the contract. By its notice served on April 12th plaintiff had indicated its purpose to enforce a forfeiture. By its notice of January 7th it declared the forfeiture and thereby elected to terminate the sales agreement and did so as far as lay within its power. Beck v. Shepherd Fruit Co., Inc., supra. The effect of the exercise of its right of forfeiture of the sales agreement was to cancel the assignment of the proceeds from the sale of the crop for the year 1940.

[3, 4] In the affidavit filed in support of its motion for the original summary judgment, it was expressly averred that the sales agreement had not been terminated. Technically that was true for at the time of filing the motion the only notice which had been served upon defendant was its declaration that it would at a future date declare a forfeiture. But the actual termination of the contract before the entry of the judgment and the failure to inform the court of such forfeiture was its own denial of the very averment made in its affidavit to the effect that the sales agreement had not been terminated and that defendant's rights had not been forfeited. By its latest act plaintiff had so altered the material facts upon which the original summary judgment was granted that the entry of such judgment was no longer warranted. The concealment of the fact of its actual

forfeiture of plaintiff's rights under the sales agreement constituted a fraud and justified the order setting aside the original judgment. McGuinness v. Superior Court, 196 Cal. 222, 230, 237 P. 42, 40 A.L.R. 1110. Where, as in the instant case, the motion to set aside the judgment on the ground of fraud is made under the provisions of section 473 of the Code of Civil Procedure, it is immaterial whether the fraud be extrinsic or intrinsic. In re Johnson, 7 Cal. App. 436, 94 P. 592.

[5] Appellant contends that defendant had no sufficient defense on the merits to the original motion for a summary judgment and that, therefore, the judgment should not have been vacated on the ground of fraud because of such lack of defense. In support of this contention appellant argues that since the contract was not terminated until after the order granting the motion for summary judgment was made, the rights of the parties had already been determined and were in no way affected by such termination. But appellant fallaciously conceives that the order granting the summary judgment finally determined the rights of the parties. On the contrary, the judgment itself spells the final determination of the rights of the parties. Code Civ.Proc. § 577. But even the judgment, although signed, is not effectual for any purpose until it is entered. Code Civ. Proc. § 664. Plaintiff's right to recover the $2,120.20 depended wholly upon the continued existence of the contract. With the contract in force, it had no right to the money sued for until the last installment of the sales contract should become payable. The moment that plaintiff deposited in the mails the notice of the forfeiture of respondent's interest in the sales contract, it lost all right to recover the money.

[6] It was not error to permit defendant to file a supplemental answer alleging occurrences material to the defense which had happened after the commencement of the action and prior to judgment. § 464, Code Civ.Proc.

The order appealed from is affirmed.

WOOD and McCOMB, JJ., concurred.

47 Cal.App.2d 862

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. SOUTHERN CITRUS ASS'N OF REDLANDS et al.

Civ. 13124.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1941.

Appeal and error ⇐165

Where judgment in favor of plaintiff was regularly set aside on defendant's own motion, defendant's attempted appeal from such judgment was ineffectual and was dismissed.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by the Security-First National Bank of Los Angeles against the Southern Citrus Association of Redlands, wherein A. C. Hauer was substituted as defendant. From a judgment for the plaintiff, the defendant appeals.

Appeal dismissed.

Julius J. Novack, of San Bernardino, for appellant.

Helgoe & Hart, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The facts of this case are the same as those set forth in our opinion in Security-First National Bank v. Hauer, 117 P.2d 952, this day filed. Defendant has attempted to appeal from the judgment entered on January 8, 1941, in favor of plaintiff. That judgment, however, was regularly set aside on defendant's own motion on January 20, 1941. As a result the attempted appeal from that judgment is ineffectual.

The purported appeal from the judgment and order is, therefore, dismissed.

WOOD and McCOMB, JJ., concurred.

49 Cal.App.2d Supp. 743

BASCH et al. v. TIDE WATER ASSOCIATED OIL CO.

No. 1439.

Appellate Department, Superior Court, City and County of San Francisco, California.

Oct. 20, 1941.

Rehearing Granted Nov. 18, 1941.

1. Vendor and purchaser ⇐232(1)

Possession of land by one other than the vendor is "notice", or at least evidence of notice, to an intending purchaser sufficient to put him on inquiry as to the right, title or interest of the occupant unless, under peculiar circumstances, there is no duty to make inquiry.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

2. Vendor and purchaser ⇐232(1)

Notice to intending purchaser resulting from possession of land by one other than the vendor is the same in effect as notice imputed by recording acts.

3. Vendor and purchaser ⇐231(1)

Records are but "constructive notice" of a title of which they enable a party to obtain actual notice or knowledge by means of search or inquiry.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Notice".

4. Vendor and purchaser ⇐232(1)

Where a person other than the vendor is in possession of land and the circumstances are such as to put an intending purchaser on inquiry, purchaser is chargeable with knowledge of all that a reasonably diligent inquiry as to the rights and claims of the occupant might have disclosed.

5. Vendor and purchaser ⇐229(1)

Where prospective purchaser knows of an outstanding lease on property, though the lessee is not in possession of the property, prospective purchaser is chargeable with knowledge of the rights and claims of the lessee.

6. Vendor and purchaser ⇐229(1)

Where at time premises were leased for service station purposes landlord by supplemental agreement agreed that if traffic were diverted so that it did not pass property tenant would be allowed to pay less rental than called for by lease and premises were thereafter sold to purchasers who took assignment of lease but had no actual knowledge of supplemental agreement and lessee was not in possession, purchasers were bound by the supplemental agreement as against contention that they were purchasers in good faith and for valuable consideration without knowledge or notice of agreement.

7. Vendor and purchaser ⇐232(9)

Tenant's possession is "notice" not only of his rights under the lease but also of any rights which he may have under a subsequent agreement not incorporated in the instrument of lease.

Appeal from Municipal Court, City and County of San Francisco.

Action for rent by Carlo and Mary Basch against the Tide Water Associated Oil Company. From a judgment for the plaintiffs, defendant appeals.

Reversed.

William F. Kiessig and Edmund D. Buckley, both of San Francisco, for appellant.

Belli & Leahy, of San Francisco, for respondents.

McWILLIAMS, Judge.

This case involves a novel question pertaining to the extent of the liability of a tenant for rent. A summarized statement of the facts involved, omitting certain irrelevant details, will sufficiently explain the single issue presented.

The defendant and appellant had leased certain real property which it contemplated using as a service station. A supplemental agreement was entered into at or approximately the same time by the lessor and lessee. Under its provisions the lessor agreed that in the event that the traffic past the leased property was diverted so that it did not pass the property, the lessee, while such condition continued, would be required to pay but a lesser sum as rental than was provided for in the lease. Approximately a month after the lease was executed and before the lessee had taken possession the property was purchased by the plaintiffs and respondents who also took an assignment of the lease but not of the collateral

agreement. Before they purchased the property respondents had had the title searched. Neither the lease nor the collateral agreement having been recorded at the time the title appeared to be clear. Respondents were shown the lease before they bought the property but were not shown and did not know of the existence of the supplemental agreement. The question is therefore presented whether respondents are entitled to the rent called for by the lease or whether they are bound by the terms of the supplemental agreement. In the latter event they have been fully paid. If they are not bound by it they are entitled to the additional sum of $680 for which they sued in the lower court and recovered judgment from which judgment appellant took this appeal.

[1-5] The question involved does not appear to have been passed on in this State up to this time. The law has long been settled in this State that possession of land by one other than the vendor is notice, or at least evidence of notice, to an intending purchaser sufficient to put him on inquiry as to the right, title or interest of the occupant unless, under the peculiar circumstances of the case, there is no duty to make inquiry. The authorities also hold that such notice resulting from possession is the same in effect as the notice imputed by the recording acts. 66 Cor.Jur. p. 1165–6. Records are but constructive notice of a title of which they enable a party to obtain actual notice or knowledge by means of search or inquiry. Garber v. Gianella, 98 Cal. 527, 529, 33 P. 458. It is also settled that if the circumstances as to possession are such as to put a purchaser on inquiry he is chargeable with knowledge of all that a reasonably diligent inquiry as to the rights and claims of the occupant might have disclosed. 25 Cal.Jur. p. 834–6. The same doctrine must on principle be applicable when the prospective purchaser knows of an outstanding lease on the property although the lessee is not in possession of the property.

[6, 7] Respondents apparently concede the general rule as to the effect of possession and of knowledge of an outstanding lease but contend that they are not bound by the terms of the supplemental agreement since they were purchasers in good faith and for valuable consideration without knowledge or notice of the supplemental agreement. We do not so read the law. As has been said by one of our most scholarly text writers on the subject:

"By the weight of authority, the tenant's possession is notice not only of his rights under the lease, but also of any rights which he may have under a subsequent agreement not incorporated in the instrument of lease, such as a contract for the purchase of the land." 1 Tiffany on Landlord and Tenant, p. 866 n., citing cases.

The writer adds that in Red River Valley Land & Inv. Co. v. Smith, 7 N.D. 236, 74 N.W. 194, the opinion approved a dictum contra in Leach v. Ansbacher, 55 Pa. 85. In the Leach case the Court had stated, in accordance with respondents' contention in the instant case, that: "When the party is in possession under a lease, the knowledge of the lease dispenses with the inquiry of how the possession is held."

But as Mr. Tiffany points out, the Supreme Court of Pennsylvania in the later case of Anderson v. Brinser, 129 Pa. 376, 11 A. 809, 18 A. 520, 6 L.R.A. 205, disapproved of its dictum in the Leach case. In the Anderson case it appears that, as in the instant case, the purchaser had been shown a lease which, he contended, was explanatory of the possession, and which relieved him from further inquiry. But the Supreme Court of Pennsylvania refused to accede to this contention although it was supported by the dictum in the Leach case. The Court stated that after careful consideration of its ruling in the Leach case it had reached the conclusion that the language last quoted above could not be allowed to stand although the ultimate holding in the case was correct. It further pointed out that the authorities cited in the earlier case did not declare the principle in support of which they were cited. Said the Court:

"Knowledge of the existence of a lease will, of course, give constructive notice of all its provisions; but the possession, apart from the lease, we think, should be treated as notice of the possessor's claim of title, whatever that claim may be, for the lease may be but the first of two or more successive rights acquired by the tenant. While in the occupancy under a lease for years, the tenant may have purchased under articles, and entitled himself to an equity; or, indeed, he may have purchased the legal estate in fee, and failed to record his deed. Would it be supposed that a knowledge of the precedent lease would

dispense with the duty of inquiry, and entitle a subsequent grantee to the protection of an innocent purchaser? Or the lease may have been the instrument of a base fraud. It may have been executed under the false and fraudulent pretense, to an illiterate person, that it was in fact a conveyance or a contract of sale. Would possession afford no protection in such a case? We think it would. In such cases the possession is the possessor's only reliance, for he may be powerless to put his claim of title upon the record." 129 Pa. page 404, 18 A. page 521, 6 L.R.A. 205.

The Pennsylvania Court cited, among other authorities upholding its conclusion the English cases of Daniels v. Davison, 16 Ves. 249 and Allen v. Anthony, 1 Mer. 287. These cases were cited with approval by our Supreme Court in the case of Pell v. McElroy, 36 Cal. 268, 272. Also see on the same subject and to the same effect 66 Cor.Jur. p. 1176.

It is true that there are a few cases to the contrary such as the Texas case cited by respondents. But as was said in the well considered Nebraska case of Dengler v. Fowler, 94 Neb. 621, 143 N.W. 944, the minority doctrine is based on the "isolated" Texas case of Hamilton v. Ingram, 13 Tex.Civ.App. 604, 35 S.W. 748. As the Nebraska Court said [94 Neb. 621, 143 N. W. 946]:

"The decisions generally, however, announce a contrary doctrine. The possession of a tenant is not only notice to the world of his rights as lessee, but is notice of all other interests of which inquiry would elicit knowledge. A purchaser of land, in possession of a lessee who was not asked about his interests in the demised premises, is bound by all of the equities enforceable by the lessee against the vendor."

Although in the instant case the lessee was not in possession of the property the lessor's knowledge of the lease had the same result as possession, since, as pointed out above, the two circumstances are equally effective in imposing on a prospective purchaser the duty to make inquiry.

Respondents cite and rely on the case of Smith v. Yule, 31 Cal. 180, 89 Am.Dec. 167 and the cases which have followed it.

The Yule case held in effect that the duty that ordinarily is incumbent on a prospective purchaser to inquire as to the right or title of the person whom he finds in possession of real property that he contemplates purchasing does not apply in situations where the possession is consistent with the record title. But in the instant case respondents' possession was not consistent with the record title since it is undisputed that the record title was not in the lessee, the appellant herein.

The judgment is reversed.

We concur: FOLEY, J., and GRIFFIN, P. J.

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18 Cal.2d 859

CITY OF LOS ANGELES v. OFFNER.

S. F. 16607.

Supreme Court of California.

Oct. 21, 1941.

Mandamus ⇐16(1)

Where time specified in resolution of city's board of public works for receiving bids for leasing of a rubbish incinerator to city had expired, questions presented by city's mandamus proceedings to compel board's secretary to post notices inviting bids were "moot", and writ of mandamus would be denied.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

In Bank.

Mandamus proceedings by the City of Los Angeles against Milton Offner to compel respondent, as Secretary of the city's Board of Public Works, to post and publish notices inviting sealed bids for construction and leasing to the city of a rubbish incinerator.

Writ denied.

Ray L. Chesebro, City Atty., and Hugh H. MacDonald, Deputy City Atty., both of Los Angeles, for appellant.

Paul E. Schwab, of Beverly Hills, Amicus Curiae for appellant.

Richard C. Waltz, of Beverly Hills, for respondent.

PER CURIAM.

By this proceeding in mandamus the petitioner, City of Los Angeles, seeks to compel the respondent, as secretary of its Board of Public Works, to post and publish notices inviting sealed bids for the construction and leasing to the city of a rubbish incinerator. As alleged in the petition herein, the resolution of the board providing for the proposed incinerator requires that such bids be received "on or before the hour of 10 o'clock A. M. of Wednesday, September 17, 1941". The time specified for receiving such bids having expired, this matter has become moot.

The alternative writ heretofore issued is discharged and a peremptory writ is denied, without prejudice.

18 Cal.2d 835

MOORE et al. v. PURSE SEINE NET et al.

L. A. 16192.

Supreme Court of California.

Oct. 20, 1941.

Rehearing Denied Nov. 18, 1941.

1. Admiralty ⇐23

An action for forfeiture of purse seine net used to take fish in navigable waters of Catalina Island in violation of Fish and Game Code involved a "maritime" cause of action within meaning of Judicial Code giving federal district courts exclusive original cognizance of all civil actions of admiralty and maritime jurisdiction except where common-law remedy is adequate. St.1933, pp. 470, 471, §§ 842, 845; Jud.Code §§ 24(3), 256, 28 U.S.C.A. §§ 41(3), 371.

See Words and Phrases, Permanent Edition, for all other definitions of "Maritime".

2. Admiralty ⇐23

An action for forfeiture of a fish net used in an illegal manner involves a "maritime" cause of action within meaning of Judicial Code giving to federal district courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction except where common-law remedy is adequate, if the property proceeded against is an integral part of the vessel or its equipment and is seized on navigable waters. St. 1933, pp. 470, 471, §§ 842, 845; Jud.Code §§ 24(3), 256, 28 U.S.C.A. §§ 41(3), 371.

3. Admiralty ⇐2

Under saving clause of Judicial Code, giving to federal district courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction except where common-law remedy is available, a case involving a maritime cause of action may properly be brought in state court if remedy pursued is traditionally within the jurisdiction of common-law courts, even though the right to sue is created by a recently enacted statute. Jud.Code §§ 24(3), 256, 28 U.S.C.A. §§ 41(3), 371.

4. Admiralty ⇐1

If an action is of a type that was cognizable in both admiralty and common-law courts, state courts retain a concurrent jurisdiction with federal admiralty courts to entertain the action. Jud.Code §§ 24(3), 256, 28 U.S.C.A. §§ 41(3), 371.

5. Admiralty ⇐2

The saving clause of Judiciary Act and Judicial Code, excepting from exclusive original cognizance of federal district courts over civil causes of admiralty and maritime jurisdiction cases in which common-law remedy is available, does not contemplate admiralty remedies in a common-law court, but its meaning is that in cases of concurrent jurisdiction in admiralty and at common law, the jurisdiction at common law is not taken away. Jud.Code §§ 24(3), 256, 28 U.S.C.A. §§ 41(3), 371.

6. Admiralty ⇐2

The fact that federal forfeiture statutes require that a proceeding thereunder against a vessel or its equipment be brought in a federal district court sitting as a court of admiralty does not prevent state from conferring jurisdiction upon her courts to proceed with such cases under a state statute if the type of action is a traditional common-law remedy. Jud.Code §§ 24(3), 256, 28 U.S.C.A. §§ 41(3), 371.

7. Common law ⇐3, 7

The "common law" of England includes not only the lex non scripta but also the written statutes enacted by Parliament prior to the time of separation of the colonies from the mother country.

See Words and Phrases, Permanent Edition, for all other definitions of "Common Law".

8. Action ⇐16
Admiralty ⇐1

Actions in common-law courts are usually in personam as contrasted to the in rem proceedings of admiralty courts, but an action in rem can be brought by the state in an ordinary common-law court for the forfeiture of goods or articles used in violation of laws imposing such a penalty even though articles sought to be forfeited are ships, appurtenances thereof or cargoes.

9. Admiralty ⇐23

California state court had jurisdiction over action for forfeiture of purse seine net used to take fish in navigable waters adjacent to Catalina Island in violation of Fish and Game Code, since such action involved a traditional "common-law remedy" within provisions of Judicial Code giving federal district courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction except where common law is competent to provide a remedy, even though forfeiture statute was enacted long subsequent to the Judiciary Act. St.1933, pp. 470, 471, §§ 842, 845; Jud.Code §§ 24(3), 256, 28 U.S.C.A. §§ 41(3), 371.

See Words and Phrases, Permanent Edition, for all other definitions of "Common-Law Remedy".

10. Fish ⇐16

A petition alleging that a purse seine net "is and was at all times herein mentioned an appliance used for the taking of fish" and was used in violation of specified section of Fish and Game Code, constituted a sufficient allegation that net was illegally used to catch fish so as to state a cause of action for forfeiture of net under provisions of Fish and Game Code. St.1933, pp. 470, 471, §§ 842, 845.

11. Courts ⇐488(3)

A petition in superior court for a judgment to declare a fish net a public nuisance forfeited to the state under provisions of Fish and Game Code was one to abate a nuisance and therefore within appellate jurisdiction of District Court of Appeal, and where a hearing had been granted by the Supreme Court after decision by the District Court of Appeal, the Supreme Court had jurisdiction of the case for all purposes, notwithstanding original appeal was improperly transferred to Supreme Court. St.1933, p. 471, § 845; Const. art. 6, §§ 4b, 4c.

In Bank.

Appeal from Superior Court, Los Angeles; Harry R. Archbald, Judge.

Action by E. C. Moore and others against Purse Seine Net, claimed by the C. J.

Hendry Company and others, to have the net declared a public nuisance forfeited to the state. From a judgment declaring the net forfeited, claimants appeal.

Judgment affirmed.

For prior opinions, see 98 P.2d 766, and 105 P.2d 919.

Rehearing denied; EDMONDS, J., dissenting.

Alfred T. Cluff and Sawyer & Cluff, all of Los Angeles, Arch E. Ekdale, of San Pedro, Cluff & Bullard, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Eugene M. Elson and Paul D. McCormick, Deputy Attys. Gen., for appellees.

TRAYNOR, Justice.

California law enforcement officers seized a large purse seine fishing net in use on the fishing boat "Reliance" in navigable waters of the Pacific Ocean adjacent to Catalina Island. The taking of fish by net within these waters is unlawful. Fish and Game Code, § 842, St.1933, p. 470. The California Fish and Game Commission filed a petition in the superior court asking for a judgment to declare the net a public nuisance forfeited to the state, and to order its destruction or sale under the provisions of section 845 of the Fish and Game Code. A judgment of forfeiture issued from which the owners of the net have appealed. They do not challenge the power of the state to enact legislation regulating fishing within territorial waters and providing for the forfeiture of nets used in an illegal manner, but they contend that the state court has no jurisdiction to proceed in the action because it is a maritime cause of action within the exclusive admiralty jurisdiction of the federal courts.

[1-3] Section 9 of the Judiciary Act of 1789, 1 Stat. 76, and later statutes re-enacting the same provision (Judicial Code, §§ 24[3], 256, 28 U.S.C.A. 41, subd. 3, 371) provide that the federal district courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it". See The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397. The present proceeding involves a maritime cause of action. If the property proceeded against is an integral part of the vessel or its equipment and is seized on navigable waters the cause is maritime. Turner v. United States, 2 Cir., 27 F.2d 134; The Buffalo, D.C., 148 F. 331; The Witch Queen, 30 Fed.Cas. p. 396, No. 17,916. This fact alone, however, does not establish that the action is within the exclusive jurisdiction of the federal courts. The saving clause of the Judiciary Act makes it clear that a case involving a maritime cause of action may properly be brought in a state court if the type of remedy pursued is traditionally within the jurisdiction of the common law courts. Even though the right to sue is created by a recently enacted state statute, it is within the saving clause so long as the remedy is of a type recognized at common law (Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582), including equity. Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638, 20 S.Ct. 824, 44 L.Ed. 921.

[4-6] If the action is of a type that was cognizable in both admiralty and common law courts the state courts retain a concurrent jurisdiction with the federal admiralty courts to entertain the action. Reynolds v. The Favorite, 10 Minn. 242, 10 Gil.Minn. 190, 193, New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 390, 12 L.Ed. 465; Percival v. Hickey, 18 Johns, N.Y. 257, 9 Am.Dec. 210; 1 Kent Com. 367, 377; 1 Story, Constitution, 533. See American S. B. Co. v. Chase, 16 Wall. 522, 21 L.Ed. 369; Sherlock v. Alling, 93 U.S. 99, 23 L.Ed. 819; Fisher v. Boutelle Trans. & Towing Co., D.C., 162 F. 994; International Nav. Co. v. Lindstrom, 2 Cir., 123 F. 475; The Harrisburg, 119 U.S. 199, 213, 7 S.Ct. 140, 30 L.Ed. 358; The Hamilton, 207 U.S. 398, 28 S.Ct. 133, 52 L.Ed. 264; Aurora Shipping Co. v. Boyce, 9 Cir., 191 F. 960, 966. "The saving clause of the Judiciary Act and of the Judicial Code does not contemplate admiralty remedies in a common law court. Its meaning is that in cases of concurrent jurisdiction in admiralty and at common law, the jurisdiction in the latter is not taken away." Benedict, Admiralty, 5th Ed. § 23. See Knapp, Stout & Co. v. McCaffrey, supra; Red Cross Line v. Atlantic Fruit Co., supra. The fact that federal forfeiture statutes, similar to that of California, require that a proceeding thereunder against a vessel or its equipment be brought in a federal district court sitting as a court of admiralty (see The Sarah, 8 Wheat. 391, 5 L.Ed. 644; United States v. The Betsy and Charlotte, 4 Cranch 443, 2 L.Ed. 673; The Confiscation Cases, 7 Wall. 454, 19 L.Ed. 196; United States v. La Vengeance, 3 Dall, 297,

1 L.Ed. 610; United States v. Grundy, 3 Cranch 337, 2 L.Ed. 459; The Palmyra, 12 Wheat. 1, 6 L.Ed. 531) does not prevent California from conferring jurisdiction upon her courts to proceed with such cases under a California statute if the type of action is a traditional common law remedy.

It is therefore necessary to determine whether this forfeiture proceeding by the state is the type of action which was cognizable in a common law court. In 1789 when the Judiciary Act was enacted there had been little development of the common law in federal or state courts of the United States. An examination of the English common law as it existed before that time must therefore be made.

[7] In determining the jurisdiction of the English common law courts, acts of Parliament defining that jurisdiction must be taken into account. It is well established in California that the common law of England includes not only the *lex non scripta* but also the written statutes enacted by Parliament. Martin v. Superior Court, 176 Cal. 289, 168 P. 135, L.R.A.1918 B, 313; People v. Richardson, 138 Cal.App. 404, 32 P.2d 433. Other jurisdictions are in accord with this view, most of them holding that English statutes enacted prior to the time of separation of the colonies from the Mother Country in 1776 are included within the English common law. See cases cited in 78 U. of Pa.L.Rev. 195; 11 Am.Jur. 166; 22 L.R.A. 508 et seq.

[8] Appellants' contention that the present proceeding is of a type unknown to the common law courts because it is an action *in rem* against the net itself rather than *in personam* against the owners of the net is unsound. While it is true that actions in common law courts are usually *in personam* as contrasted to the *in rem* proceedings of the courts of the Admiralty, it has long been established that an action *in rem* can be brought by the state in an ordinary common law court for the forfeiture of goods or articles used in violation of laws imposing such a penalty even though the articles thus proceeded against are ships, appurtenances thereof, or cargoes. The Statute of 12 Car. II, c. 18 (7 English Statutes at Large) enacted in 1660 provided that all imports to and exports from England and its possessions must be in English ships "under the penalty of the *forfeiture and loss of all the goods and commodities* which shall be imported into or exported out of any the aforesaid places in any other ship or vessel, *as also of the ship or vessel, with all its guns, furniture, tackle, ammunition and apparel;* one third part thereof to his Majesty, his heirs and successors; one third part to the governor of such land, plantation, island or territory where such default shall be committed, in case the said ship or goods be there seized, or otherwise that third part also to his Majesty, his heirs and successors; and the other third part to him or them who shall seize, inform or *sue for the same in any court of record,* by bill, information, plaint or other action, wherein no essoin, protection or wager of law shall be allowed;". (Italics added.) This statute, providing for the institution of forfeiture proceedings in any court of record against ships and cargoes used in violation of the act clearly authorized a remedy by forfeiture in the common law courts. In the case of Roberts v. Withered, 1696, 5 Mod. 193; 12 Mod. 92; L Salk 223, it was held that in proceeding to forfeit a ship and cargo under the above act, an action of detinue would properly lie in the court of the King's Bench. "* * * for my Lord Coke (b) was of the opinion, that the bringing a replevin is a claim in law, and that the property is vested thereby in the plaintiff. So by navigating contrary to the act, the property is divested out of the former owners; and by this action now brought, it is vested in the plaintiff, and therefore he may bring detinue for it." This decision was approved in Wilkins v. Despard, 5 Durnf. & East's Rep. 112.

Such forfeiture to the state of illegally used articles has continued as an accepted common law procedure. The statute of 13 & 14 Car. II. c. 7, 11, 18, 20 (8 English Statutes at Large) provided for the forfeiture in common law courts of various articles used in violation of law, certain types of vessels being included in chapter 11. The Customs Consolidation Act of 1876 (39 & 40 Vict. c. 36) imposes, as part of the penalty for smuggling, forfeiture to the Crown of the goods smuggled and the *ship, boat,* carriage, or horse used for their conveyance. Chapter 36, paragraph 218 of the act provides: "All duties, penalties, and forfeitures incurred under or imposed by the Customs Acts * * * may be sued for, prosecuted, determined, and recovered by action, information, or other appropriate proceeding in the *High Court of Justice in England, the superior courts of common law* at Dublin or Edinburgh * * * or by information in the name of

some officer of Customs or Excise, before *one or more justice or justices* in the United Kingdom, the Isle of Man, or the Channel Islands. * * *" (Italics added.) See 9 Halsbury's Laws of England 377; Frailey v. Charlton [1920] 1 K.B. 147. While this statute is of recent origin, it indicates that at the present time in England forfeiture proceedings against vessels and cargo are instituted in common law courts rather than courts of admiralty. See, also, Dangerous Drugs Act, 1920, 10 & 11 Geo. 5, c. 46, s. 14 as amended, 1923, 13 & 14 Geo. 5, c. 5, s. 2 (1); 22 Halsbury's Laws of England 399.

In the United States the federal government from early times has provided for the forfeiture of certain articles used in violation of law. See 14 Stat.L. 156; 14 Stat. L. 151, 165; 13 Stat.L. 240; 14 Stat. L. 178; 12 Stat.L. 319; The Sarah, 8 Wheat. 391. See, also, Internal Revenue Code, 26 U.S.C.A. §§ 3720 et seq., 2154, 2155 et seq.; 19 U.S.C.A. § 1584. California has likewise exacted forfeiture of various illegally used articles. Pen.Code, § 325 [1872]; Health and Safety Code, §§ 12304-5, St.1939, p. 784 [former Stats.1887, ch. 95, p. 110]; Health and Safety Code, § 11610. The early federal statutes required that in the trial of cases involving seizures made on waters navigable by vessels of ten tons burden and upward the court sit as a court of admiralty (see The Sarah, supra; Reynolds v. The Favorite, supra, 10 Minn. 242, 10 Gil. 193), but the federal cases themselves recognize that such forfeiture proceedings constituted a valid remedy at common law. Thus, in the case of The Palmyra, supra [12 Wheat. 14, 6 L.Ed. 531], Mr. Justice Story stated: "It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. * * * In the contemplation of the common law, the offender's right was not divested, until the conviction. But this doctrine never was applied to seizures and forfeitures created by statute, in rem, cognisable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing." See United States v. 5 Boxes of Asafœtida, D.C., 181 F. 561; The Sarah, supra.

There are cases which state that an in rem action against a vessel is not a common law remedy and is therefore within the exclusive admiralty jurisdiction of the federal courts. The Moses Taylor, supra; The Ad. Hine v. Trevor, 4 Wall. 555, 18 L.Ed. 451; The Glide, 167 U.S. 606, 17 S. Ct. 930, 42 L.Ed. 296; The Belfast, 7 Wall. 624, 19 L.Ed. 266. These cases, however, were concerned with types of in rem proceedings that were foreign to the common law. They are authority for the rule that a state court can have no jurisdiction over an action in rem against a vessel when such action has no counterpart in the common law courts. See Knapp, Stout & Co. v. McCaffrey, supra. But these cases are not controlling in circumstances where the common law provided an analogous remedy. As stated by the Supreme Court of Minnesota in Reynolds v. The Favorite, supra: "In England in the court of exchequer, and in the United States in the district courts, in seizures made on land for violation of the revenue laws, the proceedings are in rem, according to the course of the common law. Though a proceeding is in rem, it is not necessarily a proceeding or cause in admiralty. The Sarah, 8 Wheat. 391 [5 L.Ed. 644]; United States v. Four Hundred Twenty-two Casks of Wine, 1 Pet. 547 [7 L.Ed. 257]; 1 Kent Com. 374-5-6."

The courts of other jurisdictions with statutes similar in nature to the one now under consideration have enforced such forfeitures under the assumption that they had jurisdiction to do so. See State v. Umaki, 103 Wash. 232, 174 P. 447; State v. Mavrikas, 148 Wash. 651, 269 P. 805; Sterrett v. Gibson, Tex.Civ.App., 168 S.W. 16, affirmed, Tex.Civ.App., 172 S.W. 1198. See, also, Mirkovich v. Milnor, D.C., 34 F. Supp. 409; Ieck v. Anderson, 57 Cal. 251, 40 Am.Rep. 115. In the case of The Bessie Mac, D.C., 21 F.Supp. 220, a federal district court held that forfeiture proceedings under a Washington statute similar in nature to that of California were maritime in nature and should therefore be brought in a federal court. The court, however, failed to consider whether such proceedings, though maritime, constituted a common law remedy within the saving clause of the Judiciary Act.

[9] It is therefore clear that the forfeiture of illegally used nets authorized by the California statute involves a traditional common law remedy cognizable in the state courts, even though the statute was enacted long subsequent to the Judiciary Act. Red Cross Line v. Atlantic Fruit Co., supra.

[10] Appellants contend that the petition for forfeiture filed by the Fish and Game Commission did not allege that the purse seine net in question was used for the taking of fish and therefore failed to state a cause of action. The petition stated, however: "That said purse seine net * * * is and was at all times herein mentioned an appliance used for the taking of fish" and "was * * * used in violation of the provisions of Section 842 of the Fish and Game Code of the State of California." This constitutes a sufficient allegation that the net was illegally used to catch fish.

[11] Since the judgment of forfeiture in the instant case pronounced the net in question a public nuisance pursuant to section 845 of the Fish and Game Code which declares any net used in violation of law to be a public nuisance, the action is one to abate a nuisance and therefore within the appellate jurisdiction of the District Courts of Appeal. Cal.Const., Art. 6, § 4b. Although the original appeal was improperly transferred to this court by the District Court of Appeal of the Second Appellate District, this court on November 20, 1939, transferred the cause to the District Court of Appeal of the First Appellate District. The case is now here by virtue of an order granting a hearing after decision by that court. This court therefore has jurisdiction for all purposes. Cal.Const., Art. 6, § 4c.

The judgment is affirmed.

GIBSON, C. J., CURTIS and CARTER, JJ., concurred.



18 Cal.2d 843

SMITH v. INDUSTRIAL ACCIDENT COMMISSION.

S. F. 16557.

Supreme Court of California.

Oct. 20, 1941.

1. Workmen's compensation ⇐737

Where transportation is furnished by employer to convey a workman to and from his place of work as an incident of the employment, and the means of transportation are under control of the employer, an injury sustained during such transportation "arises out of the course of employment" and is compensable, but the transportation furnished must be connected with the employment.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of Course of Employment".

2. Workmen's compensation ⇐719

The payment to employee of the cost of transportation by public facility to and from his place of residence to the place of work does not ordinarily in itself furnish a basis for concluding that an injury sustained during such transportation "arose out of the course of employment".

3. Workmen's compensation ⇐730

Injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have "arisen out of and in the course of the employment" and hence as being compensable, even though occurring after employee has left actual point where he has been working and has actually ceased to render services.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of and in Course of Employment".

4. Workmen's compensation ⇐745

Where employee of Golden Gate International Exposition after checking out at administration office at end of day's work on Treasure Island, all of which Island and the roads thereon were under control of employer, boarded truck of employer, as was practice of employee, without knowledge or consent of driver and rode along roads affording most direct route to ferry terminal enroute home, injuries sustained when employee leaped from moving truck, when it turned in opposite direction from route to ferry terminal, "arose out of the course of employment", and hence were compensable.

5. Workmen's compensation ⇐752

In determining whether injuries sustained by employee of Golden Gate International Exposition while traveling on roads on Treasure Island under control of employer enroute home at end of day's work arose out of employment so as to be compensable, the fact that such roads were used by public attending Exposition and employees of concessions as well as employees of Exposition was not decisive, since the fact that public by

permission used roads did not make them "public highways".

See Words and Phrases, Permanent Edition, for all other definitions of "Public Highway".

6. Evidence ⇐5(2)

In determining whether injuries sustained by employee of Golden Gate International Exposition while traveling on roads on Treasure Island under control of employer enroute home arose out of employment so as to be compensable, court took judicial notice of fact that the only members of public that could use such roads were those who paid to visit exposition or were given permission to enter by employer.

7. Workmen's compensation ⇐745

The fact that employee enroute home from work rode on employer's truck on roads under employer's control instead of walking did not render injuries sustained when employee dismounted from truck, still on premises controlled by employer, noncompensable where it was custom of employees to obtain such rides and employer had not prohibited the practice.

8. Workmen's compensation ⇐772

The fact that compensation claimant's injuries were sustained when he leaped from a moving truck did not render injuries noncompensable, since negligence on the part of claimant is not a defense in proceeding for workmen's compensation.

In Bank.

Proceeding upon the petition of Joseph H. Smith for a writ of review to annul an order of the Industrial Accident Commission denying petitioner compensation.

Order annulled.

Elvin B. Connolly and Fredrick S. Farr, both of San Francisco, for petitioner.

Everett A. Corten, of San Francisco (Edmund D. Leonard, of San Francisco, of counsel), for respondents.

CARTER, Justice.

Petitioner seeks annulment of an order of the Industrial Accident Commission denying him compensation.

Viewing the evidence most favorable to respondents it appears that petitioner, Joseph H. Smith, was employed as an unskilled laborer by the Golden Gate International Exposition on April 8, 1940, at Treasure Island in San Francisco Bay. His duties consisted of performing labor on various portions of the roads on Treasure Island, he being required to work in various places from time to time. He resided in San Francisco and traveled to and from the island by ferry boats not operated or controlled by his employer; his employer did, however, pay for his transportation. The entire island, comprising several hundred acres, including the system of roads thereon, was under the control of the employer, the latter being engaged in conducting an exposition or fair thereon. The roads on the island were designed and being used for the accommodation of the public attending the exposition, employees of the Golden Gate International Exposition, persons connected with concessions, etc. The employees were required to check out at the end of each day's work at the employer's administration office situated on the northeast portion of the island. The terminal of the ferry boats used by petitioner to return to his home in San Francisco was on the west side of the island, more than one-half mile from the administration office. Generally one going from the administration building to the terminal would travel south on one of the north-south roads to its intersection with an east-west road, thence westerly on the latter to the terminal. In order for the various crews of employees hired by the employer to travel about from one part of the island to the other to get from one assignment of work to another during the working day each crew was provided by the employer with a truck which was driven by the foreman of the crew. These trucks were not supplied by the employer for the purpose of carrying laborers from the administration building to the ferry terminal. On the day in question the petitioner, after his day's work, checked out at the administration office and started to the ferry terminal on the north-south road. When he was in the road in front of the office he saw a crew truck traveling in a southerly direction. The truck was one assigned to a carpenter crew and was being operated by the foreman thereof. Several employees were riding in the truck. He boarded the truck while it was in motion without the knowledge or express consent of the driver. When the truck reached the east-west road intersection it turned east, the direction opposite to the terminal which was petitioner's destination and he jumped from the truck while it was in motion and in so doing suffered the injuries for which he sought

compensation. Up to the time of the injury petitioner was traveling the most direct route to the terminal. The employer had not issued any orders prohibiting the employees from riding on the trucks to or part way to the terminal. It was the practice of employees to ride in said trucks either all or part of the way.

With the facts being as above stated, the respondent Commission found that "Said injury did not arise out of nor occur in the course of the employment, nor while performing any service incidental thereto." It is respondents' position that the application of the going and coming rule prevents an award of compensation to petitioner. We cannot agree.

[1, 2] It may be observed with reference to petitioner's riding upon the employer's truck, that it is the general rule that when transportation is furnished by the employer to convey a workman to and from his place of work, as an incident of the employment, and the means of transportation are under the control of the employer, an injury sustained during such transportation arises out of the course of employment and is compensable. Harlan v. Industrial Accident Commission, 194 Cal. 352, 228 P. 654; Dellepiani v. Industrial Accident Commission, 211 Cal. 430, 295 P. 826. But the transportation furnished must be connected with the employment or as said in Trussless Roof Co. v. Industrial Accident Commission, 119 Cal.App. 91, 93, 6 P.2d 254.

"The use of the words 'as such' is necessary because courtesy rides given by the employer do not give rise to liability under the statutes. Boggess v. Industrial Acc. Comm., 1917, 176 Cal. 534, 169 P. 75, L.R.A. 1918F, 883; Gruber v. Mercy, 1929, 145 A. 106, 7 N.J.Misc. 241. In other words, the transportation has to be furnished as a part of the contract of employment, to come within the rule. In re Donovan 1914, 217 Mass. 76, 104 N.E. 431, Ann.Cas.1915C, 778." In the instant case the transportation facility, the truck, although owned and controlled by the employer, was not furnished by it under any agreement for transporting employees from the administration office to the ferry terminal. There are present, however, two other factors of importance. It was the custom of the employees to ride in the trucks to the terminal after checking out, and the roads traveled were all a part of the employer's premises, that is, Treasure Island, upon which the exposition was being conducted. These factors will be considered in connection with the discussion later herein dealing with the employer's premises, and whether petitioner left the employment when he boarded the truck. It also may be pointed out that the fact that the employer reimbursed the employee for his fare on the ferry from the island to San Francisco would not of itself cause the injury to arise out of the course of employment. The payment to the employee of the cost of public transportation to and from his place of residence to the place of work does not ordinarily in itself, furnish a basis for concluding that an injury sustained during such transportation arose out of the course of employment. Trussless Roof Co. v. Industrial Accident Commission, supra.

[3, 4] The rule is, that it is not necessary for an injury to be compensable that it occur before the employee shall have left the actual point where he has been working, and before he actually ceases to render service. Injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment and are thus compensable. Makins v. Industrial Accident Commission, 198 Cal. 698, 247 P. 202, 49 A.L.R. 411; Jimeson v. Industrial Accident Commission, 23 Cal.App.2d 634, 73 P.2d 1238; Judson Mfg. Co. v. Industrial Accident Commission, 181 Cal. 300, 184 P. 1; Bountiful Brick Co. v. Giles, 276 U.S. 154, 48 S.Ct. 221, 72 L.Ed. 507, 66 A.L.R. 1402. In the instant case the entire island and system of roads thereon were under the control of the employer and used by it in the conduct of the exposition. Petitioner's duties took him to various parts of the island as the assignments of work demanded. He was injured while leaving the island and had not loitered thereon after having checked out at the administration office. He was leaving the premises by the most direct route and via the roads, the only means provided for egress therefrom. Under these circumstances we believe that petitioner was on his employer's premises and leaving by the means provided therefor when the injury was sustained, and that it may be said that it was contemplated by the employer that he would still be in its employment until he embarked on the ferry boat to leave the island, the employer's premises, which he did by the only and most reasonable route available. In Lynch v. City of New York, 242

N.Y. 115, 151 N.E. 149, 150, the City of New York maintained a hospital and grounds on an island in the East River. A nurse there employed was injured when walking on a sidewalk on the island while going to one of the public facilities to leave the island for New York City. The court of appeals in affirming an award of the State Industrial Board stated:

"But going to and coming from work becomes an incident of the employment when the employee is within the precincts of the employer. * * * The city is the employer in this case. The rule here stated would be pushed to an illogical and absurd extreme if it were applied to all the sidewalks of New York over which city employees might pass on their way to and from their work. But the city maintains a plant on Welfare Island, and within that plant the employee is exposed to the hazards peculiar to the employment as well as the hazards of life in general. The hazards of the employment are analogous to those of an employee in a manufacturing plant or railroad shop. The location of the hospital was such as to make the boat the customary and practical way of ingress and egress. The walk to the boat landing was as much a part of the plant as the hospital itself. Although claimant was not at work when the accident happened, the employment necessarily contemplated that claimant should from time to time leave the island and return, as much as it contemplated that she should work there. A reasonable interval of time for the purpose was therefore within the necessary scope of the employment." In McDonald v. Richardson County, 135 Neb. 150, 280 N.W. 456, an office employee of the county working in the courthouse was injured while leaving on a drive from the building to the street. The court there said at page 458 of 280 N.W.:

"In this case Byrd McDonald was not in the courthouse for her own personal reasons. She was in the building because she was employed there. For that reason she was on the driveway on the grounds. It was necessary as a part of her employment that she come and go across the grounds after leaving the public street. To urge that she had a right to go upon the premises as a member of the public is, we think, putting too narrow a construction upon the meaning of the compensation act as to what is or is not within the course of employment. An employee is required to cross the grounds of the premises of employer. An employee leaving the premises of her employer in the usual and customary way after her work is ended is within the course of her employment within the meaning of the workmen's compensation law. Walking to and from the street and a building where one is employed is a necessary incident of the employment, and an injury sustained in so doing is compensable."

[5, 6] Respondents make much of the fact that the roads on the island in the instant case were used by the public attending the exposition and employees of concessions thereon, as well as employees of the Golden Gate International Exposition. That factor is not decisive when it is remembered that the employment necessarily contemplated that the employees must leave the island to return home, that the roads were under the control of the employer, and that therefore, their employment necessarily required that they use the roads on the island; no other means were available. Traveling over those roads to reach the public transportation facilities for leaving the island together with the dangers attendant therewith was therefore incident to the employment. The island was and the roads thereon were controlled by the employer, and the court may take judicial notice that the only members of the public that could also use the roads were those willing and able to pay the admission charge made by the employer for entry on the island and to visit the exposition there conducted, or those given permission so to enter by the employer. Merely because the public by permission used the roads did not make them public highways. The island and its system of roads was not unlike a manufacturing plant. Lynch v. City of New York, supra; see, also, Wilson Berger Coal Co. v. Brown, 223 Ky. 183, 3 S.W.2d 199. There is nothing in the case of London, etc., Co. v. Industrial Acc. Comm., 173 Cal. 642, 161 P. 2, cited by respondents contrary to the views herein expressed. There the work had ended and there was no evidence that the leaving of the premises by the workman to return home was incidental to the employment. The general statement therein that the fact that the employee was still on the employer's estate does not of itself make the injury compensable, is probably correct, but that does not mean that that factor considered with others will not make an injury compensable.

Respondents refer to authorities to the effect that an employee of a city engaged in

street work in a certain part of the city, who receives injuries while going to or from his home on city streets cannot recover compensation. We are not here called upon to decide that question. From what we have heretofore said such a case is clearly distinguishable from the case at bar. See, also, Lynch v. City of New York, supra.

[7, 8] It cannot be said that the fact that petitioner rode on the truck rather than walked bars his recovery on the ground that he stepped out of the course of his employment. This is true because the evidence showed that it was the custom of employees to obtain such rides and the employer had not given any orders prohibiting the practice. See Associated Indemnity Corp. v. Industrial Accident Comm., 18 Cal.2d 40, 112 P.2d 615. That petitioner boarded a moving truck and jumped from it while it was moving is not significant. It is nothing more than a charge of negligence on his part which is no defense in proceedings for workmen's compensation. California Casualty Indemnity Exchange v. Industrial Accident Comm., 5 Cal.2d 185, 53 P.2d 758; Associated Indemnity Corp. v. Industrial Accident Comm., supra.

The order is annulled.

TRAYNOR, J., and MOORE and PULLEN, JJ. pro tem, concurred.



47 Cal.App.2d 424

MATHEWS v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA et al.

Civ. 12618.

District Court of Appeal, Second District, Division 1, California.

Oct. 22, 1941.

1. Appeal and error ⇐882(3)

Where action to recover certain disability benefits and certain premiums paid by insured was tried on theory that releases executed by insured were void because insured was mentally incompetent, new theory that compromise as result of which insured executed releases was void even if insured had been mentally competent because of absence of new consideration could not be urged for first time on appeal.

2. Appeal and error ⇐882(3)

The theory upon which a case is tried must be adhered to on appeal and a party is not permitted to change his position and adopt a different theory on appeal.

3. Insurance ⇐579

Where releases executed by insured in favor of insurer were written instruments, they were presumptive evidence of consideration. Civ.Code, § 1614.

4. Insurance ⇐579

Where disability payments were not required to be made to insured in event of his recovery and at time settlement was made no one could tell when that event would occur and insurer contended that such event had already occurred and at time when only $100 was unpaid on disability installments, $500 was paid to insured and premium was reduced $2.50 per annum and insurer waived first premium to thereafter become due, the release was supported by consideration.

5. Insurance ⇐579

Where at time insurer contended that insured had recovered and that insurer was no longer liable for disability payments, compromise agreement was entered into, the fact that insured did not cash check for $500 given him as part of the consideration for the compromise agreement did not render the agreement void, since any delay in cashing the check could not be charged to the insurer.

6. Appeal and error ⇐1008(1)

In action by insured's executrix to recover disability benefits and certain premiums paid by insured, evidence regarding whether releases executed by insured as result of compromise agreement were procured by undue influence or were void because of insured's incompetency was for the trial judge.

7. Appeal and error ⇐1011(1)

In action by insured's executrix to recover disability benefits and certain premiums paid by insured, findings of trial judge, based on conflicting evidence, that releases executed by insured were not procured by undue influence and were not void because of incompetency of insured could not be disturbed on appeal.

8. Insurance ⇐665(7)

In action by insured's executrix to recover disability benefits and certain premiums paid by insured, evidence sustained trial judge's finding that insured was competent to execute releases set up by insurer as defense.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Elise Hotchkiss Mathews, executrix with the will annexed of the estate of F. B. Mathews, also known as Frank Berry Mathews, deceased, against the Pacific Mutual Life Insurance Company of California and others to recover disability benefits and certain premiums. From an adverse judgment, plaintiff appeals.

Affirmed.

H. R. Skinner and George S. Dennison, both of Los Angeles, for appellant.

Guthrie & Darling, of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

Appeal from a judgment against the plaintiff, executrix with the will annexed of the estate of F. B. Mathews, also known as Frank Berry Mathews, deceased, in an action to recover certain disability benefits claimed to be due said decedent, the insured, in his lifetime, and certain premiums paid by the insured under a policy of insurance issued by the defendant. The Pacific Mutual Life Insurance Company, under a clause of said policy providing that said defendant would pay said decedent the sum of $100 per month should he, before attaining the age of sixty years and while the policy was in force, and no premiums in default, become "so disabled as to be totally and permanently unable to perform any work or engage in any occupation or profession for wages, compensation or profit, or suffer the irrevocable loss * * * of the * * * use of one hand and one foot", and in addition, said defendant would waive the payment of future premiums.

Another clause in the policy provided that should said insured, before attaining the age of sixty years, elect to cancel such benefit provisions, "a reduction in the annual premium of twenty-five cents for each Ten Dollar Unit of monthly payments" under such policy would thereafter be made.

The policy was issued May 12, 1923, and the insured paid the annual premiums of $366 until as of March 5, 1931, when said insured submitted to the insurer a written statement captioned "Preliminary Particulars of Total Disability", in which he claimed that "he had been totally disabled and continuously prevented from performing any work or engaging in any occupation or profession for wages compensation, or profit, and that such disability began on December 27, 1930". Said defendant, upon receipt of such proof, paid to said insured the sum of $100 as of March 7, 1931, and a like sum monthly thereafter to and including January 1, 1932, and waived the annual premium due on May 12, 1931, "as and for claimed total disability benefits under the terms and conditions of such policy of insurance".

On February 10, 1932, an agreement in writing was entered into between the defendant insurer and the insured whereby in consideration of the sum of $500 paid by the insurer to said insured, the reduction by the insurer of the annual premiums required to be paid under such policy of insurance from $366 to $363.50, and the waiver by the insurer of the annual premium as reduced, to become due May 12, 1932, said insured acknowledged in writing full payment, satisfaction, discharge, compromise, and release of all claims on account of permanent and total disability benefits under said policy of insurance growing or thereafter to grow out of alleged disability suffered on or about March 7, 1931, and it was further agreed that the total disability benefits under said policy of insurance were cancelled and entirely eliminated as of February, 1932, and said insured accepted from said insurer and retained the sum of $500, the waiver of the premiums due on May 12, 1932, and said reduction in the amount of said annual premium.

The reduced premiums were thereafter paid by said insured and the insurer made no further disability payments until December 1, 1936, when, under a written agreement entered into between defendants and the insured in November, 1936, under and by which written agreement the insured, in consideration of the sum of $1,200, applied as a credit to a policy loan then outstanding against said policy of insurance, the resumption of said payments of $100 per month beginning as of said

December 1, 1936, and to continue so long as said insured lived and remained permanently totally disabled, and the waiver of premiums under said policy of insurance so long as said payments continued, said insured "acknowledged full payment, satisfaction, discharge, compromise and release of all claims against defendants claimed to have accrued prior to December 1, 1936, on account of alleged permanent total disability benefits under said policy of insurance". The terms of said written agreement were fully complied with by the defendants to and including April 5, 1937, the date of the death of said insured.

The trial court found that on February 10, 1932, and on November 30, 1936, said insured was mentally competent, and as conclusions of law found that plaintiff was not entitled to recover and that defendants were entitled to judgment for their costs.

Plaintiff's complaint sought to recover the monthly payments not paid by defendants and the amount of the premiums paid by insured subsequent to said settlement of February 10, 1932.

In her complaint plaintiff prayed the court to declare any and all releases signed by the insured "void and without effect, due to the incompetency of the said insured to execute them, and due to the undue influence exercised over him by the defendant, or its authorized employes". The complaint contains allegations to the effect that on or about March 1, 1931, said decedent submitted due proof of total and permanent disability, disabling him from "the performance of any work or engaging in any occupation or profession, or which caused him to suffer the *irrevocable* (loss of) *use of one hand and one foot*". (Emphasis ours.) Such allegation is denied in defendants' answer, except that such answer admits and alleges that said decedent submitted to defendants a written statement in which decedent claimed that "he had been totally disabled and continuously prevented from performing any work or engaging in any occupation or profession for wages, compensation, or profit", and that such disability began December 27, 1930. The trial court found that such allegations in plaintiff's complaint were untrue except as to the allegation of due proof of permanent disability, and found that the allegations of the complaint that the settlement of 1932 (waiving the disability features of the policy) was the result of mental incompetency of decedent and undue influence exercised over him by defendant, were not true.

Plaintiff's contention throughout the trial was that the two releases given by the insured were the result of decedent's mental incompetence or undue influence.

Appellant contends here that the compromise of 1932 was void, even assuming decedent to have been mentally competent, as no new consideration passed, on the theory, apparently, that the company's liability under the disability provision of the policy was liquidated and that no honest dispute existed on the subject of insured's health or his right to benefits.

[1, 2] This new contention cannot be urged here. "The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal." Ernst v. Searle, 218 Cal. 233, 240, 22 P.2d 715, 718.

[3, 4] Both releases were by written instruments, which are presumptive evidence of a consideration. § 1614, Civil Code. Nor do we agree that the ultimate and aggregate amount of the liability was liquidated. As long as the disability continued the defendant was compelled to pay the insured the amount fixed by the policy. Payments were not required in the event of his recovery, however, and at the time the settlement was made in 1932, no one could tell when that event would occur. As a matter of fact, defendants then contended that such event had already occurred, and at the time of such settlement there was a serious dispute as to whether any more payments were due under the policy. The date of the death of insured was uncertain at that time. The payment of $100 that would have been due insured February 1, 1932, was not made. On February 10, 1932, the first release was executed. At that time defendant company gave decedent a check for $500, and insured executed a receipt for that amount in full payment, satisfaction and discharge of all claims of himself, his heirs and assigns, that then had accrued or might thereafter accrue against defendant on account of such total disability benefit clause of his policy of insurance, "growing or to grow out of alleged disability suffered by myself on or about 3/7/31", and it was agreed therein that such total disability provision of such policy should be eliminated and

that premiums thereafter coming due under such policy should be reduced by $2.50 per annum, and that the annual premium in the reduced amount, due May 12, 1932, would be waived by the company. Therefore, at a time when only $100 was unpaid on the disability installments, $500 was paid and other valuable considerations were given insured by the company for such release, so there is no merit in such contention of appellant.

[5] It appears from the evidence that the insured did not cash the check for $500 given him on February 10, 1932, and appellant urges that because of that the agreement was void. The check was given insured. He could have cashed it so far as anything appears. Any delay was his own fault, which could not be charged to defendants. It appears, too, that on May 23, 1932, said insured, not having been able to find his policy of insurance until after February 10, 1932, took it to the home office of insurer, to be properly endorsed eliminating the permanent total disability clause. The policy, properly endorsed, was returned to decedent.

Appellant states in her brief that, "Broadly speaking, the single issue presented * * * is the validity of the alleged compromises", and that such issue involves consideration of whether or not, (1), the compromises, as a matter of law, constitute an accord and satisfaction; and, whether or not, (2), Mathews was competent, as a matter of fact, to enter into the agreements.

It is apparently appellant's contention that the court erred in failing to find that the insured from January 1, 1931, until his death, was, as a matter of fact, permanently and totally disabled. Her argument is not clear, but we gather that it was advanced because of the finding of the court that the insured, during all of such period "was unable to use his left arm and left leg", and apparently it is assumed by appellant that such finding is equivalent to a finding that insured did suffer the irrevocable loss of the use of one hand and one foot, which, under the policy, would have entitled the insured to the disability provisions even in the absence of a showing of total disability.

Insured suffered a paralytic stroke in December of 1930, which paralyzed his left arm and left leg and slightly affected his speech. Even assuming that the evidence showed that the insured suffered a total disability, we fail to see where that is material on this appeal if the two releases are valid, or if only the release of November 30, 1936, is valid. If the insured was not competent, or acting under undue influence at the time he executed the release, he had a perfect right to make any contract with the defendant company which he desired.

It is undisputed in the record before us that the insured made no effort at any time to rescind the release agreement of 1932, or that of 1936, in which he released all claims against defendant which he claimed had accrued prior to December 1, 1936; that plaintiff witnessed the execution of such last mentioned agreement, and made no attempt to rescind either of said release agreements until June 1, 1938.

The situation presented by such undisputed facts could well have been considered by the trial court as inconsistent with incompetency on the part of insured.

[6, 7] Other evidence offered in support of any asserted undue influence or of incompetency simply resulted in a conflict, and the inferences that were to be drawn from a showing of undue influence or incompetence under such circumstances were for the trial judge who found against such claim. Such a finding cannot be disturbed on appeal for well known reasons that require no citation of authority.

[8] Assuming that the reasons given by plaintiff's witnesses support the opinions given as to competency, at the best there is a conflict in the evidence on such question, and we cannot say that the trial court erred in its findings.

Judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.

47 Cal.App.2d 381

SWEELEY v. GORDON et al.

Civ. 13078.

District Court of Appeal, Second District, Division 2, California.

Oct. 20, 1941.

Rehearing Denied Nov. 12, 1941.

Hearing Denied Dec. 18, 1941.

1. Contracts ⇐136

A plea of estoppel to assert the invalidity of a contract sued on is directed to the equity power of the court.

2. Brokers ⇐43(1)

A broker suing on an oral agreement for a commission was presumed to know that brokers' contracts for commissions for selling realty are by statute declared to be invalid and are unenforceable unless put in writing and subscribed by property owner, and broker was in no position to invoke equitable powers of the court to uphold his contention that because defendant owner knew of his activities, orally promised to pay commission, and accepted the fruits of his labor, defendant was estopped from taking advantage of the statute of frauds. Civ. Code, § 1624, subd. 5.

3. Brokers ⇐43(1)

The statute providing that an agreement employing a broker to sell realty for compensation is invalid unless in writing, subscribed by the party to be charged, was placed in the Civil Code for the protection of owners of realty and also for the protection of brokers. Civ.Code, § 1624, subd. 5.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by C. E. Sweeley against Samuel E. Gordon and another to recover a commission allegedly earned in the sale of an apartment house. From a judgment of dismissal as to the named defendant, plaintiff appeals.

Affirmed.

See, also, 118 P.2d 16.

W. W. Comstock, of Los Angeles, for appellant.

Harry J. Miller, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff, a real estate broker, commenced this action against Samuel E. Gordon and Louis Neubeiser to recover a sum alleged to be due him as commission for the sale of an apartment house owned by defendant Gordon. Each defendant filed a demurrer and both demurrers were sustained without leave to amend. Plaintiff has filed separate appeals from the judgments of dismissal. Mr. Gordon will hereinafter be referred to as defendant. The appeal from the judgment in favor of Mr. Neubeiser is disposed of by a separate opinion this day filed. 118 P.2d 16.

From the allegations of the complaint it appears that on or about June 7, 1940, defendant gave to plaintiff an unsigned written memorandum showing that his apartment house was for sale, giving its location, description and other items, and stated that the memorandum had been distributed among other real estate brokers with the understanding that it should be a "written employment" and that he would pay to any broker to whom such memorandum was delivered the regular commission for the sale of the property; that defendant authorized plaintiff to sell the apartment house for a total price of $68,500, stating that he would pay a commission of $3,425 in case of sale; that thereafter plaintiff notified defendant that he intended to expend considerable money advertising the property in an effort to sell it and defendant stated to plaintiff, "that is fine, go ahead and do what you can to sell it and I will pay you the regular Los Angeles Realty Board commission"; that as a result of this conversation and relying thereon and on the written memorandum plaintiff incurred great expense advertising the property for sale and devoted a large part of his time in an effort to find a purchaser and showed the property to various parties; that plaintiff notified defendant of his activities and was again told by defendant to "go ahead" and sell the property and again promised to pay a commission in case of sale; that plaintiff "produced" Louis Neubeiser as a purchaser and so informed defendant; that thereafter defendant and Neubeiser entered into a conspiracy whereby Neubeiser should buy the property "without the knowledge of plaintiff for the purpose of depriving plaintiff of any profit or commission"; that on August 23, 1940, defendant and Neubeiser entered into an agreement whereby the property was sold to Neubeiser for the sum of $66,000. It is further alleged that plaintiff was led to change his position and that the conduct of defendants "amounted to a

representation that defendants would stand by their agreement and not avail themselves of the Statute of Frauds, and relying on said representations plaintiff was induced to refrain from obtaining a more formal agreement".

The judgment of the lower court was based upon subdivision 5 of section 1624 of the Civil Code, which provides that an agreement employing a broker to sell real estate for compensation is invalid unless in writing subscribed by the party to be charged. It is conceded that Gordon did not sign any authorization employing plaintiff to sell the property but it is argued by plaintiff that since Gordon knew of plaintiff's activities, orally promised him to pay the commission and accepted the fruits of his labor, he is now estopped from taking advantage of the statute of frauds.

The issue presented by plaintiff has been before the reviewing courts of California in a number of analogous situations and in each instance the decision has been adverse to the plaintiff's contention. In Patterson v. Torrey, 18 Cal.App. 346, 123 P. 224, the defendant had unsuccessfully attempted to negotiate an exchange of property with one McFarland. He thereupon gave to the plaintiff a signed memorandum of the terms upon which he was willing to make the exchange and requested the plaintiff to see McFarland in regard to making the exchange. The plaintiff saw McFarland and procured from him an acceptance of the offer made by the defendant and the exchange was consummated. The trial court gave judgment for the plaintiff for his commission but the judgment was reversed, the reviewing court holding that the instrument given by the defendant to the plaintiff did not constitute an employment of the plaintiff which bound him to pay a commission. In Hicks v. Post, 154 Cal. 22, 96 P. 878, 879, Post held an authorization in writing signed by Hicks by which Post was given the "exclusive handling, subdividing, and sale" of certain real property. The authorization was dated March 3, 1903, for two years "and for such further time as may be agreed upon at the end of the said two years". After the end of two years Hicks served written notice on Post declaring the agreement of March 3, 1903, to be at an end. Post claimed that before March 3, 1905, the plaintiff had orally agreed to an extension of the authority and that he had expended a considerable amount of money in furtherance of his agency. Although the matter came before the court on a suit by Hicks to quiet his title against the claim of Post to an interest in the property, the question whether the written authority of an agent could be extended by oral agreement was before the court because of the contention that Hicks was estopped to deny that the contract continued in force after March 3, 1905. The ruling of the trial court in excluding evidence offered to show that the plaintiff had orally agreed upon an extension of the contract was upheld by the reviewing court in an opinion by Mr. Justice Sloss in which it is said: "The fact that, acting under an invalid agreement, he made efforts to find purchasers, cannot, of course, operate to prevent the other party from asserting the invalidity of the contract. To hold the contrary would be to abrogate the statute of frauds." A situation involving the same principle was presented in McRae v. Ross, 170 Cal. 74, 148 P. 215, 216, a case in which it was claimed that three of the defendants had authorized their brother, a fourth defendant, to act for them in employing the plaintiff, the authorization not being in writing. The court held that there was no ground for the contention that the allegations raised an estoppel and remarked: "To so hold would destroy the statutory requirement that authority to sell real property must be in writing."

[1-3] The only claim now made by plaintiff is that the judgment should be reversed under the doctrine of estoppel. A plea of this kind is directed to the equity power of the court. Plaintiff is a real estate broker and as such is presumed to know that contracts made by brokers for commissions for the sale of real estate are declared to be invalid by the code and are unenforceable in the courts unless they are put in writing and subscribed by the owners of the property. He nevertheless failed to secure proper written authorization but relied upon the oral promise of defendant. The equitable powers of the court may not be invoked by one in his position. Subdivision 5 of section 1624 was placed in the Civil Code for the protection of owners of real estate and also for the protection of real estate brokers. As pointed out in Hicks v. Post, supra, a ruling that plaintiff could recover under the allegations of his

complaint would be tantamount to an abrogation of the section of the statute of frauds applicable to sales of real estate by brokers.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.



47 Cal.App.2d 385

SWEELEY v. GORDON et al.

Civ. 13162.

District Court of Appeal, Second District, Division 2, California.

Oct. 20, 1941.

Rehearing Denied Nov. 12, 1941.

Hearing Denied Dec. 18, 1941.

Conspiracy ⟸8

An apartment house owner had the right to sell directly to purchaser, and purchaser had the right to purchase directly from owner, and hence broker's action against purchaser based on charge that owner and purchaser entered into a conspiracy for purpose of depriving broker of any profit or commission could not be maintained, since conspiracy to be actionable must result in the perpetration of an unlawful act or some injurious act by unlawful means.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by C. E. Sweeley against Samuel E. Gordon and Louis Neubeiser to recover a commission allegedly earned in the sale of an apartment house. From a judgment of dismissal as to defendant Neubeiser, plaintiff appeals.

Affirmed.

W. W. Comstock, of Los Angeles, for appellant.

Gerard Remington, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff commenced this action against defendant Louis Neubeiser and Samuel E. Gordon to recover a commission alleged to have been earned in the sale of an apartment house owned by defendant Gordon. The demurrers of the defendants were sustained without leave to amend. In this appeal plaintiff has appealed from the judgment of dismissal as to defendant Neubeiser. On a separate appeal prosecuted by plaintiff as to defendant Gordon this court has on this day rendered judgment affirming the judgment of the lower court, 118 P. 2d 14. The facts alleged in plaintiff's complaint are set forth in the opinion filed in the appeal as to defendant Gordon.

Defendant Gordon was the owner of the property for the sale of which plaintiff claims that he is entitled to a commission. Plaintiff alleged that he "produced" defendant Neubeiser as a purchaser at the price of $68,500 but that Neubeiser purchased the property directly from Gordon for the sum of $66,000. It is claimed that Neubeiser thereby profited to the extent of $2,000 by purchasing directly from the owner and that Gordon was enabled to profit to the extent of $925 by selling directly to Neubeiser. It is alleged in the complaint that the defendants "entered into a conspiracy whereby the said Louis Neubeiser should buy said property from the other defendants without the knowledge of plaintiff for the purpose of depriving plaintiff of any profit or commission in the making of said sale. * * *"

The court did not err in sustaining the demurrers. Gordon had the legal right to sell directly to Neubeiser, who in turn had the legal right to purchase directly from Gordon. Plaintiff's claim against Neubeiser is based on a charge of conspiracy between the two defendants, but conspiracy to be actionable must result in the perpetration of an unlawful act or some injurious act by unlawful means. McIntire v. Chevrolet Motor Co., 115 Cal.App. 187, 191, 1 P.2d 40. Plaintiff's allegations do not meet the requirements of this rule.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

47 Cal.App.2d 438

VALENTINE v. VALENTINE.

Civ. 6538.

District Court of Appeal, Third District, California.

Oct. 22, 1941.

1. Divorce ⇐303(1)

In divorce proceedings, the court has power to modify its decree as to custody of minor children from time to time as circumstances change. Civ.Code, § 138.

2. Divorce ⇐303(2)

The court, in modifying divorce decree as to custody of minor children, proceeds upon new facts considered in connection with the facts formerly established, the change of circumstances, the conduct of the parties and the best interests of the children. Civ.Code, § 138.

3. Divorce ⇐298(1)

The good of minor child is regarded as the controlling force in directing its custody in divorce decree. Civ.Code, § 138.

4. Divorce ⇐303(2)

The morals of parents, their financial condition, their subsequent marriage, age of the child, and devotion of either parent to child's best interests, are all factors to be considered by court in application to modify divorce decree as to custody of minor child. Civ.Code, § 138.

5. Divorce ⇐303(3), 312

All applications to modify divorce decree as to custody of minor children are addressed to discretion of the court below, and its conclusion will not be disturbed, except it should clearly appear that its discretion has been abused. Civ.Code, § 138.

6. Divorce ⇐312

Where record at former hearing at which trial court entered interlocutory divorce decree granting husband custody of minor child was not before District Court of Appeal, court would assume, in support of order modifying interlocutory decree by awarding custody of child to wife, that other and different facts were established at the second hearing. Civ.Code, § 138.

7. Divorce ⇐303(3)

On wife's motion to modify interlocutory divorce decree granting husband custody of minor child, evidence of delinquencies of either husband or wife, which concerned acts committed prior to first hearing at which interlocutory decree was entered was not admissible. Civ.Code, § 138.

8. Divorce ⇐312

Admission of testimony concerning acts committed by husband and wife prior to first hearing at which interlocutory divorce decree was entered granting husband custody of minor child on wife's motion for an order modifying decree by awarding custody of child to her was not an error of sufficient gravity to warrant a reversal of the order granting wife's motion, where there was abundant evidence to sustain finding that wife was a fit person to have custody of her daughter aside from such testimony. Civ. Code, § 138 and 138(2).

9. Divorce ⇐303(3)

Evidence failed to show that trial court abused its discretion in modifying interlocutory divorce decree granting husband custody of minor child by awarding custody of child to wife. Civ.Code, § 138 and 138(2).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by George Valentine against Hyla M. Valentine for divorce. An interlocutory decree was entered in favor of plaintiff under the provisions of which the custody of a minor daughter of the parties was awarded to the plaintiff, and thereafter the defendant made a motion for an order modifying the interlocutory decree and awarding custody of the minor child to her. From an order modifying the interlocutory decree and awarding custody of the minor child to the defendant, the plaintiff appeals.

Affirmed.

Hawkins, Hawkins & Cardozo, of Modesto, for appellant.

Gumpert & Mazzera and J. Calvert Snyder, all of Stockton, for respondent.

TUTTLE, Justice.

An interlocutory decree of divorce, based upon the sole ground of extreme cruelty, was entered in favor of appellant on November 24, 1939, under the provisions of which the custody of a minor daughter of the parties was awarded to appellant. The child was about two years of age.

The court also found that respondent was not a fit and proper person to have the custody of said minor. Thereafter, and on the fourth day of April, 1940, respondent moved the court for an order modifying said decree, and awarding the custody of said minor to her. The testimony taken at the hearing takes up some two hundred pages of the transcript. In addition, there are forty affidavits which are a part of the record. The trial court granted the motion, and entered an order awarding the custody of said minor to respondent, her mother. This appeal is taken from the order.

At the outset we might call attention to the law governing a situation of this character. Section 138 of the Civil Code provides as follows:

"In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same. In awarding the custody the court is to be guided by the following considerations:

"(1) By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question;

"(2) As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father."

[1-5] In Crater v. Crater, 135 Cal. 633, 67 P. 1049, 1050, it is said:

"It is well established that in divorce proceedings the court has the power to vary and modify its decree as to the custody of the minor children from time to time as circumstances change. The court, in revising and modifying its decree, proceeds upon new facts considered in connection with the facts formerly established, the change of circumstances, the conduct of the parties, and the best interests of the child. The good of the child is regarded as the controlling force in directing its custody, and the courts will always look to this, rather than to the whims and caprices of the parties. The morals of the parents, their financial condition, their subsequent marriage, the age of the child, and the devotion of either parent to its best interests, are all factors to be weighed and considered by the court. All such applications are addressed to the sound legal discretion of the court below, and its conclusion will not be disturbed here, except it should clearly appear that its discretion has been abused."

[6] It is the contention of appellant that under the holding in the case of Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719, the decree could not be modified unless the evidence discloses a "change of circumstances" since the entry of the first order, and that the record shows that the facts presented are the same as those proven at the original hearing. Respondent asserts that other and additional facts were proven at the second hearing. As the record at the former hearing is not before us, we cannot say that the proof was the same as that adduced at the original hearing. In support of the order, we must assume that other and different facts were established at the second hearing.

It is next urged that the court erred, over the objection of appellant, in admitting in evidence testimony concerning matters which occurred prior to the first hearing. Only three instances of such alleged error are pointed out by appellant. Several witnesses were asked the question in respect to respondent, and concerning her reputation for morality "at any time during the last six or eight months". The second hearing was held more than six months after the first. The only other instance of testimony in the same category to which an objection was overruled, is the following (with a Mrs. Medlin on the witness stand): "Q. Now, will you state whether or not, prior to 1939, Mr. Valentine manifested any affection toward you? A. Yes. We manifested an attraction for each other."

[7-9] The sole issue before the court was the fitness of each spouse to have the custody of their child. Each attacked the other. Evidence of the delinquencies of either which concerned acts committed prior to the first hearing were clearly not admissible. In re Wood, 103 Cal.App. 790, 285 P. 323. We are of the opinion, however,

that the admission of the testimony mentioned was not an error of sufficient gravity to warrant a reversal of the order. Aside from such testimony, there is abundant evidence to sustain the finding of the trial court that respondent was a fit person to have the custody of her daughter. In addition, the legislature has laid down the rule that "other things being equal, if the child is of tender years, it should be given to the mother". Civ.Code, § 138, subd. (2). In the final analysis, the sole question is the best welfare of the minor, and on a hearing of this character, justice is not attained by a too strict adherence to the technical rules of evidence. The discretion committed to the trial court was not abused.

The order is affirmed.

THOMPSON, J., and PULLEN, P. J., concurred.



47 Cal.App.2d 409

ALHAMBRA BUILDING & LOAN ASS'N v. DE CELLE et al.

Civ. 13300.

District Court of Appeal, Second District, Division 2, California.

Oct. 21, 1941.

Hearing Denied Dec. 18, 1941.

1. Appeal and error ⇐882(4)

In action by spouses' judgment creditor to set aside deeds, conveying real property purchased by spouses to wife's relatives thereof in trust for her, as defrauding her creditors, and to subject property to judgment lien, defendants, contending in trial court that neither wife nor husband in his lifetime or his estate had any interest in property, may not claim, on appeal from judgment for plaintiff, that property was spouses' community property and hence that deceased husband's personal representative was necessary party and only person entitled to sue for recovery thereof.

2. Parties ⇐84(5)

In action by spouses' judgment creditor to set aside deeds, conveying real property purchased by spouses to wife's relatives in trust for her, as defrauding her creditors, and to subject property to judgment lien, defendants, failing to urge by demurrer or answer to complaint that personal representative of deceased husband's estate was necessary party to action, "waived" objection to failure to join him as party plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

3. Appeal and error ⇐1036(3)

In action by spouses' judgment creditor to set aside deeds, conveying real property purchased by spouses to wife's relatives in trust for her, as defrauding her creditors, and to subject property to judgment lien, neither defendants nor personal representative of deceased husband's estate were prejudiced by failure to join such representative as party plaintiff, as any interest of such representative was not and could not be effectively adjudicated against him.

4. Fraudulent conveyances ⇐295(4)
Limitation of actions ⇐197(2)

In action by spouses' judgment creditor to set aside deeds, conveying real property purchased by spouses to wife's relatives, as defrauding her creditors and to subject property to judgment lien, where complaint set forth claim that grantees acquired mere naked legal title in trust for wife, defendants' contention that evidence did not show fraudulent conveyances because there was no showing that plaintiff did not have ample security at time of conveyances and that there was no evidence warranting maintenance of action instituted over three years after date of conveyances was without merit.

5. Evidence ⇐123(2)

In action by spouses' judgment creditor to set aside deeds, conveying real property purchased by spouses to wife's relatives in trust for her, as defrauding her creditors, and to subject property to judgment lien, grantees' letters to wife, mentioning moneys theretofore sent her by them, but not accompanied by any moneys, were not admissible in evidence as part of "res gestæ", as statements therein were not contemporaneous with transmission of money, but mere recitals of past events.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestæ".

6. Evidence ⇐118

"Res gestæ" means automatic and undesigned incidents attending particular act in issue, and they are admissible as evidence in explanation of such act.

7. Evidence ⇐118

When act in issue has intrinsically no definite legal significance or only ambiguous one, its legal purport or tenor may be ascertained by considering the words accompanying it.

8. Fraudulent conveyances ⇐313(1)

In action by spouses' judgment creditor to set aside deeds, conveying real property purchased by spouses to wife's relatives in trust for her, as defrauding her creditors, and to subject such realty to judgment lien, court erred in setting aside conveyances in toto, instead of declaring them void only so far as necessary to liquidate plaintiff's claims.

9. Appeal and error ⇐1152

In action by spouses' judgment creditor to set aside deeds, conveying real property purchased by spouses to wife's relatives in trust for her, as defrauding her creditors, and to subject property to judgment lien, trial court's error in setting aside conveyances in toto, instead of declaring them void only so far as necessary to liquidate plaintiff's claims, may be cured on appeal, without remanding case to trial court, by striking out erroneous paragraphs of court's conclusions and judgment and substituting correct paragraphs.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by the Alhambra Building & Loan Association against Agnes J. Krupp DeCelle and others to subject certain realty to the lien of a judgment for plaintiff as property of judgment debtor, though title thereto stood in others' names, and to set aside deeds conveying such property to such others as fraudulent. Judgment for plaintiff, and defendants appeal.

Modified, and affirmed as modified.

S. S. Hahn and W. O. Graf, both of Los Angeles, for appellants.

George A. Elstein, of Los Angeles, and H. S. Farrell, of Alhambra, for respondent.

HANSON, Justice pro tem.

This is an action in equity instituted by a judgment creditor to subject two parcels of real estate to its judgment as being the property of the judgment debtor although title thereto stood in the names of third persons. From a judgment rendered in favor of the creditor the defendants, both debtor and title holders, have appealed.

The amended complaint, which is labeled "Amended Complaint to Set Aside Fraudulent Conveyance", alleges that Agnes J. Krupp DeCelle and her husband, Charles E. DeCelle, deceased, purchased the properties here involved and caused the grantors thereof to name as grantees certain relatives of Mrs. DeCelle, and that these relatives took the title to the properties in trust to hold the same as the separate property of Mrs. DeCelle in order to assist her in defrauding her creditors. The prayer of the complaint was that the deeds conveying the properties to the relatives be set aside and that the properties be subjected to the lien of the plaintiff's judgment. The trial judge found that the defendant Mrs. DeCelle, from her separate funds and not those of the community, purchased and improved the two properties here in question and caused the titles thereto to be taken in the names of her relatives, to be held by them in secret trust for her and her alone, and entered judgment accordingly.

[1-3] Appellants contend that the properties here involved were community property, owned by Mrs. DeCelle and her deceased husband, and hence not only was the latter's personal representative a necessary party but such representative alone was entitled to sue to recover property fraudulently caused to have been transferred by him. The complete answer to this claim is that in the court below appellants contended that neither Mrs. DeCelle nor her husband in his lifetime, nor his estate upon his death, had any interest in the property. They may not now "mend their hold" or on appeal become self-appointed guardians of the rights of the estate of the decedent. No one with the right to represent decedent's estate is here to urge the error, if error there be. The right of appellants to claim that the personal representative of the decedent's estate was a necessary party to a complete determination of the action could have been urged in the lower court by demurrer or answer, but the objection not having been made it was waived. Ah Tong v. Earle Fruit Co., 112 Cal. 679, 45

P. 7. Furthermore, appellants are in no manner prejudiced, and neither is any personal representative, for that matter, for the simple reason that if he had an interest it has not been effectively adjudicated against him, and could not be as he was not a party to the litigation.

[4] Appellants' next contention is that the evidence does not show a fraudulent conveyance in that there is no showing that respondent did not have ample security at the time the conveyances were made; and, further, there was no evidence to warrant the maintenance of the action instituted more than three years after the date of the conveyance. If the action had been predicated solely on the theory of a fraudulent conveyance to a third party, with no interest reserved or held in trust for the judgment debtor, there would have been merit in the claim. Here, however, one of the claims of respondent, as set forth in its complaint, was that the grantees in the deeds to the properties here involved acquired by their deeds a mere naked legal title and held such title in trust for Mrs. DeCelle. This was tantamount to saying that Mrs. DeCelle was and at all times had been the beneficial owner of the properties and that title simply rested in other parties for her.

[5-7] Another contention of appellants is that four letters written to Mrs. DeCelle by some of her co-defendants during the period from 1924 to 1928 should have been admitted on the theory that they were part of the res gestae. The letters disclosed that moneys had been transmitted by some of the grantees. They were not accompanied by any moneys at the time they were transmitted to Mrs. DeCelle or her husband. Instead, they mentioned only moneys which had theretofore been sent. Accordingly the letters were not part of the res gestae. The statements contained in the letters are not contemporaneous with the act of transmitting money; they are mere recitals of past events. "Res gestae" means the "automatic and undesigned incidents attending the particular act in issue". They are admissible in explanation of such act. The letters to Mrs. DeCelle belong to that class of res gestae sometimes referred to as "verbal acts". When the act in issue has "intrinsically no definite legal significance, or only an ambiguous one, its legal purport or tenor may be ascertained by considering the words accompanying it". Keefe v. State, 50 Ariz. 293, 72 P.2d 425, 427. As thus defined the letters to Mrs. DeCelle did not constitute a part of the res gestae. They were a narrative of past occurrences—namely, the purported transmission of money.

[8, 9] The final contention of appellants is that it was error to set aside the conveyance in toto. The claim is made that the court should have limited its judgment to declaring the conveyance void only so far as necessary to liquidate the claims of the respondent. Emmons v. Barton, 109 Cal. 662, 42 P. 303; Liuzza v. Brinkerhoff, 29 Cal.App.2d 1, 3, 83 P.2d 976. We dare say that had the appellants brought the point to the attention of the trial court at the time the conclusions were signed the court would have limited them accordingly, and its judgment as well. However, if the court's action here was erroneous, and we think it was, it is an error which we can cure without the necessity of sending the case back to the trial court.

The conclusions should be and they are hereby modified by striking out the first paragraph thereof and substituting in lieu the following:

That the plaintiff herein is entitled to a decree adjudging that the deeds conveying said properties herein described to the defendants Ane Margrete Ebbesen, Elly Ebbesen May, Edel Ebbesen and Klara Sorensen are fraudulent and void as to the plaintiff, and that the lands in said deeds described be adjudged subject to the lien of the plaintiff's judgment and that said conveyances be set aside to the extent necessary to liquidate said judgment.

Also, the judgment is modified by substituting in place of the second paragraph thereof the following:

It is therefore hereby ordered, adjudged and decreed that the plaintiff have judgment that the deeds conveying the properties described in the amended complaint on file herein to the said defendants Ane Margrete Ebbesen, Elly Ebbesen May, Edel Ebbesen and Klara Sorensen were made to defraud the creditors of the said defendant Agnes J. Krupp DeCelle, and are fraudulent and void as against the plaintiff in this action; and that the lands therein described are subject to the lien of plain-

tiff's judgment, and to the extent necessary to liquidate said judgment said deeds are set aside.

With the foregoing modification the judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.



47 Cal.App.2d 441

PEOPLE v. EFSTATHIOU.

Cr. 1778.

District Court of Appeal, Third District, California.

Oct. 22, 1941.

1. Homicide ⇐254

Evidence that defendant and victim engaged in physical encounter, that they exchanged blows with their fists, and that defendant hit victim and knocked him down, that defendant started to cross street but turned back and kicked victim, and testimony of physician that the cause of death was fracture of skull and that victim also had a fractured jaw sustained conviction for second degree murder.

2. Homicide ⇐23(2)

To constitute murder in the second degree, the act need not be deliberate or premeditated.

3. Homicide ⇐23(1)

"Murder in second degree" is an unlawful killing, perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, without any premeditated design to effect the death of the person killed, or of any human being.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder in Second Degree".

4. Homicide ⇐23(1)

Even if the death was occasioned by striking head on sidewalk after defendant had struck deceased, jury could reasonably have found defendant guilty of second degree murder, since the consequences which would follow a fall upon concrete walk must have been known to the defendant.

5. Criminal law ⇐554

In second degree murder prosecution, the jury were privileged to disbelieve defendant's version of the affray.

6. Homicide ⇐114

The fact that defendant ran out of restaurant and sought deceased and that defendant returned to scene of encounter and kicked deceased while he lay prostrate were inconsistent with defendant's plea of self-defense in second degree murder prosecution.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

George Efstathiou was convicted of murder in the second degree, and he appeals.

Affirmed.

H. E. Manning and A. B. Reynolds, both of Vallejo, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

TUTTLE, Justice.

Appellant was found guilty of murder in the second degree, and now appeals from a judgment of conviction rendered pursuant to the verdict, and also an order denying motion for new trial.

The sole question presented is the sufficiency of the evidence to sustain the verdict.

The victim, Nick George, was the proprietor of a restaurant in the city of Vallejo. Appellant was employed there as a cook. At about the hour of 1 o'clock on May 21, 1941, appellant and George had an argument over the manner in which the former had prepared a steak for a customer. George complained that "the steak was too small, and people no want". Appellant replied that he did not cut the steaks, but that the day-man cut them. Finally, George told the cook that he was "fired". Within a very short time George left the restaurant by the front door. Appellant evidently saw him leave, and ran after him, passing through the building and outside. The two met a short distance down the street. There were no witnesses to the beginning of the physical encounter which ensued. Appellant testified that they exchanged blows with their fists, and that he hit George and knocked him down. A witness testified that appellant then started

to cross the street, but started back and went to where George was lying, and kicked him. George died as a result of his injuries. A physician testified that the cause of death was a fracture of the skull. He also testified that the jaw of decedent was fractured.

[1] We think the jury was fully justified in finding appellant guilty of murder in the second degree. The contention of appellant is as follows:

"What was the direct and proximate cause of the death of the deceased? If his death was occasioned by striking his head on the sidewalk, the evidence will not sustain the verdict of murder in the second degree. While we will concede that the kicking and striking deceased after he was down was reprehensible on the part of defendant, unless injuries sustained by these acts were the direct and proximate cause of the death of deceased, defendant cannot be convicted by reason of these acts."

[2-6] In order to constitute murder in the second degree, the act need not be deliberate or premeditated. 13 Cal.Jur., § 11, p. 594. The crime has been defined as "an unlawful killing, perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, without any premeditated design to effect the death of the person killed, or of any human being". 29 C.J., § 105, p. 1119. The consequences which would follow a fall upon a concrete walk must have been known to appellant. Conceding that the cause of death was the contact with the walk after the blow had been struck, the jury could reasonably have found the verdict in question. There is the further fact that malice is indicated by the pursuit of the deceased by appellant. It is true that the testimony of appellant was to the effect that the deceased struck the first blow. If the jury had found that appellant was acting in self-defense, such a verdict would be upheld. But the jury were privileged to disbelieve appellant's version of the affray, and there are facts and circumstances which would sustain such a view. The chief one is that appellant ran out of the restaurant and sought the deceased. Such conduct is utterly inconsistent with the plea of self-defense. The jury was therefore justified in finding that the fatal assault was unlawful and without justification. The further conduct of appellant in returning to the scene of the encounter and kicking deceased while he lay prostrate, is not comportable with the conduct of a man who only seeks to defend himself.

We can find no valid reason why the judgment should be disturbed.

The judgment and order are affirmed.

PULLEN, P. J., and THOMPSON, J., concurred.



ADAMS v. TALBOTT (DUNGAN, Intervener).

Civ. 11426.

District Court of Appeal, First District, Division 2, California.

Oct. 25, 1941.

Hearing Granted Nov. 19, 1941.

1. Appeal and error ⇐832(4)

A point first raised by appellant on petition for rehearing would not be considered where it was based on a state of facts contrary to an assumption entertained throughout trial.

2. Appeal and error ⇐417(1)

Notices of appeal are not to be strictly construed unless the misdescription has misled the respondent, and where it appears that the misdescription was deliberate, intentional and did mislead, the appellant should be held to his notice. Code Civ.Proc. § 953a.

3. Appeal and error ⇐422

Where notice of appeal did not indicate that it was intended to be directed to an order entered on October 23, and trial court clerk and counsel for appellee were led to believe that the notice was directed to judgment entered on June 21, and appellant's counsel prosecuted appeal on that assumption and motion to strike notice was granted on ground that time for appeal from judgment had expired, appellant was not entitled to have order striking notice of appeal vacated on ground that she intended to appeal from order of October 23, and that time for appeal from such order had not expired. Code Civ.Proc. § 953a.

On petition for rehearing.

Rehearing denied.

For prior opinion, see 117 P.2d 17.

Garth V. Lacey, of Salinas, and George Olshausen, of San Francisco, for appellant.

J. P. Mandl, of Salinas, for respondent Talbott.

Stanley K. Lawson, of Salinas, for respondent Dungan.

PER CURIAM.

Following the decision herein appellant associated new counsel and has filed a petition for a rehearing which changes the entire complexion of the case as heretofore presented. A judgment was entered on June 19, 1939. On October 17, 1939, appellant filed a motion with respect to conditional parts of this judgment which was denied on October 23rd. On November 9th she gave notice of appeal "from the judgment". She now states that the reason why she used the word "judgment" is plain; that she "construed the judgment of June 19th, to be interlocutory. As a corollary she believed that the court's action of October 23rd was the entry of a final judgment. It is from this that she intended to appeal."

On October 10, 1939, appellant filed her final account as trustee in which she stated that the judgment of June 19th had become final. This account was settled on October 16th and on the day following she gave notice of motion to quiet her title to the property described in the judgment of June 19th. An order was entered on October 23rd denying this motion and directing the appellant to reconvey to respondent upon his payment of the sums called for in the judgment. On November 9th appellant gave notice of appeal "from the judgment * * * and from the whole of said judgment", and his notice to the clerk to prepare a transcript under section 953a of the Code of Civil Procedure was of the same form and substance, without any indication that the record was to be made upon the matters relating to the order of October 23rd. On November 11th respondent gave notice of motion to strike the notice of appeal and to terminate proceedings for a record. This motion was based upon the single ground that the time for appeal had expired. This motion was granted on December 15th by an order reciting that the judgment of June 19th was final and "that the time for appeal from said judgment has expired." On December 22nd appellant filed notice of motion to vacate the latter order upon the sole ground that the court was without jurisdiction to dismiss the appeal, and again without any indication that she intended to appeal from the order of October 23rd.

The appeal herein was taken from the order of December 15th above noted. The appellant stated and argued two points, whether the original judgment was final or interlocutory, and whether the trial court had jurisdiction to dismiss the appeal even if notice had not been given in due time. No suggestion was made at any stage of the proceedings that the appeal was intended to be directed to the order of October 23rd. The trial court, the clerk, and counsel for respondent were all led to believe that the notice was directed to the judgment of June 21st, and counsel then acting for the appellant prosecuted his appeal in this court upon the same assumption.

There is no controversy here over the use of the words "judgment" and "order". At the time when the motion to terminate the proceedings on the appeal from the judgment was made, heard, and granted, the time for notice of appeal from the order of October 23rd had not expired. If the appellant had then desired to appeal from that order she had ample time to do so. If she had indicated to the trial court and opposing counsel that the notice given was intended to reach such order the proceedings may not have been dismissed.

[1-3] The rules of law now presented are two, that a point first raised by appellant on a petition for rehearing should not be considered when it is based upon a state of facts contrary to an assumption entertained by the trial court as well as by the parties throughout the trial; I Cal. Jur.Ten Year Supp., p. 312; and that, though notices of appeal are not to be strictly construed unless the misdescription or error has misled the respondent, where it appears that the "misdescription" was deliberate, intentional and did mislead, the appellant should be held to his notice. I Cal.Jur.Ten Year Supp., p. 336; Dimity v. Dixon, 74 Cal.App. 714, 718, 241 P. 905.

The petition for a rehearing is denied.

47 Cal.App.2d 387

TRAVELERS FIRE INS. CO. v. BROCK & CO.

Civ. 12595.

District Court of Appeal, Second District, Division 1, California.

Oct. 21, 1941.

1. Appeal and error ⇐1097(1), 1195(1)

The rules of law declared on prior appeal constitute the "law of the case" and must be accepted as correct statements of the law in subsequent proceedings.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

2. Appeal and error ⇐1097(1)

In order that rules of law declared on former appeal be mandatorily applicable to decision of case, it must appear that the facts upon which the application depends are the same in all material respects as those presented on the former appeal.

3. Bailment ⇐16

A bailee for repairs does not wrongfully assume control in placing the bailed article with another for repairs unless the bailment agreement requires the bailee to perform the labor personally.

4. Appeal and error ⇐1097(1)

Rule of law declared on prior appeal of case could not be shown to be incorrect on subsequent appeal.

5. Bailment ⇐31(3)

In action to recover reasonable value of a diamond clip brooch left with bailee for repair, evidence sustained finding that there was no agreement that the bailee would himself perform the labor or do the work necessary to repair the brooch.

6. Bailment ⇐31(3)

In action to recover reasonable value of diamond clip brooch left with bailee for repair, involving issue whether bailee violated the bailment contract by sending the brooch to another for repair, witness' testimony that he did not hear any statement made by bailee's representative to effect that he was going to do anything except to repair it was properly construed as meaning that witness did not recall any statement by the representative that the brooch was to be sent out.

7. Contracts ⇐4

A "contract implied in fact" is one not expressed by the parties but implied from facts showing a mutual intention to contract. Civ.Code, § 1621.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract Implied in Fact".

8. Contracts ⇐4

An assumption, intention or expectation of either party alone, not made known to the other party to contract, can give rise to no inference of an implied contract in accordance therewith.

9. Appeal and error ⇐996

Where at most conflicting inferences might be drawn from the evidence, trial court's finding was binding on court of appeal.

10. Bailment ⇐31(3)

In action to recover reasonable value of a diamond clip brooch left with bailee for repair, evidence sustained finding that bailee used and exercised proper, reasonable and sufficient care in selecting other concern to which the brooch was delivered for the repair work.

11. Bailment ⇐31(3)

In action to recover value of a diamond clip brooch left with bailee for repair, where bailee delivered brooch to a diamond dealer which in turn delivered the brooch and a diamond to a diamond cutter to have diamond cut to fit the brooch, evidence sustained finding that the diamond cutter from whom the brooch was stolen was not negligent in any manner contributing to the loss.

12. Bailment ⇐33

In action to recover value of a diamond clip brooch left with bailee for repair, where bailee delivered brooch to a diamond dealer which in turn delivered the brooch and a diamond to a diamond cutter to have diamond cut to fit the brooch, the fact that the diamond cutter kept a card bearing the combination of his safe hidden in his office would not constitute negligence as a matter of law but merely presented a "question of fact" for the trial court.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by the Travelers Fire Insurance Company against Brock & Company, to recover the value of a brooch which had been left with defendant for repair. From an adverse judgment, plaintiff appeals.

Affirmed.

H. L. Breidenbach, of Los Angeles (Potter & Potter, and Bernard Potter, Jr., of Los Angeles, of counsel), for appellant.

Shattuck, Davis & Story, of Los Angeles, for respondent.

SHAW, Justice pro tem.

This is an appeal by plaintiff from a judgment for defendant after trial by the court sitting without a jury. From the record it appears that plaintiff's assignors, Joe and Mary Brandt, who were husband and wife, delivered to defendant, which was engaged in the jewelry business, a diamond brooch from which a small stone had been lost, for the purpose of having it repaired by replacing the lost stone. Defendant, not having a diamond which would fit the brooch, delivered it to E. & I. Woorgaft & Company, a diamond dealer, which furnished a diamond and in turn delivered the brooch and the diamond to Julian Del Monte, a diamond cutter, in order for him to cut the diamond to fit the brooch. While the brooch was thus in Del Monte's possession, it was stolen. Plaintiff, which had insured the Brandts against loss of the brooch, paid them its value, took an assignment of their claim against defendant, and brought this action to recover the value of the brooch from defendant.

The relation between the Brandts and defendant was, of course, that of bailor and bailee. Plaintiff's principal contention on appeal is, that defendant violated the bailment contract by sending the brooch to E. & I. Woorgaft & Company for repair instead of doing the work itself. In response to this contention, defendant invokes the doctrine of the "law of the case". Upon a former trial of this action a judgment was rendered in favor of plaintiff, from which the defendant appealed. On that appeal the district court of appeal reversed the judgment for error in excluding evidence offered by the defendant, the purport of which, other than that it did not relate to the terms of the bailment contract, is immaterial here, first announcing several rules of law as "governing" the case and then declaring that, "Applying the foregoing rules of law to the facts of the instant case, * * * the offered evidence was material to an issue before the court and it was therefore prejudicial error to exclude the same". Travelers Fire Ins. Co. v. Brock & Co., 1938, 30 Cal.App.2d 112, 85 P.2d 905, 907.

[1, 2] The rules of law thus declared have become the "law of the case" and must be accepted as correct statements of the law in the subsequent course of the case. Penziner v. West American Finance Co., 1937, 10 Cal.2d 160, 170, 74 P.2d 252; Erlin v. Nat'l. Union Fire Ins. Co., 1936, 7 Cal.2d 547, 61 P.2d 756; United Dredging Co. v. Industrial Acc. Comm., 1930, 208 Cal. 705, 712, 284 P. 922; Swarzwald v. Cooley, 1940, 39 Cal.App.2d 306, 319, 103 P.2d 580. But in order that any such rule be mandatorily applicable to the decision of the case, it must appear that the facts upon which such application depends are the same in all material respects as those presented on the former appeal. Haase v. Central Union H. S. Dist., 1938, 27 Cal. App.2d 319, 322, 80 P.2d 1044.

[3, 4] One of the above mentioned rules declared on the former appeal is: "A bailee for repairs does not wrongfully assume control in placing the bailed article with another for repairs unless the bailment agreement expressly or impliedly requires the bailee to perform the labor personally." Travelers Fire Ins. Co. v. Brock & Co., supra. A considerable part of plaintiff's argument on this appeal is devoted to an effort to show the incorrectness of this rule. Under the principles already stated this may not be done.

[5, 6] On the last trial the court made a finding that, "there was no express or implied agreement that defendant Brock and Company would itself perform the labor or do the work necessary to repair said diamond clip brooch". This finding is supported by the evidence and brings the rule just quoted into operation. The bailment agreement was entered into orally by Mrs. Brandt and Mr. Kronemiller, agent of defendant, in a conversation at which they and Mr. Brandt were present. Mrs. Brandt testified, regarding this conversation:

"Q. Did he (Mr. Kronemiller) ask your permission on that occasion to send

the jewelry to anybody else? A. He did not tell me that he was sending it, or I did not inquire.

"Q. Nothing said about it? A. Nothing said about it."

Mr. Brandt testified regarding the same conversation as follows: "Q. On this occasion when you were on the premises of Brock & Company, and talking to this gentleman who introduced himself, when the brooch was left, do you recollect whether the permission of Mrs. Brandt or yourself was sought by Mr. Kronemiller or anyone, to send the brooch any place else for work thereon? A. I did not hear any statement made by Mr. Kronemiller to the effect that he was going to do anything except to repair it at Brock & Company." The testimony of both these witnesses was given by deposition and at the time the answer of Mr. Brandt just quoted was read, the trial judge stated, regarding it: "* * * As I read it, it is to the effect that, 'I don't recall any statement by Mr. Kronemiller that the brooch was to be sent out'." We agree that this is a permissible construction of the answer. This testimony is enough to warrant the finding that there was no express contract that Brock & Company would do the work themselves.

Plaintiff contends that there was at least a contract implied in fact to that effect, relying on testimony tending to show that the brooch was worth $2,500, and defendant was so informed at the time the contract was made; that Mrs. Brandt had inquired from friends as to the best and most reliable jeweler to do the work and had been advised to go to defendant; that defendant had a large jewelry business and a repair department and usually did not send repair work out to others; that Mrs. Brandt assumed the work would be done on defendant's premises and would not have left it there for repair had she known it would be sent out; and that defendant's manager, who took it in, did not see anything unusual about it and expected the work would be done in defendant's shop. None of these matters, except the value of the brooch, appear to have been mentioned between the parties to the contract.

[7-9] "An implied contract is one, the existence and terms of which are manifested by conduct." Civ.Code, § 1621. "A contract implied in fact is one not expressed by the parties, but implied from facts and circumstances showing a mutual intention to contract." 17 Corpus Juris Secundum, Contracts, § 4, p. 318. Without such mutual intention there can be no contract in fact; hence the assumption, intention or expectation of either party alone, not made known to the other, can give rise to no inference of an implied contract in accordance therewith. Excluding such matters from consideration, we have no evidence requiring a finding here of an implied contract such as plaintiff relies upon. At most, it might be said that from the evidence conflicting inferences in that respect are possible, in which case the trial court's finding that there was no such contract is binding on us.

[10-12] The trial court found that E. & I. Woorgaft & Company and Julian Del Monte "enjoyed a good reputation for honesty, integrity, skill and workmanship and for the exercise of ordinary and reasonable care in respect of property of others entrusted to them"; that defendant "used and exercised proper, reasonable and sufficient care" in selecting these two concerns to do the work above mentioned and in delivering the brooch to them for that purpose; and that the brooch was stolen from Del Monte, but not by reason of any negligence of Del Monte. Plaintiff attacks these findings also as unsupported by the evidence. There was evidence that, to defendant's knowledge, Woorgaft and Del Monte were of good reputation in the respects pointed out by the finding. This being so, it is a reasonable inference that defendant used due care in selecting them to attend to the work. Assuming, but not deciding, that defendant might nevertheless be liable for the negligence of Del Monte, the evidence supports the finding that he was not negligent in any manner contributing to the loss. The fact that he kept a card bearing the combination of his safe hidden in his office cannot be held to constitute negligence as a matter of law, but merely presents a question of fact for the trial court.

The judgment is affirmed.

YORK, P.J., and WHITE, J., concurred.

47 Cal.App.2d 431

SAMPSON v. BRUDER et al.

Civ. 13293.

District Court of Appeal, Second District, Division 2, California.

Oct. 22, 1941.

Rehearing Denied Nov. 18, 1941.

Hearing Denied Dec. 18, 1941.

1. Trusts ⇐110

In executor's suit to compel reconveyance of realty which aged grantor had conveyed to defendant, who thereafter conveyed to codefendant, evidence warranted judgment for executor on ground that defendant had been a confidential advisor to grantor and that grantor by reason of such fiduciary relationship executed deed to defendant without sufficient consideration and under undue influence and without a purpose to divest herself of ownership, and that defendant took realty as a constructive trustee for grantor and that codefendant was aware of trust and took title in violation thereof.

2. Trusts ⇐91

A "constructive trust" is imposed not because of intention of parties but because person holding title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep property.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust".

3. Trusts ⇐1, 62, 91

A "constructive trust", unlike an "express trust" or "resulting trust", is remedial in character.

See Words and Phrases, Permanent Edition, for all other definitions of "Express Trust" and "Resulting Trust".

4. Trusts ⇐95

Where owner of property transfers it, being induced by fraud, duress or undue influence of transferee, the transferee holds property upon a "constructive trust" for transferor.

5. Trusts ⇐102(1)

A "constructive trust" arises where one person acquires title to property from another by an abuse of a fiduciary or confidential relation between them.

6. Trusts ⇐107

In executor's suit to compel reconveyance of realty which aged grantor had conveyed to defendant, after showing of confidential relationship between grantor and defendant, burden was still upon executor to prove that transaction between grantor and defendant did not create a fee simple interest in defendant but that execution and delivery of deed to defendant under the circumstances constituted defendant a constructive trustee.

7. Trusts ⇐44(3)

To prove a trust by parol under a conveyance absolute in terms, the evidence must be clear, satisfactory and convincing.

8. Appeal and error ⇐1008(1)

The sufficiency of evidence for purpose of proving a trust by parol under a conveyance absolute in terms is for trial court's determination.

9. Judgment ⇐585(3)

A judgment of probate court denying a petition for appointment of a guardian for grantor in proceedings to which defendant was not a party did not "estop" grantor's executor from thereafter maintaining suit against defendant to compel a reconveyance of realty which grantor conveyed to defendant before judgment, and judgment was not "res judicata" as to right to maintain suit for reconveyance.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop" and "Res Judicata".

10. Judgment ⇐634

The rule estopping parties from further litigation of issues in controversy concerning which there has been an adjudication does not apply where parties and issues are not the same.

11. Lis pendens ⇐25(7)

Where aged grantor conveyed realty to defendant under circumstances constituting defendant a constructive trustee, and a lis pendens covering realty had been filed in guardianship proceedings respecting grantor before defendant executed and delivered a deed purporting to convey realty to codefendant, the lis pendens constituted "constructive notice" to codefendant of an adverse claim, as regards right of executor's grantor to compel a reconveyance.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Notice".

12. Trusts ⇐372(3)

In executor's suit to compel reconveyance of realty which aged grantor had con-

veyed to defendant, who thereafter conveyed to codefendant, evidence supported conclusion adverse to codefendant's defense of being a bona fide purchaser for value. Civ. Code, § 2243.

13. Trusts ⇐356(1)

Everyone to whom property is transferred in violation of a trust holds the property as an involuntary trustee under such trust, unless he purchased it in good faith and for a valuable consideration. Civ.Code, § 2243.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Suit by Richard Hunt Sampson, as executor, etc., against Emil A. Bruder and another to compel a reconveyance of real property and for an accounting. From a judgment for plaintiff, defendants appeal.

Affirmed.

Lewis D. Collings and Jerrell Babb, both of Los Angeles, for appellants.

Lasher B. Gallagher, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

From a judgment for plaintiff in an action to compel a reconveyance of certain real property and for an accounting defendants appeal.

Plaintiff is executor of and trustee under the will of Laura Shellabarger Hunt, who died October 22, 1936, at the age of about 89 years. See Estate of Hunt, 33 Cal.App.2d 358, 91 P.2d 609. Mrs. Hunt met defendant Bruder in 1918 and her relationship with him became increasingly close during the succeeding years. In November of 1933 a grant deed was executed by Mrs. Hunt to Bruder covering the real property here in dispute—a two-story building in Culver City with eight or nine stores on the ground floor and sixteen apartments on the second floor. A month later she executed and delivered to Bruder a bill of sale for the furniture and fixtures in the building. On February 16, 1935, Bruder executed a deed for the property to defendant Coulter. Mrs. Hunt died on October 22, 1936. This suit was filed June 24, 1937, to recover the property and for an accounting on the ground that defendant Bruder's title was that of a constructive trustee and that defendant Coulter was charged with knowledge thereof. Judgment was rendered for plaintiff requiring a reconveyance of the property, and defendants were also required to make an accounting of receipts and expenditures in connection with the property, following which a money judgment for the balance due was given against each defendant.

On appeal defendants assert that the pleadings are defective and that the evidence is insufficient. They also point to a determination of the probate court in February, 1935, that Mrs. Hunt was at that time not incompetent, and claim that because of that proceeding plaintiff is estopped and the matter is res adjudicata. Defendant Coulter separately defends her title, claiming to be an innocent third person purchasing the property for a valuable consideration.

[1] The trial court found that Mrs. Hunt sustained injuries about June 4, 1932, which confined her to bed or wheel-chair, and that she continued up to the time of her death in a physically weakened and infirm condition; that defendant Bruder had been and on November 20, 1933, was an intimate, trusted and confidential adviser, and that by reason of that "confidential and fiduciary relationship" Mrs. Hunt, as grantor, executed a deed to the property in question, worth $35,000, to him as grantee, without sufficient consideration and under undue influence by him; that defendant Bruder assisted Mrs. Hunt in writing checks, had access to her safety deposit box, knew her business transactions and visited her nearly every day, and that at the time the deed was executed Mrs. Hunt had no independent advice; that defendant Bruder held legal title to the property but that he took it as trustee for Mrs. Hunt, and that defendant Coulter knew of this and took title in violation of that trust and held such title as involuntary trustee for Mrs. Hunt. Evidence which is impressive and convincing supports these findings.

Other evidence was presented to the effect that defendant Bruder was known as Dr. Bruder, although he was not a physician but at one time held a license as a masseur; that in Mrs. Hunt's presence he said he could look into her eyes and tell what had happened during her life and could tell just when she was going to die. On one occasion he was interrupted in her apartment standing over her, looking into her eyes and saying he could tell her past and when she would die. At other times he said to her that he had many times gone into undertaking parlors and observed dead

people and had later brought them back to life, and that some of them had intermarried and borne children. The trial court may well have questioned whether such conduct on the part of Bruder could be identified, as urged on this appeal, as "simple acts of kindness and consideration shown to an elderly crippled woman" which would be an adequate consideration for the transfer to him of property worth $35,000.

During his relationship with Mrs. Hunt defendant Bruder borrowed money from her and induced her to invest substantial sums of money in stocks of companies of which at times he was president—one a mining company and the other a marble mountain company for which Bruder said he worked testing rocks. At various times before she executed the deed Bruder told Mrs. Hunt that the people of Culver City did not like her and that that was why she could not rent the property; that it was a "white elephant"—a liability—and that if she would deed the property to him he would make a show place of it and make her proud of it within a year. In November, 1934, a year after the deed here in dispute was executed, Mrs. Hunt's funds were used to pay the taxes on the property. Checks from tenants for rent were made payable to Mrs. Hunt as late as May, 1935. Prior to execution of the deed a joint bank account had been opened by Mrs. Hunt and Bruder, and she executed a power of attorney permitting him to endorse her name to checks. Bruder later drew out the money and deposited it in his own name. Even after the execution of the deed Mrs. Hunt referred to the property as "my Culver City property", and the insurance on the property remained in her name until April of 1935.

The evidence was sufficient to support the conclusion of the trial court that Bruder gained the confidence of Mrs. Hunt and persuaded her to part with the legal title to the property without a purpose or desire on her part to divest herself of ownership of this important portion of her estate. There is evidence indicating that due to statements made to her by Bruder she may have underestimated the value of the property at the time of the deed to him, and other evidence warranting the inference that he may have coerced as well as deceived her; but without undertaking to make an analysis of the mental, physical and emotional ingredients of the relationship between Bruder and Mrs. Hunt, it is sufficient to say that the evidence supports the finding of the trial court that Bruder took the property as a constructive trustee for Mrs. Hunt.

[2-5] A constructive trust is imposed not because of the intention of the parties but because the person holding the title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property. A constructive trust, unlike an express trust or resulting trust, is remedial in character. Restatement of the Law of Trusts, vol. 2, p. 1249. Where the owner of property transfers it, being induced by fraud, duress or undue influence of the transferee, the transferee holds the property upon a constructive trust for the transferor. A constructive trust arises where one person acquires title to property from another by an abuse of a fiduciary or confidential relation between them. Restatement of the Law of Restitution, § 166.

[6-8] After the showing of the confidential relationship herein the burden was still upon the plaintiff to prove that the deed was not what it purported on its face to be; in other words, to prove that the transaction did not create a fee-simple interest in the defendant Bruder but that the execution and delivery of the deed to him under all the facts surrounding or pertinent to the transaction constituted that defendant a constructive trustee. To prove a trust by parol under a conveyance absolute in its terms the evidence must be clear, satisfactory and convincing. Taylor v. Bunnell, 211 Cal. 601, 296 P. 288. The sufficiency of the evidence for this purpose is a matter for determination by the trial court. Sherman v. Sandell, 106 Cal. 373, 39 P. 797.

[9, 10] The proceeding of February, 1935 (Estate and Guardianship of Hunt, 11 Cal.App.2d 21, 52 P.2d 533), denied the petition for the appointment of a guardian of the person and estate of Mrs. Hunt, but it neither estops plaintiff from this proceeding nor constitutes this action res adjudicata. In the guardianship proceeding the trial court undertook to determine whether at that time Mrs. Hunt needed a guardian and not to test the legal effect of dealings between her and Bruder—the latter of course not being party to those proceedings. The rule set out in Pratt v. Vaughan, 2 Cal.App.2d 722, 38 P.2d 799, estopping parties from further litigation of

issues in controversy concerning which there has been an adjudication does not apply in a case where the parties and the issues are not the same and the controversy relates to a different subject matter.

[11] The day after the trial judge in the guardianship proceeding held that Mrs. Hunt was not incompetent, defendant Bruder executed and delivered to defendant Coulter a deed to the property, claiming as consideration for the transfer the extinguishing by Coulter of a debt owed to her by Bruder in an amount of $25,000. A lis pendens covering the property had been filed in the guardianship case and constituted constructive notice to Coulter of an adverse claim of interest. It appeared that Coulter for many years had worked for not over $27 a week at seasonal employment and lived at an endowed home for working girls, for which she paid from $8 to $10 a week; that she worked in 1932 or 1933 for the S. E. R. A. and in 1934 or 1935 for the W. P. A., and had signed an application for aid in September, 1933, declaring she had nothing but property taxed at $5 per year. Yet she claimed to have loaned large sums in cash to Bruder over this period of years, taking promissory notes but no security and not paying any taxes thereon. After the deed to Coulter, in February, 1935, Bruder made several leases to tenants of the Culver City building, and in July of 1935 signed his name as owner on an application to the board of equalization relating to that property. Checks for rent from tenants were made payable to Bruder as late as May, 1936.

[12, 13] At a date subsequent to the deed to Coulter a suit was brought by Security-First National Bank of Los Angeles against Bruder and Coulter (44 Cal.App.2d 767, 113 P.2d 3, 6) to subject the Culver City property to a judgment against Bruder for a deficiency after the foreclosure and sale under a mortgage of other property securing a note executed by him. Judgment was rendered for the bank, and in affirming the case the appellate court reviewed the foregoing and other evidence, which was also before the court in this case, and concluded that the stories of the two defendants, Bruder and Coulter, "indicate a community of dishonest enterprise" and that the conveyance was without consideration. The trial court in the instant case had evidence before it sufficient to support a conclusion adverse to defendant Coulter's separate defense of being a bona fide purchaser for value. "Everyone to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration." Civ.Code, § 2243.

No other questions raised by appellants require discussion.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concurred.



47 Cal.App.2d 405

JACKSON v. THOMPSON et al.

Civ. 13116.

District Court of Appeal, Second District, Division 2, California.

Oct. 21, 1941.

1. Dismissal and nonsuit ⇐60(1)

Where the statute authorizing the court in its discretion to dismiss any action for want of prosecution on motion of the defendant whenever plaintiff has failed for two years after action is filed to bring the action to trial does not apply, the only basis for an order dismissing an action for want of prosecution must be found in the court's inherent power to dismiss for want of prosecution. Code Civ.Proc. § 583.

2. Dismissal and nonsuit ⇐60(2)

An order allowing defendants to file an amended answer after cause had been submitted was not tantamount to a "reopening" of the case as respects power of court to dismiss action for alleged failure to bring it to trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Reopening".

3. Dismissal and nonsuit ⇐60(2)

Where cause had been tried, parties had rested, and trial court had taken cause under submission within six months after it had been filed, it became the duty of the trial

court to reach a decision without interference by any agency whatever, and no decision having been announced, the trial court's failure in that respect was attributable solely to its own delays.

4. Dismissal and nonsuit ⇐60(2)

A plaintiff's duty has been discharged when he has diligently brought his cause to trial, and there is no obligation on plaintiff to remonstrate with the court for an immediate decision while the submission of the case is pending.

5. Dismissal and nonsuit ⇐60(2)

Where proceeding for reopening a case after it had been submitted to the court was instituted on defendants' motion, their failure to ask for and procure an order of reopening could not be cast on plaintiff as evidence of his lack of diligence.

6. Dismisssal and nonsuit ⇐60(2)

Where defendants, who moved to reopen a submitted cause, were permitted to file an amended answer, and plaintiff was given 15 days in which to plead, plaintiff's right to plead within the 15 days was a naked right which carried with it no obligation to request defendants to proceed with such proof as they desired to add to the record, and plaintiff was not chargeable with neglect for failure to demur to the amended answer.

7. Pleading ⇐236(4)
Trial ⇐377(2)

An order reopening a submitted case may be made before admitting further evidence, but a court may in its discretion permit amendments to pleadings even after submission where the amendments do not effect a change in the nature of the action.

8. Dismissal and nonsuit ⇐60(2)

Where no order was made reopening a submitted case on defendants' motion, and defendants filed the only pleading following submission pursuant to permission to file an amended answer, plaintiff's duties were at an end until called on to prepare findings.

9. Dismissal and nonsuit ⇐60(2)

The statute providing that the court may in its discretion dismiss any action for want of prosecution on motion of the defendant whenever plaintiff has failed for two years after action is filed to bring the action to trial impliedly forbids the court to exercise its inherent power to dismiss the action where it has been brought to trial within two years, and hence the trial court had no power to dismiss for want of prosecution an action which had been tried and submitted. Code Civ.Proc. § 583.

10. Dismissal and nonsuit ⇐60(2)

Where plaintiff was not chargeable with procrastination, laches, or neglect, he was entitled to a final judgment after the expiration of the time allowed him to plead to an amended answer which defendants were permitted to file after case had been submitted, and dismissal of action for want of prosecution was in disregard of statute authorizing dismissal when plaintiff has failed for two years to bring action to trial. Code Civ. Proc. § 583.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Duncan P. Jackson against Margaret C. Thompson and others to enforce the payment of a note. From an order dismissing his action for want of prosecution, plaintiff appeals.

Reversed.

T. H. Canfield, of Santa Barbara, for appellant.

Fred A. Shaeffer, of Santa Maria, for respondents.

MOORE, Presiding Justice.

Plaintiff appeals from an order dismissing his action for want of prosecution.

On July 21, 1936, plaintiff filed suit to enforce the payment of a promissory note which by assignment defendants had guaranteed to pay. A demurrer to the complaint was overruled on August 3d. On August 5th defendants filed their answer. Plaintiff brought the action to trial January 27, 1937. At the trial evidence was introduced and both parties then rested. The minute entry following the trial reads: "Said Cause was thereupon submitted to the court for consideration and decision and by the court taken under advisement." One week later, February 3, 1937, defendants served and filed their "Notice of Motion for Order Reopening Case and Permitting Defendants to file Amended Answer". This motion was noticed for February 15th. At the time it was called the parties appeared in court and stipulated that defendants might file an amended answer and that plaintiff have fifteen days within which to plead. The court ordered accordingly. Thereafter, on the 5th day of March, the

parties filed a written stipulation that the amended answer annexed to the notice of motion might be filed as the amended answer. No order was made vacating the submission of the cause and neither was any request made for such order at any time. Plaintiff evidently deemed it inadvisable to demur to the amended pleading. No further proceedings were had until March 11, 1939. On that date defendants served and filed their notice of motion to dismiss the action on two grounds: (1) failure for more than two years after filing to bring the action to trial; and (2) that more than two years have elapsed since the filing of the action and plaintiff has not prosecuted with diligence. The motion to dismiss came on for hearing May 15, 1939, when the defendants submitted the statistical data hereinabove recited. Plaintiff countered by submitting the minute entries of the court showing in addition the trial of the action on the 27th day of January, 1937, giving names of the witnesses introduced on behalf of plaintiff and that both parties had rested.

Following the hearing on the motion and the arguments of counsel, the court granted the motion to dismiss for lack of prosecution.

Section 583, Code of Civil Procedure, reads in part: "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant * * * whenever plaintiff has failed for two years after action is filed to bring such action to trial."

[1-8] The foregoing is the only statute providing for the dismissal of an action for want of diligence in its prosecution. If the quoted section does not apply, the only basis for the order must be found in the court's inherent power to dismiss for want of prosecution. The order allowing defendants to file an amended answer after the cause had been submitted was not tantamount to a reopening of the case. The cause had been tried and in exact words the parties had rested and the court had taken the cause under submission practically within six months after it had been filed. In that state of the record, it became the duty of the trial court to reach a decision without interference by any agency whatever. No decision having been announced, the trial court's failure in that respect is to be attributed solely to its own delays. There is no obligation upon the plaintiff to remonstrate with the court for an immediate decision while the submission of a case is pending. Plaintiff's duty has been discharged when he has diligently brought his cause to trial. Raggio v. Southern Pacific Co., 181 Cal. 472, 185 P. 171. The proceeding for a reopening of the case was instituted on the motion of defendants. Their failure to ask for and procure an order of reopening cannot be cast upon the plaintiff as evidence of his lack of diligence. In that very proceeding plaintiff cooperated with the defendants in effectuating a speedy order allowing defendants to file their amended answer. Neither is plaintiff to be charged with neglect in not demurring to the amended answer. His right to plead within the fifteen days was a naked right and carried with it no obligation to request defendants to proceed with such proof as they desire to add to the record. Knowing that the judge who had tried the case and taken it under submission was still among the living, there was nothing to indicate to plaintiff that a decision would not ultimately be rendered. Raggio v. Southern Pac., supra. It has long been the approved practice to make an order reopening a submitted case before admitting further evidence. Andrus v. Smith, 133 Cal. 78, 65 P. 320; Westbay v. Gray, 116 Cal. 660, 48 P. 800. But a court may in its discretion permit amendments to pleadings even after submission where the amendment does not effect a change in the nature of the action. Hancock v. Board of Education, 140 Cal. 554, 74 P. 44. Defendants having filed the only pleading filed following submission and no order having been made to reopen the case, plaintiff's duties were at an end until called upon to prepare findings.

[9] This brings us to a consideration of the discretion exercised by the court in the order of dismissal. It having been established that the case had been tried and submitted, there was no power vested in the court to dismiss the action for want of prosecution. In view of the fact that the statute (Code Civ.Proc., § 583) makes a definite provision for the dismissal of an action for failure to prosecute within two years, this impliedly forbids the court to exercise its inherent power to dismiss the action where it has been brought to trial within two years. Johnston v. Baker, 167 Cal. 260, 139 P. 86.

[10] If, during the trial or after submission, plaintiff had requested a continuance or a reopening of the case and

had then taken no further action, a dismissal of his action would have been a proper order. Craghill v. Ford, 127 Cal.App. 661, 16 P.2d 343. But he was not chargeable with procrastination, laches or neglect. He did his duty and was entitled to a final judgment after the expiration of the time allowed him to plead to the amended answer. The dismissal of his action was a disregard of the cited code section.

The judgment is reversed.

WOOD and McCOMB, JJ., concurred.



ROUTH v. QUINN et al.

Civ. 13188.

District Court of Appeal, Second District, Division 2, California.

Oct. 21, 1941.

As Modified Nov. 10, 1941.

Rehearing Denied Nov. 12, 1941.

Hearing Granted Dec. 18, 1941.

1. Officers ⇐116

A public officer is liable in damages to one who has proved a special injury by reason of the refusal of the official to perform a ministerial duty or by negligence in the performance of such duty.

2. Officers ⇐116

The damages recoverable from a public officer for special injury resulting from refusal of the official to perform a ministerial duty or from negligence in the performance of such duty are limited only by the extent of such special injury regardless of the intentions of the officer.

3. Appeal and error ⇐863

On appeal from a judgment for defendant after general demurrer to complaint had been sustained without leave to amend, the appellate court is not concerned with plaintiff's ability to prove his allegations, but solely with the question regarding whether plaintiff's pleading states a cause of action or whether by amendment it can be made to do so.

4. Taxation ⇐576

The statute providing that the assessor shall have power to collect the taxes on all property when, in his opinion, taxes are not a lien upon real property sufficient to secure payment of taxes vests the officer with discretion in determining which movables he shall sell. Pol.Code, § 3820.

5. Taxation ⇐576

Assessor computing taxes for which movables are to be sold when lien on real property is insufficient has no discretion. Pol.Code, §§ 3821, 3823.

6. Taxation ⇐576

In the matter of computing tax to be collected by means of sale of movables when lien on real property is insufficient, the statute is "mandatory". Pol.Code, § 3823.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

7. Taxation ⇐576

Under statute regarding matter of computing taxes to be collected by means of sale of movables when lien on real property is insufficient, assessor's duty is absolute plain and certain and is therefore a purely "ministerial duty". Pol.Code, §§ 3650, 3823

See Words and Phrases, Permanent Edition, for all other definitions of "Ministerial Duty".

8. Taxation ⇐576

Negligence in the performance of county assessor's duty of computing tax to be collected by means of sale of movables when lien on real property is insufficient, if it results in obtaining an excessive sum, vitiates the sale as well as the written instrument evidencing the conveyance. Pol.Code, § 3823

9. Pleading ⇐203

A demurrer reaches only matters appearing on the face of the pleadings to which it is directed. Code Civ.Proc. § 430.

10. Pleading ⇐34(1)

A complaint must be construed liberally when its sufficiency is brought in question by demurrer. Code Civ.Proc. § 452.

11. Taxation ⇐570(1)

If the error which vitiated tax sale of dehydrating plant was not caused by negligence of defendant county assessor and his chief deputy but rather by negligence of auditor, such fact was a matter of defense to be alleged and proved by the assessor, his deputy and surety in purchaser's action for damages resulting from the negligence which rendered the sale void.

12. Taxation ⇐570(4)

In action by tax sale purchaser of dehydrating plant for damages resulting from alleged negligence of county assessor and his chief deputy in claiming a tax which was 79 cents in excess of correct legal amount due, thereby rendering sale void and rendering purchaser liable to owner of property, the complaint stated a cause of action against the assessor, his chief deputy and surety on the assessor's official bond. Code Civ.Proc. § 452; Pol.Code, §§ 961, 3820, 3821, 3823.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by O. B. Routh against John R. Quinn, County Assessor of Los Angeles County, and others to recover damages resulting from alleged misfeasance or negligence of the assessor and his deputy. From an adverse judgment, plaintiff appeals.

Reversed, with directions.

Combs & Murphine, of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and Gordon Boller and A. Curtis Smith, Deputies Co. Counsel, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

Plaintiff sued the county assessor of Los Angeles county, his chief deputy and the surety on the assessor's official bond to recover damages resulting from the alleged misfeasance or negligence of the assessor and his deputy. From a judgment entered in defendant's favor, after a general demurrer to the complaint had been sustained without leave to amend, plaintiff has appealed.

The substance of the complaint is as follows: In June, 1938, the assessor and his chief deputy held a tax sale of personal property at public auction. At that sale a dehydrating plant was sold to plaintiff as the highest bidder for $250. A bill of sale conveying the dehydrator was signed in the name of the county assessor by his chief deputy. This writing was delivered to plaintiff when he took possession of the chattel. The tax for which the property was sold was the unsecured personal property tax for the year 1938-1939. While the true and correct tax due was $83.57, the assessor and his deputy negligently claimed a tax of $84.36 at the time of the sale which was $0.79 in excess of the correct legal amount due. At the sale plaintiff was ignorant of the error and of the negligence of the officials in making the computation.

One A. L. Becker had been the tax delinquent and owner of the property. After the sale he laid claim to the plant, instituted an action in the superior court for damages and recovered judgment against this plaintiff for the sum of $4,500 as the value of the dehydrator and the damage caused by the conversion on the ground that the sale was void by reason of the miscalculation and error in computing the rate and amount of the tax on the property. The judgment so obtained was satisfied by this plaintiff by the payment of $4,500 after his place of business had been subjected to attachment and execution. Defendant company was the surety on the official bond of the assessor which was conditioned upon the faithful performance of his duties.

Plaintiff demands as damages the sum of $14,500 alleged to be the total amount paid in satisfaction of the judgment he was required to pay, counsel fees and expenses of defending the Becker action, and damages for the loss of his business. Plaintiff's request for leave to amend his complaint was denied and the judgment from which this appeal is taken was thereafter entered.

[1-3] The cause of action which plaintiff has attempted to plead is based upon the theory that in the discharge of a purely ministerial duty a public officer is liable in damages to any one who is especially injured by reason of the negligence of the officer in attempting to perform his official and ministerial duty. Plaintiff does not seek to recover the purchase price paid for the dehydrator at the void tax sale. He merely demands all damages proximately resulting to himself from the negligence of the assessor and his deputy. A public officer is liable in damages to one who has proved a special injury by reason of the refusal of the official to perform a ministerial duty or by negligence in the performance of such duty. Such damages are limited only by the extent of such special injury regardless of the intentions of the officer. Doeg v. Cook, 126 Cal. 213, 58 P. 707, 77 Am.St.Rep. 171; Mock v. City of Santa Rosa, 126 Cal. 330, 58 P. 826; Ham v. County of Los Angeles, 46 Cal.App. 148, 189 P. 462; Wolfsen v. Wheeler, 130 Cal.App. 475, 19 P.2d 1004; 21 Cal.Jur. 908, sec. 88. Our concern here is not with plaintiff's ability to prove his allegations (Katenkamp v. Union Realty Co., 6 Cal.2d 765, 59 P.2d 473), but solely with the question as to whether plaintiff's

pleading states a cause of action or whether by amendment it can be made to do so.

[4, 5] Section 3820 of the Political Code provides that "The assessor shall have power to collect the taxes on all property when, in his opinion, said taxes are not a lien upon real property sufficient to secure payment of the taxes. * * *" This section vests the officer with discretion in determining which movables he shall sell. Section 3821 allows him discretion in choosing his method of seizure and sale. But when he comes to the task of computing the tax the assessor has no discretion, for section 3823 reads as follows: "In the enforcement of the provisions of section 3820 of this code the assessor shall be governed, as to the amount of taxes to be collected by him on property mentioned in said section, by the state rate (if any), the county rate, the special school district, road district, and other local district rates for the locality * * *."

[6-8] Thus, in the matter of computing the tax to be collected, the statute is mandatory. Since the officer's duty is absolute, plain and certain, it is therefore purely ministerial. Doeg v. Cook, supra. No discretion is involved. The value of the property has already been determined by the assessor under his duties prescribed by section 3650. The rate of taxation is specific. § 3823. His only remaining duty is to multiply the value by the specified rate. Ham v. County of Los Angeles, 46 Cal.App. 148, 162, 189 P. 462. Negligence in the performance of that duty if it results in obtaining an excessive sum vitiates the sale as well as the written instrument evidencing the conveyance.

With the foregoing requirements the facts alleged in the instant complaint generously comply. It alleges that plaintiff made the purchase and took possession. This made him guilty of wrongfully taking the property of the delinquent tax payer. He was thus, by virtue of the assessor's negligence, cast in the role of a trespasser, a converter of his neighbor's property. For such damages as he may have suffered as a result of the successful litigation waged against him by Mr. Becker, he is justified in seeking recovery from the assessor and his deputy whose negligence caused his loss.

[9] Defendant vainly contends that, if the tax was excessive the error resulted from the assessor's use, as required by law, of the tax rate of the previous year which had been erroneously computed by the county auditor. Thereby defendants ignore a fundamental rule of pleading, to-wit, that a demurrer reaches only matters appearing on the face of the pleadings to which it is directed. Fassett v. Nascimiento, 108 Cal. App. 14, 291 P. 269; Code Civ.Proc., § 430. The pleading does not even suggest the theory of recovery on account of the auditor's negligence in determining the tax rate of the previous year. The complaint alleges: "that said defendants negligently, carelessly and wrongfully claimed a tax of $84.36 at the time and place of said sale, being an amount of $0.79 in excess of the correct amount of tax according to law on said property; that said excessive sum was claimed by virtue of an error carelessly and negligently made by defendants * * * in the computation of said tax; that said defendants negligently computed said tax in that they failed to carry the same out to the correct number of decimal places in the computation thereof. * * * The County Assessor having miscalculated and made an error in computing the rate and amount of the tax and negligently and wrongfully computed the same and that an excessive and illegal tax rate had been charged said A. L. Becker in connection therewith * * * in that they made a mathematical error in the computation of said tax and failed to make the correct computation thereof."

[10-12] To sustain the contention that such allegations must be construed as charging only negligence on the part of the auditor in the computation of the tax rate for the previous year would require us to assume facts not appearing on the face of the complaint. By construing the complaint liberally, as indeed we must, when its sufficiency is brought in question by demurrer (§ 452, Code Civ.Proc.; Penziner v. West American Finance Co., 133 Cal.App. 578, 24 P.2d 501), it appears to charge only the defendants with having negligently computed the amount of taxes due. If it be true that the error which vitiated the sale of the dehydrator was not caused by the negligence of defendant but rather by the negligence of the auditor, such fact is a matter of defense to be alleged and proved by defendants on the trial. But for the purpose of further proceedings, the complaint states a cause of action against the assessor and his chief deputy for the recovery of damages resulting from the negligent performance of a ministerial duty by such defendants.

It follows from this conclusion that a cause of action is likewise stated against

the surety on the assessor's official bond, which is conditioned upon the faithful performance of his duties. Such bond is "for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity; * * * and any person so injured or aggrieved may bring suit on such bond in his own name. * * *" Pol. Code, § 961.

Respondents contend that the buyer at a tax sale is subject to the rule of caveat emptor and therefore is not entitled to damages because of his failure to obtain a valid title to the movable property acquired by his purchase at such sale. But this is an action sounding solely in negligence. It is, for that reason, unnecessary to determine the rights of plaintiff in an action to recover damages for a breach of warranty.

The judgment is reversed with directions to the trial court to overrule the demurrer and permit the defendants to answer if they be so advised.

WOOD and McCOMB, JJ., concurred.



47 Cal.App.2d 418

KELLY v. DARO et al.

Civ. 12583.

District Court of Appeal, Second District, Division 1, California.

Oct. 22, 1941.

1. Libel and slander ⇐42, 45(1)

Communications to interested parties and reports of official proceedings at public meetings, unlike communications in discharge of public duty or in official proceedings, are protected by "qualified privilege" only, and defense of "privilege" is not available unless publication and surrounding circumstances conform to statutory conditions. Civ.Code, § 47.

See Words and Phrases, Permanent Edition, for all other definitions of "Privilege" and "Qualified Privilege".

2. Libel and slander ⇐37

Generally, defamatory matter published in due course of legislative proceedings is "absolutely privileged", and the rule includes proceedings in all legislative bodies, whether state or municipal.

See Words and Phrases, Permanent Edition, for all other definitions of "Absolutely Privileged".

3. Libel and slander ⇐37

The privilege of a witness appearing before a committee of the legislature in a matter within the jurisdiction of the committee is the same as that of a witness in judicial proceedings.

4. Libel and slander ⇐37

A statement made by a witness at a hearing before a committee of the legislature which is pertinent to the questions and subject of examination is "absolutely privileged".

5. Libel and slander ⇐37

The right of a legislative body to investigate implies the right to take evidence, and a witness before a legislative body must of necessity be protected with respect to defamatory statements made by him which are pertinent to questions and the subject of the examination.

6. Libel and slander ⇐80
Limitation of actions ⇐178

In action to recover damages for libel based on publication by defendants, who were engaged in promoting wrestling matches, of an alleged false statement that plaintiff, a sports writer, accepted a bribe for reporting wrestling events in a favorable manner, a complaint which showed upon its face that alleged original libel was barred by statute of limitations, and that alleged republication thereof was before a legislative investigating committee and was therefore absolutely privileged, and was insufficient to state a cause of action. Code Civ. Proc., § 340, subd. 3, Civ.Code, § 45, 47.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Mark Kelly against Lou Daro and Jack Daro for damages for libel. From a judgment dismissing complaint after a demurrer thereto had been sustained without leave to amend, the plaintiff appeals.

Affirmed.

James P. Fitzpatrick, of Los Angeles, and Clyde F. Murphy, of North Hollywood, for appellant.

Irving S. Baltimore and George Baltimore, both of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from a judgment of dismissal in an action for libel, after a general and special demurrer to the complaint had been sustained without leave to amend, upon the grounds that "the alleged testimony before a committee of the California state legislature therein referred to was of a privileged character, and the alleged 1935 and/or 1936 publication appearing on the face of the complaint to be outlawed".

The complaint herein reveals that appellant, Mark Kelly, "for a period of approximately twenty-two years prior to the month of April, 1939, * * * had devoted his entire time, energy, and talent to the profession of attending and reporting athletic events and contests of all kinds", thereby achieving a position of national prominence in his chosen profession and the reputation of being a fearless and unbiased critic in the world of sports. During the years immediately preceding April, 1939, appellant was the writer of a daily featured article in a Los Angeles newspaper under the title "What Nots by Mark Kelly", and was particularly directing his critical attention to the field of professional wrestling in the state of California, frequently announcing in print his individual conviction that wrestling as a sport was a "joke".

During this period the defendants Daro were engaged in the business of managing and promoting wrestlers and wrestling matches and were co-owners of a lessee's interest in a lease upon Olympic Auditorium in the city of Los Angeles. It is alleged that said defendants, early in the year 1936, directed their bookkeeper, Helen Copin, to make an entry in the books of the ostensible copartnership to the effect that in 1935 defendant Lou Daro had paid to appellant the sum of $11,211.51, and that such entry was intended by the defendants to mean that "although the plaintiff herein was employed exclusively on matters of sports by the Los Angeles Examiner to report, write, edit and columnize his unbiased opinions upon sports and all forms of sport promotion and to criticize impartially and independently all types and forms of amateur and professional athletic contests and to have no interest in or emolument from any sport or any promoter of sport, the said plaintiff herein had accepted the sum of $11,211.51 in cash from the defendant Lou Daro as a 'pay-off' or bribe or emolument in return for reporting, writing, editorializing and columnizing wrestling events and wrestling promotion activities in a manner which should favor and should be partial to wrestling business of the defendants Lou Daro and Jack Daro * * *".

During the 1939 session of the California state legislature, pursuant to House Resolution No. 71, the assembly appointed a committee of three members to investigate, and for that purpose to conduct hearings and take evidence relative to the activities of the state athletic commission. The first hearing of the committee was conducted at Sacramento on April 20, 1939, at which time the respondent Jack Daro and his employee, Helen Copin, were subpoenaed as witnesses and testified by reading from the books of the copartnership (which were produced at the hearing under a subpoena duces tecum), the entry heretofore referred to, to-wit, that in the year 1935, appellant Mark Kelly had accepted and received from defendant Lou Daro the sum of $11,211.51 as a bribe or "pay-off".

It is then alleged that the original entry made and published in 1936 and republished on April 20, 1939, before the legislative committee was false, misleading, defamatory, libelous, unprivileged and without legal cause, and exposed appellant to hatred, contempt, ridicule and obloquy, causing him to lose his position with the Los Angeles newspaper, and to suffer grave humiliation and great indignity, all to his damage in the total sum of $775,000.

The complaint further alleged that the defendants Daro knew and intended at the time the original entry was made in 1936 that it should be seen by their own agents and other persons, who would repeat and circulate the same.

Appellant concedes that the statute of limitations has run against an action for libel based upon the original entry (subd. 3, § 340, Code Civ.Proc.), but he argues that the instant action is founded upon the republication of the original entry before the legislative committee on April 20, 1939, and that a witness testifying before such committee has only a qualified and not an absolute privilege.

Section 45 of the Civil Code defines libel as "a false and unprivileged publica-

tion by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation".

Section 47 of the same code defines a privileged publication as "one made—

"1. In the proper discharge of an official duty.

"2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law; * * *".

[1] In discussing the question of privilege in the case of People v. Faber, 29 Cal.App.2d Supp. 751, at page 759, 77 P.2d 921, at page 925, the court made the following comment: "In a civil action the privilege extended by the first two subdivisions of section 47 has been held to be absolute and unqualified (Hale Co. v. Lea, 191 Cal. 202, 205, 215 P. 900), provided the publication is relevant to the official duty involved or to the cause or subject of inquiry (Wyatt v. Buell, 47 Cal. 624). The sort of relevancy required is further defined in Irwin v. Newby, 102 Cal.App. 110, 282 P. 810, 283 P. 370. On the other hand, the forms of privileged communications defined by subdivisions 3, 4, and 5 of section 47, applicable to libel and slander alike, 'are protected by a qualified privilege only; that is, to make the defenses available, the publication and the circumstances surrounding it must conform to the conditions laid down in the statute.' 16 Cal.Jur. 67, citing Longsworth v. Curson, 56 Cal.App. 489, 206 P. 779."

[2-4] In 36 Corpus Juris 1260, section 239(b), the following statement appears: "As a general rule, defamatory matter published in the due course of legislative proceedings is absolutely privileged. Peterson v. Steenerson, 113 Minn. 87, 129 N.W. 147, 31 L.R.A.,N.S., 674. The rule is broad and comprehensive including proceedings in all legislative bodies, whether state or municipal. A member of the legislature is not liable in an action of defamation for words published in the discharge of his official duties, even though made maliciously. * * * But this privilege does not extend to words spoken unofficially although in the legislative hall and while the legislature is in session. The privilege of a witness appearing before a committee of the legislature in a matter within the jurisdiction of the committee is the same as that of a witness in judicial proceedings. Sheppard v. Bryant, 191 Mass. 591, 78 N.E. 394, 6 Ann.Cas. 802; Wright v. Lothrop, 149 Mass. 385, 21 N.E. 963. A statement made by a witness in such an examination which is pertinent to the questions and the subject of examination is absolutely privileged. Sheppard v. Bryant, supra."

In the Sheppard case is was held that where a witness was subpoenaed, sworn and examined before a legislative committee, appointed to investigate the conditions under which coal was received, supplied and sold in the city of Boston and vicinity, statements made in the course of his examination which were pertinent to the questions and the subject of examination were absolutely privileged. In said cited case, the court, at page 400 of 78 N.E. quoted from Wright v. Lothrop, 149 Mass. 385, 21 N.E. 963, 965, as follows: " 'The examination of witnesses is regulated by the tribunal before which they testify, and if witnesses answer pertinently questions asked them by counsel which are not excluded by the tribunal, or answer pertinently questions asked by the tribunal, they ought to be absolutely protected. It is not the duty of a witness to decide for himself whether the questions asked him under the direction of the tribunal are relevant, as the witness is sworn to tell the whole truth relating to the matter concerning which his testimony is taken, he ought also to be absolutely protected in testifying to any matter which is relevant to the inquiry or which he reasonably believes to be relevant to it. But a witness ought not to be permitted with impunity to volunteer defamatory statements which are irrelevant to the matter of inquiry and which he does not believe to be relevant. This statement of the law, we think, is supported by the decisions in this commonwealth. The English decisions perhaps go somewhat further than this in favor of a witness; certainly they apply the rule liberally for his protection.' "

[5] In support of his claim that a witness has only a qualified privilege, appellant cites section 590, Restatement of the Law of Torts (Defamation), page 236, to the effect that members only of the Congress or of the legislatures of the various states are absolutely privileged However, it is stated in Comment a of said section 590: "The privilege, however, is

not confined to conduct on the floor of the legislative body. It extends to the work of the legislative committees or subcommittees which are engaged in an investigation or other work authorized by the legislative body, whether the work is performed while that body is in session or during a recess."

The right to investigate implies the right to take evidence. Consequently, in view of the authorities heretofore cited, a witness must of necessity be protected with respect to defamatory statements made by him which are pertinent to the questions and the subject of the examination.

As stated in 12 A.L.R. 1255: "Defamatory testimony before a regularly constituted legislative body, or a committee thereof, making a legally authorized investigation, is generally held to be subject to the same rules of privilege as similar testimony in courts of justice. If the testimony is material to the inquiry, or responsive to the question asked by the tribunal, it is generally held to be privileged absolutely in action for libel or slander. Terry v. Fellows, 1869, 21 La. Ann. 375; Wright v. Lothrop, 1889, 149 Mass. 385, 21 N.E. 963; Sheppard v. Bryant, 1906, 191 Mass. 591, 78 N.E. 394, 6 Ann.Cas. 802. See, also, McLaughlin v. Charles, 1891, 60 Hun 239, 14 N.Y.S. 608."

House (or Assembly) Resolution No. 71, quoted at length in the first amended complaint herein, created a special assembly committee on athletic affairs to consist of three members, authorized and directed "to make a thorough and complete study of, and investigation into all matters and things relating to boxing and wrestling in this State, and the administration of the laws pertaining thereto"; authorized said committee to hold public hearings at any place in the state and "to do any and all things necessary to make a full and complete investigation of the matters herein referred to, and to require the production of books, agreements, documents, reports, accounts, and papers of every kind, to make its own rules of procedure, and to issue subpoenas to compel the attendance of witnesses and to procure testimony * * * the said committee is hereby given leave to sit during the sessions of the Legislature and to report back to the Assembly its recommendations as soon after the adoption of this resolution as possible * * *".

As heretofore stated, respondent Jack Daro and his employee, Helen Copin, were subpoenaed as witnesses, and testified from the books which were kept by defendants and which were produced under a subpoena duces tecum. The questions asked and the answers given thereto were pertinent to the inquiry relating to boxing and wrestling.

[6] Since the complaint shows upon its face that the original libel is barred by the provisions of subdivision 3, section 340, Code of Civil Procedure, and that the alleged republication thereof before the legislative investigating committee was absolutely privileged, the demurrer was properly sustained without leave to amend.

For the reasons stated, the judgment of dismissal is affirmed.

DORAN and WHITE, JJ., concurred.



47 Cal.App.2d 414

PEOPLE v. ZUCCARO.

Cr. 2184.

District Court of Appeal, First District, Division 1, California.

Oct. 22, 1941.

Hearing Denied Nov. 17, 1941.

1. Criminal law ⇐1071

The gravity of alleged offense of committing lewd or lascivious acts on body of child and contributing to minor's delinquency, considered with main contention on appeal from conviction thereof that trial court erred in denying appellant's motion for new trial because of deputy public defender's waiver of certain rights of appellant, *held* to warrant consideration of appeal, irrespective of failure of "statement of grounds of appeal" to specify such grounds and points on which appellant relies. Pen.Code, § 288; St.1937, p. 1033, § 702; Rules for the Supreme Court and District Courts of Appeal, rule 2, § 7.

2. Witnesses ⇐40(1), 45(2)

In prosecution for committing lewd or lascivious acts on child's body and contributing to minor's delinquency, where record showed that complaining witness was duly sworn, that she was 11 years old and in public school grade commonly reached at that age at time of trial, and that she attended Sunday school and knew that she should not bear false witness against her neighbor and would be punished if she did not tell the truth, and transcript of evidence disclosed that she had definite recollection

of episode in question and ability to relate correctly names, dates and details connected therewith, admission of her testimony was not error. Pen.Code, § 288; St.1937, p. 1033, § 702.

3. Criminal law ⇐1186(5)

In prosecution for committing lewd or lascivious acts on child's body and contributing to minor's delinquency, where child witness for defendant testified that she played with complaining witness in such witness' room on afternoon during which offense was alleged to have been committed and that defendant was around dressed in his clothes, deputy public defender was not derelict in failing to ask witness whether she was in complaining witness' presence all of time on such date and whether defendant committed any offense, as further cross-examination of witness might have injured defendant's cause. Pen.Code, § 288; St.1937, p. 1033, § 702.

4. Criminal law ⇐956(7)

A deputy public defender's affidavit, specifically denying certain allegations and denying generally other allegations of motion by his client, convicted of crime, for new trial because of such deputy's waiver of certain rights of client, and averring that attorney who prepared affidavit supporting motion was not present at trial and made practice of submitting such false affidavits to embarrass court and thwart proper administration of justice, was legally sufficient when considered with reporter's transcript showing that client received fair trial.

5. Criminal law ⇐1097(1)

In absence of definite statement of facts tending to show injury to one convicted of crime beyond mere return of verdict against him, District Court of Appeal cannot determine merit of his general contention on appeal that deputy public defender's failure to challenge jurors and cross-examine certain witnesses was not in exercise of good judgment.

6. Criminal law ⇐956(7)

Where deputy public defender denied in toto allegations of affidavit supporting affiant's motion for new trial after his conviction of crime that certain woman was material witness for affiant and was at his house on date of alleged offense therein and that affiant had so advised such deputy there was no affidavit by such woman that she was present at time or could have testified to any material fact to defendant's benefit, and nine witnesses called and examined by such deputy on affiant's behalf testified to affiant's good character, specific offenses charged, and complaining witness' physical condition, denial of such motion was not error because of deputy's failure to subpœna such woman as witness.

7. Criminal law ⇐1158(1)

A reviewing court must rely on conclusions reached by trial judge on hearing of motion for new trial, unless contrary to record.

8. Criminal law ⇐1176

On appeal from conviction of crime, appellant's point that trial court erred in denying his motion for new trial because of deputy public defender's failure to challenge jurors, object to leading questions, move to strike out witnesses' conclusions, make argument to jury, and submit instructions or advise defendant of his right to written instructions, is without merit, in absence of proof of injury to defendant.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Salvatore Zuccaro was convicted of committing lewd or lascivious acts on the body of a child under fourteen years of age in violation of Pen.Code, § 288, and contributing to the delinquency of a minor in violation of Welfare and Institutions Code, St. 1937, p. 1033, § 702, and he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener and Dennis Hession, Deputy Attys. Gen., for respondent.

WARD, Justice.

Appellant was convicted of a felony, to-wit, violation of section 288 of the Penal Code, and, under a second count, with a misdemeanor, violation of section 702 of the Welfare and Institutions Code, St. 1937, p. 1033.

The facts are as follows: On the afternoon of September 1, 1940, while the mother of the child complainant was in Sacramento on a visit, her husband, appellant herein, stepfather of the child, clad only in a bathrobe over his undershirt, placed the child upon a bed, and, after

removing her undergarments, committed several of the acts denounced and penalized by the above sections of the Penal and the Welfare and Institutions codes. The little girl testified to the commission of such acts and to her resistance. Appellant was unsuccessful in his obvious purpose.

[1] At the outset it may be well to state that the present attorney for appellant technically neglected to afford his client adequate protection on appeal. The "statement of grounds of appeal" sets forth that appellant relies upon all the evidence in the case, statements, rulings, orders and instructions of the court, the report of the probation officer, etc.; it then requests the transcription of the record, but fails to specify "the grounds of the appeal and the points upon which the appellant relies". Rule II, sec. 7 of Rules for the Supreme Court and District Courts of Appeal. Irrespective of such failure, the gravity of the alleged offense, when considered in connection with the main contention on appeal, induces us to give consideration to the appeal.

[2] It is claimed that there was a failure to duly or at all swear the complaining witness. The record shows that "the witness was duly sworn", and the transcript of evidence discloses that she had a definite recollection of the episode in question and the ability to correctly relate names, dates and details connected therewith. The record further shows that at the time of the trial she was eleven years old, and in a grade in the public school commonly reached at that age; that she attended Sunday school and knew that she should "not bear false witness against" her neighbor, and that she would be "punished if she did not tell the truth".

[3] Appellant contends that the deputy public defender was derelict in failing to inquire of a child witness called in his behalf whether she was not in the presence of the complainant "all of the time" on the date mentioned, and whether any offense had been committed by appellant. This witness testified that on the afternoon in question, she had played with the complaining witness in the latter's room; that appellant was "around * * * dressed in his clothes". While this testimony was favorable to appellant, further cross-examination might have injured rather than benefited his cause.

[4] The principal contention on appeal is that the court erred in denying appellant's motion for a new trial. The argument thereon is primarily based on the claim that the deputy public defender waived certain rights of his client which resulted in a denial of the latter's privilege of representation by counsel, in violation of his constitutional right.

In an affidavit signed by appellant it is averred that the public defender waived the former's right to cross-examination of witnesses; failed and refused to call for certain testimony requested by appellant; failed to challenge any juror for cause or peremptorily; agreed, without appellant's consent, to a trial behind closed doors; failed to object to leading questions or to move to strike out conclusions of witnesses; failed to subpoena witnesses; failed to make an argument to the jury; neglected to submit instructions or to advise appellant of his right to written instructions. The deputy public defender countered with an affidavit denying certain allegations specifically, others generally, and averred that the attorney who prepared the affidavit for appellant was not present at the trial and that he "makes a practice of submitting this type of false affidavit to embarrass the Court and to thwart the proper administration of justice". While this affidavit is not as specific as desirable, it is legally sufficient when considered in conjunction with the reporter's transcript.

[5-7] In the absence of some definite statement of facts tending to show injury to the appellant beyond the mere return of a verdict against him, we are unable to determine the merit of his general contention that the failure of the public defender to challenge jurors, etc., was or was not in the exercise of good judgment. The failure to cross-examine certain witnesses also may or may not have been the use of good judgment in the protection of appellant's rights. In this respect, the record does not disclose injury to him. Other matters complained of, and the denial thereof, speak for themselves. The failure to attempt to subpoena a witness is a serious charge. There is a direct allegation in appellant's affidavit that "the present wife of the father of [appellant's] stepson" was a material witness for appellant and that she was "at the house of affiant" on the date of the commission of the alleged offense, and that affiant had so ad-

vised his attorney. This allegation is denied by the deputy public defender "in toto". There is no affidavit by such proposed witness that she was present at the time or that she could have testified to any material fact to the benefit of appellant. Nine witnesses were called and examined by the deputy public defender on behalf of his client. These witnesses testified to appellant's good character, to specific offenses charged and to the physical condition of the complainant. The reporter's transcript does not disclose a neglect to protect appellant's rights. On the contrary it appears that he received a fair trial upon the issues involved. Unless contrary to the record, a reviewing court must rely upon the conclusions reached by the trial judge on the hearing of a motion for a new trial.

[8] The instructions when read as a whole sufficiently informed the jury of the offense charged and adequately protected appellant's rights. In the absence of proof of injury, the remaining points raised by reason of appellant's failure to challenge jurors, etc., must be classified as without merit.

The judgment and the order denying appellant's motion for a new trial are affirmed.

PETERS, P. J., and KNIGHT, J., concurred.



HARRISON v. ADAMS et al.

Civ. 2728.

District Court of Appeal, Fourth District, California.

Oct. 21, 1941.

Hearing Granted Dec. 18, 1941.

1. Judgment ⇐846

Generally, assignee of judgment acquires no better right than assignor had at time of assignment. Code Civ.Proc. § 368.

2. Judgment ⇐883(13)

In absence of notice of assignment of judgment, judgment debtor may offset against judgment a cross-demand not reduced to judgment.

3. Judgment ⇐883(13)

A judgment debtor may acquire claims against judgment creditor from other parties after assignment of judgment and set them up in reduction of his obligation thereon, if he acquires them before he knows that judgment has been assigned.

4. Judgment ⇐848

A woman to whom judgment creditor assigned remainder of his interest in judgment, without notice to judgment debtor, after assigning portion of judgment to another for limited purpose of enabling payment of portion thereof to creditor's attorney, who was paid amount due him, is in no better position with respect to her interest in judgment than creditor would have been if he had not made second assignment, though debtor knew of first assignment.

5. Judgment ⇐883(13)

A judgment debtor, to whom note executed by judgment creditor was assigned by payee for collection only under contract providing that payee should receive two-thirds and assignee one-third of amount collected, did not acquire note in sense necessary to enable him to offset it against judgment, regardless of whether his action for such set-off was subject to statutory provision that action by assignee of thing in action is without prejudice to any set-off existing at time of or before notice of assignment. Code Civ.Proc. § 368.

6. Judgment ⇐883(13)

To permit judgment debtor to set off judgment creditor's obligation, assigned by obligee to debtor for collection only, would violate general rules of mutuality of demands and identity of interest applied in allowing one claim to be set off against another.

7. Set-off and counterclaim ⇐8(1)

The right of "set-off" exists when parties hold cross-demands under such circumstances that in equity they should be applied against each other and only the balance be recovered.

See Words and Phrases, Permanent Edition, for all other definitions of "Set-Off".

8. Assignments ⇐121
Judgment ⇐847

An assignee of claim or judgment for collection may sue thereon in his own name.

9. Judgment ⇐883(13)

The rule that court's jurisdiction of action does not depend on whether plaintiff's ownership of claims sued on was both legal and equitable or merely legal and solely for purpose of collection is not controlling on question whether a plaintiff, having merely legal title to claim, may use it as his own when equitable ownership thereof is in another, as by setting off note, assigned to him for collection only, against prior judgment obtained by maker against plaintiff.

10. Set-off and counterclaim ⇐8(1)

"Set-offs" are allowed only where parties hold cross-demands which equitably should be extinguished and only the balance paid.

11. Assignments ⇐89

An assignee of claim for collection is really a "trustee" for assignor, and such trustee may not deal with trust property as his own or use it for his own benefit without his principal's consent.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee".

Appeals from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by one Harrison against Henry J. Adams, Verda Adams and others on a note and for equitable set-off thereof against a judgment for defendant Henry J. Adams. From so much of a judgment as denied the set-off and awarded defendant Verda Adams the balance of an amount deposited with the county clerk by plaintiff to stay execution on the prior judgment, plaintiff appealed, after which, on plaintiff's death, Charlotte R. Harrison, as executrix of his estate, was substituted as appellant.

Affirmed.

Luce, Forward, Lee & Kunzel, of San Diego, for appellant.

Dempster McKee, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action on a note and for an equitable set-off. The plaintiff has appealed from that portion of the judgment which denied him the right to use this note as a set-off against a prior judgment obtained against him by Henry J. Adams. While two appeals were taken they have been consolidated. Pending the appeal the plaintiff died and the executrix of his estate has been substituted. For convenience, we will refer to the original plaintiff and appellant.

The appeal is presented on the judgment roll and the facts, as found by the court, are as follows: On April 15, 1938, Henry J. Adams obtained a judgment against Harrison for $11,000. Harrison appealed and, to stay execution, deposited the amount of the judgment in cash with the county clerk. On April 26, 1938, Adams assigned this judgment to one Meyers, a secretary in the office of two of his attorneys. On the same day, a notice of this assignment was filed in that action and served on Harrison. On May 20, 1938, Adams assigned any interest he might have in that judgment to the respondent, Verda Adams. Notice of this assignment was given to Meyers but no notice thereof was given to Harrison "except such notice as might be imputed from the notice of the assignment of the judgment from Henry J. Adams to F. N. Meyers". On July 15, 1938, one Russell endorsed to Harrison a note for $3,808.70, which had been given to Russell by Adams, and at the same time a contract was entered into between Russell and Harrison which provided that the assignment of the note was for the purpose of collection and that Russell was to receive two thirds and Harrison one third of any amount collected.

The judgment against Harrison was affirmed on appeal (Adams v. Harrison, 34 Cal.App.2d 288, 93 P.2d 237) and became final on or about October 23, 1939. Thereafter, Harrison brought this action seeking, among other things, to set off the Russel note, proportionately against the judgment obtained by Adams, who was then insolvent. A showing was made by Meyers that she had no interest in the judgment and that the assignment to her had been made for the purpose of enabling a portion thereof to be paid to Adams' attorney in the former action. This amount was paid and the balance of the deposit was retained by the clerk, under court order, subject to the outcome of this action. The court held that Harrison was not entitled to set off the Russell note against the Adams judgment, and that Verda Adams, by reason of her assignment, was entitled to the money remaining in the hands of the county clerk. This appeal followed.

[1-3] The general rule is that the assignee of a judgment acquires no better

right than the assignor had at the time of the assignment. Section 368 of the Code of Civil Procedure reflects this principle. Arp v. Blake, 63 Cal.App. 362, 218 P. 773. In the absence of notice of the assignment of a judgment the judgment-debtor may offset a cross-demand which has not been reduced to judgment. Machado v. Borges, 170 Cal. 501, 150 P. 351. He may also acquire claims against the judgment-creditor from other parties and set them up in reduction of his obligation if he acquires such claims before he knows that the judgment against him has been assigned to another. Haskins v. Jordan, 123 Cal. 157, 55 P. 786.

[4] In the instant case, the appellant knew that the judgment against him had been assigned to Meyers but did not know that any remaining interest therein had been thereafter assigned by Adams to the respondent. It appeared at the trial, however, that the assignment to Meyers was for a limited purpose and covered but a portion of the judgment. Any interest thus conveyed has been taken care of and is not involved here. The remainder belonged to Adams and would still be his and subject to any rights of the appellant but for the fact that this remainder was subsequently assigned to the respondent. The appellant had no notice of this later assignment. Under the authorities above mentioned it might well be held that with respect to the interest she took in the judgment the respondent is in no better position than Adams would have been had he not made that assignment.

[5] The controlling question here is whether Harrison acquired such an interest in the Russell note as, under the existing circumstances, he is entitled to use as an offset against the Adams judgment. It may first be noted that he gave no notice that the Russell note had been assigned to him, which suggests the interesting question whether the action brought by him is not subject to the provision of section 368 of the Code of Civil Procedure, which reads: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment."

Be that as it may, we think the appellant did not acquire the Russell note in the sense necessary to enable him to use it for his own purposes by offsetting it here, either as against Adams or as against his assignee, the respondent herein. He held the Russell note under an express contract that he took it for collection only, and that two thirds of any amount collected belonged to Russell and one third to himself. He had no real interest in the note until collection was made and even then two thirds of the proceeds belonged to another. He did not own one third of the note in such a way that he was free to use that part by itself and he could benefit himself here only by using the note in its entirety, which would involve using as his own and setting off rights in a claim which actually belonged to another.

[6-8] Whether or not a judgment-debtor is entitled to set off an obligation of the judgment-creditor which has been assigned to him for collection only has not been directly decided in this state, so far as we are advised. To permit this to be done would seem to be violative of the general rules of mutuality of demands and identity of interest which have always been applied in allowing one claim to be set off against another. The general rule is stated in Arp v. Blake, supra [63 Cal.App. 362, 218 P. 775], and other cases, as follows: "The right of set-off exists when the parties hold cross-demands under such circumstances that in equity they should be applied one against the other and only the balance be recovered." In Jones v. Chalfant, 55 Cal. 505, Jones recovered a judgment against Chalfant. Chalfant moved to set off a judgment previously recovered against Jones by one Hall and which Hall had assigned to Chalfant. It appeared that Jones had been notified of this assignment. Jones had assigned his judgment to his attorneys, who alleged that it had been assigned to them for value before they had any notice of the assignment of the Hall judgment, and that Chalfant had paid nothing for that judgment. The court affirmed an order denying Chalfant the right to offset the Hall judgment, saying that it was not satisfied that the evidence disclosed that Chalfant was the absolute owner thereof. In speaking of that judgment, the court said: "The assignee must show that he is really the absolute owner of the judgment, or he cannot set it off". The appellant argues that this is no longer the law in this state since more recent cases have held that an assignee for collection has the entire control over an assigned claim or judgment and may sue thereon in his own name. Morrison v. Veach, 190 Cal. 507, 213 P. 945; Bechtel v. Baglieto, 13 Cal.App.2d 495, 57

P.2d 192. While it is well settled that an assignee may sue in his own name the further question is here involved whether he can use a claim as his own and for his own purposes while another person has an equitable interest in it.

[9] The appellant further contends that the case of Hammell v. Superior Court, 217 Cal. 5, 17 P.2d 101, is decisive of the problem now before us. We do not so understand that case. The court was there considering whether the superior court had jurisdiction of an action upon several assigned claims when the amount of each claim was less than the jurisdictional minimum of the superior court, and the claims had been assigned to a single plaintiff solely for collection. It was there said that the jurisdiction of courts should not be made to depend upon the character of the plaintiff's ownership of the claims, that is, whether it was both legal and equitable or merely legal and solely for the purpose of collection. While the rule there laid down is eminently proper with respect to the question of jurisdiction, or the proper court for an action or actions which the plaintiff is entitled to bring, it is hardly controlling on the further question now before us as to whether a plaintiff, having merely the legal title to a claim, may use it as his own when the equitable ownership is in another. Under established rules, if this note was Russell's it could not be offset and used to pay a debt owed by Harrison to Adams. In fact, Russell is the equitable owner and Harrison will never have more than a one-third interest in it and cannot have that, so far as material here, unless the entire amount is applied as a set-off to the Adams judgment. For present purposes, Harrison is attempting to set off in payment of his own debt a claim which equitably still belongs to Russell, and the larger part of which will never belong to Harrison.

The appellant further relies on the case of Del Monte Ranch Dairy v. Bernardo, 174 Cal. 757, 164 P. 628, 630, in which the defendant attempted to set up a counterclaim for goods sold by him to the plaintiff and which claim he had previously assigned to another. The court referred to the fact that the defendant testified that the assignment was only for the purposes of collection and said: "But if it was absolute in terms, was in fact an absolute assignment, even though the unexpressed purpose was to obtain collection, it of course transferred the claim, and left defendant without any right of action thereon against plaintiff." The judgment was reversed as to the counterclaim issue for the express purpose of determining whether an absolute assignment of the claim sought to be set up as a counterclaim had been made. That case involved only the question as to which party had a right to maintain an action on the claim and has no bearing here unless the holding that evidence should be received as to whether or not an assignment is absolute is suggestive. In the case now before us, it appears without question that the assignment of the Russell note to the appellant was not absolute but was expressly made for collection only by a contract through which the assignor retained not only a present interest but the larger final interest.

[10] It seems to us that under the circumstances here appearing Harrison had not such an ownership in the Russell note as entitled him to use the same as a set-off against his own debt, and that in equity he should not be allowed to thus use Russell's property. To permit this would also be to ignore the basic reason for, and to violate the fundamental principle involved in, allowing such set-offs. They are allowed only where the parties hold cross-demands which equitably should be extinguished and only the balance paid. That means, logically, that the judgment-debtor is not, in such a case, to pay in cash that part of the judgment represented by the claim which is offset. Here, the appellant has deposited the full amount in court and he wants the full amount paid on the judgment. In effect, he asks that this part of the money be paid to a third party who is not interested in the judgment, and has no lien thereon, to the end that he may himself profit to a lesser extent from this benefit to the third party. This more nearly resembles an attempt to obtain the effect of a lien where none exists, than an extinguishment of cross-demands.

[11] A further consideration is that an assignee for collection is really a trustee for his assignor. Such a trustee may not deal with the trust property as his own or use it for his own benefit without the consent of his principal. Elam v. Arzaga, 122 Cal.App. 742, 10 P.2d 805. While Russell is not here complaining of what the appellant wants to do with the note in this action the existence of this thoroughly established rule furnishes support to the view that the appellant should not be per-

mitted to employ this equitable proceeding to enable him to use for his own, and for his own purposes, property which equitably belongs to Russell. And it further emphasizes the fact here existing that there is not the mutuality of claims which has long been required in allowing such a set-off.

The judgment is affirmed.

MARKS, J., and WEST, J., pro tem., concurred.



47 Cal.App.2d 393

PEOPLE v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 13242.

District Court of Appeal, Second District, Division 1, California.

Oct. 21, 1941.

Rehearing Denied Nov. 12, 1941.

Hearing Denied Dec. 20, 1941.

1. Eminent domain ⇐166

Proceeding in "eminent domain" is an exercise of the sovereign power of the state, even though state does not appear upon the face of the record as a party.

See Words and Phrases, Permanent Edition, for all other definitions of "Eminent Domain".

2. Eminent domain ⇐166

The owner of land sought to be appropriated to a public use may voluntarily agree with agent of state as to price and convey land to person or corporation desiring it for a public use, but proceeding in "eminent domain" is an "adversary proceeding", without any element of contract, wherein the state appropriates the use of the land to the public, subject only to constitutional requirement that just compensation must be made or paid into court for owner before the taking or damaging of land for public use.

See Words and Phrases, Permanent Edition, for all other definitions of "Adversary Proceeding".

3. Eminent domain ⇐246(2)

A plaintiff seeking to condemn land for a public use does not, by bringing the action to condemn, bind himself to take the land and pay the compensation fixed by court or jury, but under certain circumstances he may, on proper terms, abandon proceeding and decline to take the land.

4. Eminent domain ⇐246(2)

The only change as respects right of plaintiff to abandon condemnation proceeding effected by enactment of statutory provision, authorizing abandonment of proceedings at any time after filing complaint and before expiration of 30 days after final judgment by service on defendant and filing in court a written notice of abandonment, was to limit the right of abandonment to 30 days after final judgment. Code Civ.Proc. § 1255a.

5. Eminent domain ⇐246(2)

Where state served and filed notice of abandonment of eminent domain proceeding as to particular parcel more than a month before date set for trial, court would not be justified in denying state's motion for judgment of dismissal in the absence of a positive showing of very unusual circumstances estopping state from abandoning proceeding, assuming that matter of such dismissal rested in the discretion of the court. Code Civ. Proc. § 1255a.

6. Eminent domain ⇐246(2)

Landowners' contention that state by eminent domain proceeding sought not only to appropriate a portion of landowners' property but also certain rights of ingress and egress from such property and that such rights had been greatly impaired by operations already undertaken by state merely revealed possible existence of cause of action for damages to real property as result of such operations, which could be determined in an independent action, and stated no ground for "estopping" state from abandoning proceeding.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

7. Eminent domain ⇐246(1)

Plaintiff may abandon condemnation proceeding as against a particular parcel of property by following procedure prescribed by statute without abandoning the entire project. Code Civ.Proc. § 1255a.

8. Eminent domain ⇐246(2)

Under provisions of statute, regarding dismissal of condemnation proceedings, plaintiff in such proceeding has an absolute right to abandon the action and obtain a

judgment of dismissal within the time provided by statute, unless for some conceivable reason, the plaintiff is estopped from so doing. Code Civ.Proc. § 1255a.

9. Eminent domain ⇐246(2)

The provisions of statute regarding the dismissal of eminent domain proceedings are "mandatory" upon the trial court. Code Civ.Proc. § 1255a.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

10. Mandamus ⇐60

Where state as plaintiff in condemnation proceeding served and filed notice of abandonment more than a month prior to date set for trial but trial court denied state's motion for judgment of dismissal, District Court of Appeal granted peremptory writ of mandate requiring trial court to enter judgment dismissing proceeding. Code Civ.Proc. § 1255a.

Proceeding in mandamus by the People against the Superior Court of Los Angeles County and others to compel the named respondent to dismiss a certain condemnation proceeding after abandonment thereof by petitioner.

Peremptory writ of mandate granted.

Hearing denied. HOUSER and CARTER, JJ., dissenting, see 120 P.2d 655.

Holloway Jones, Clifford D. Good, George C. Hadley, Lincoln V. Johnson, and Francis J. Carr, all of San Francisco, for petitioner.

J. H. O'Connor, Co. Counsel, and Douglas De Coster, Deputy Co. Counsel, both of Los Angeles, and George H. Francis, of Independence, for respondents.

DORAN, Justice.

Petitioner herein seeks a writ of mandate to compel respondents to enter a judgment dismissing a condemnation proceeding upon motion of petitioner made in the court below pursuant to the provisions of section 1255a of the Code of Civil Procedure, which motion was made after petitioner had filed a notice of abandonment of the said proceedings in accordance with the provisions of the said section of the code above referred to. The notice in question stated that petitioner abandoned the said proceedings as against one parcel of land concerned therein, for which parcel one Frank Monteleone and Lucy Monteleone had appeared as defendants. The notice of abandonment was filed over a month prior to the date set for trial of the condemnation action and the motion for judgment of dismissal was made prior to the trial date.

In opposition to petitioner's motion for dismissal the defendants above named interposed a "plea of equitable estoppel" based upon the claim, as therein stated, that petitioner, by its complaint in the condemnation proceeding and by its resolution of intention, sought to condemn and take away not only a portion of the defendants' property, but also certain rights of ingress and egress from defendants' said property; that the said rights of ingress and egress had been greatly impaired by physical operations already undertaken by petitioner under an order of immediate possession of property concerned in the condemnation proceeding; and that, in view of the progress already made on the public improvement in question, defendants' rights above mentioned would soon be destroyed. Further, that petitioner did not propose to abandon the said improvement contemplated in its original resolution of intention, but, to the contrary, was proceeding diligently and rapidly to the completion thereof; and that the motion to dismiss as to the parcel in question was not made in good faith, but for the purpose of vexing defendants with successive experiments in litigation in order for petitioner to arrive at the price it desired to pay; and that the motion for judgment of dismissal was made in order to avoid the full responsibility imposed upon petitioner under the eminent domain laws of the state. Other statements to the same effect were made by defendants in their said plea. Defendants further contended therein that in the absence of a revocation of the ordinances of intention or an abandonment of the entire proceedings, petitioner has no right to dismiss as to only one parcel of land under a single and different ownership than that of the other lands in the said proceeding; and that petitioner is bound by the rules of equity to prosecute its condemnation case against defendants to final judgment. The court below denied petitioner's motion for judgment of dismissal, whereupon petitioner made its present application for a writ of mandate. In their answer to the petition herein respondents adopt the contentions made by the defend-

ants Monteleone in the court below on the motion for dismissal of the condemnation proceeding.

In so far as here pertinent, section 1255a of the Code of Civil Procedure states: "Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendants and filing in court a written notice of such abandonment; * * *. Upon such abandonment, express or implied, on motion of any party, a judgment shall be entered dismissing the proceeding * * *." The section just quoted is included in Title VII of the code, governing proceedings in eminent domain.

[1-3] In Pool v. Butler, 141 Cal. 46, at page 49, 74 P. 444, at page 445, it is stated: "The proceeding in eminent domain is an exercise of the sovereign power of the state, though the state does not appear upon the face of the record as a party. The owner of the land sought to be appropriated to a public use may voluntarily agree with the agent of the state as to price, and convey it to the person or corporation who may desire it for a public use, but in the proceeding under the statute there is no element of contract. It is an adversary proceeding, wherein the state appropriates the use of the land to the public, subject only to the requirement of the Constitution that the land shall not be taken or damaged for public use without just compensation having been first made or paid into court for the owner. Const. art. 1, § 14. But a plaintiff seeking to condemn land for a public use does not, by bringing the action to condemn, bind himself to take the land and pay the compensation fixed by the court or jury, since it may be so great as to make the proposed use impossible, or the delay in obtaining the right to use the land for the purpose intended may permit another to acquire a competitive use of other lands for the same purpose, and thus make his use undesirable, even if the compensation were reasonable. Hence a plaintiff in such action is conceded to have a right to abandon the proceeding and decline to take the land; the question then being, at what stage of the condemnation proceedings may he abandon the enterprise or decline to take the property? Pending the motion for a new trial, and later, pending the appeal, it is clear that plaintiffs were not bound to pay or deposit the damages assessed upon the trial; and it is equally clear by the motion and the appeal that the defendants refused to accept payment at least until they had exhausted all their resources to defeat the condemnation, and during all that time the plaintiffs had the right to abandon the enterprise and refuse to pay the compensation assessed by the court."

In Southern Pac. R. R. Co. v. Reis Estate Company, 15 Cal.App. 216, at page 218, 114 P. 808, at page 809, 810, it is stated: "We think it unnecessary to determine the character of right with reference to dismissal which a plaintiff may possess in proceedings of this character after verdict and before final decree of condemnation. That he is entitled to abandon the claim to the property and ask a dismissal before the expiration of 30 days from the entry of the judgment has been determined in Pool v. Butler [supra]." The court in the Southern Pacific R. R. case assumed, without deciding, that such right of dismissal is within the discretion of the court only, but held that the trial court in there granting plaintiff a dismissal had not abused any discretion. Plaintiff there had moved to dismiss, within thirty days after trial and a verdict fixing the amount of compensation and damages, upon the grounds "that the damages and values fixed by the jury were excessive, and a dismissal of the case was an abandonment by the plaintiff of its claim for the property". Chief Justice Beatty dissented from the order denying a hearing of this latter case in the Supreme Court, stating: "It is not decided, and I do not think it ought to be held, that where the whole controversy in a condemnation case is over the compensation to which the land owner is entitled, the plaintiff has the unqualified right to dismiss the proceeding upon payment of costs after he has subjected the defendant to heavy expenses in addition to court costs in the legitimate effort to prove the loss and damage that he will sustain in consequence of the condemnation sought. This was the main question in the case, but it is left undecided, * * *".

In Metropolitan Water District v. Adams, 16 Cal.2d 676, 107 P.2d 618, 620, recently before the Supreme Court of this state, respondents took the position that when possession of the land is taken by a plaintiff under order of court in a con-

demnation proceeding, the condemner's right to the property becomes vested, and concurrently the property owner's right to the payment to him of a sum of money for such taking becomes vested. In other words, that the act of taking possession irrevocably fixes the respective rights of the contemner and the landowner, and that after possession is thus taken of the land, the contemner becomes the vested owner of the land. The court held that such a position could not be sustained, first, because the law does not provide for absolute immediate payment; second, the act of taking possession does not irrevocably fix the rights of the parties, because one of the possible issues in every condemnation case is whether there is any public necessity to take the owner's land, and should this issue be decided against the plaintiff, the proceeding terminates and the owner is restored to the possession of his land; and lastly, because the plaintiff may abandon the proceeding at any time before the expiration of thirty days after final judgment by serving upon defendant and filing in court written notice of such abandonment. The court then stated: "While the plaintiff by abandoning the proceeding subjects himself to the payment of certain costs and expenses incurred by the defendant, the service and filing of said notice ipso facto terminates the proceeding, except in those rare instances in which the condemner is estopped from availing itself of the right of abandonment."

[4] Respondents have cited City of Los Angeles v. Deacon, 3 Cal.2d 641, 46 P.2d 165, and Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 44 P.2d 547, in support of their position. In so far as these cases concern the right of abandonment of a condemnation suit they can have no application here, as the abandonment considered in both cases was attempted after the time allowed therefor by the provisions of section 1255a, supra. It cannot be disputed that plaintiff in the instant case filed notice of abandonment within the time provided by the code. As far as the application of the doctrine of estoppel is concerned, the Times-Mirror and Deacon cases both present a set of facts entirely different from the circumstances of the instant case. In the Times-Mirror case the property owner had actually changed its position as the result of the condemnation proceedings and in reliance upon the condemner's taking the property. The doctrine of estoppel does not appear to have been discussed in the Deacon case. In passing, it should be stated that the court in the Deacon case pointed out the fact that the case of Pool v. Butler, supra, was decided before the enactment of section 1255a. However that may be, the reasoning in the quotation hereinabove given from the Pool case may be applied to the situation in the instant case under the provisions of section 1255a. Moreover, it would appear that the only change wrought in the situation by the enactment of section 1255a was that of limiting the right of abandonment to thirty days after final judgment. See City of Los Angeles v. Deacon, supra, 3 Cal.2d at page 649, 46 P.2d 165.

[5] From the foregoing it would appear that petitioner, as plaintiff in the condemnation proceeding, was well within its rights in serving and filing notice of abandonment at the time it did, and that in the absence of a positive showing of very unusual circumstances the court would not be justified in denying plaintiff's motion for judgment of dismissal, assuming that the matter of such dismissal rested in the discretion of the court. In this connection, it is difficult to perceive of a situation existing before the trial of a condemnation action wherein the plaintiff could be estopped from abandoning the proceeding.

[6, 7] The defendants in their plea, raised in opposition to petitioner's motion for judgment of dismissal in the court below, have stated no grounds for estoppel. The statements there made by defendants and adopted here by respondents merely reveal the possible existence of a cause of action for damages to defendants' real property as the result of the operations of petitioner. This is a matter entirely independent of the question of the appropriation of the real property to a public use, and one for which the defendants may institute an independent action for damages without prejudice to their rights. McCandless v. City of Los Angeles, 214 Cal. 67, 4 P.2d 139. The contention that petitioner may not abandon condemnation proceedings as against any one parcel of property without abandoning the entire project is without substance. If, after the institution of a condemnation action, a plaintiff should determine that a certain parcel of land is not necessary in the operations contemplated, there is no law to prevent an

abandonment of proceedings against the land in question; and the right of a plaintiff to abandon condemnation proceedings is not affected merely by the fact that the property in question may have suffered damage through plaintiff's operations.

[8] Under the circumstances here presented, it appears that there was no good cause shown for the denial of petitioner's motion for judgment of dismissal under section 1255a of the Code of Civil Procedure. Moreover, the provisions of section 1255a, supra, here in question are similar to those of section 583, wherein it is provided that any action shall be dismissed by the court unless such action is brought to trial within five years after the filing thereof, unless the parties have stipulated in writing to an extension of time. Section 583, in that respect, has been held mandatory upon the court. Andersen v. Superior Court, 187 Cal. 95, 200 P. 963. Under the provisions of section 1255a it would also appear that a plaintiff in a condemnation proceeding has an absolute right to abandon the action and obtain a judgment of dismissal, within the time provided, unless, for some conceivable reason, the plaintiff is estopped from so doing. In that connection, the following language in Andersen v. Superior Court, supra, 187 Cal. at page 100, 200 P. at page 965, is pertinent:

"But, conceding that there may be equitable grounds of estoppel to the enforcement of the dismissal of an action under section 583, Code of Civil Procedure, * * * the question to be first presented to this court under a mandamus proceeding would be one of law, as to whether the facts pleaded and passed upon by the trial court constituted a sufficient ground for denying the motion to dismiss. It cannot be claimed that it is a matter within the discretion of the trial court to arbitrarily determine what extraneous circumstances will excuse a compliance with the statute."

[9] The above quotation from the Andersen case applies with equal force to the situation presented upon a motion for dismissal of a condemnation action under the provisions of section 1255a. The provisions of section 1255a regarding the dismissal of such actions are mandatory upon the trial court.

[10] For the foregoing reasons, a peremptory writ of mandate requiring the Superior Court of the County of Los Angeles to enter a judgment dismissing the said condemnation proceeding as to the parcel of land in question is granted.

YORK, P. J., and WHITE, J., concurred.



47 Cal.App.2d 470

DAY et al. v. FIRST TRUST & SAVINGS BANK OF PASADENA (three cases).

Civ. 13288–13290.

District Court of Appeal, Second District, Division 2, California.

Oct. 24, 1941.

Hearing Denied Dec. 22, 1941.

1. Appeal and error ⇐989

On appeal, District Court of Appeals will not weigh and evaluate evidence, but will merely determine whether there is material, credible evidence to support trial court's findings.

2. Trusts ⇐217(3)

In determining whether golf club mortgages were proper investments for trust funds, appraised value of realty and character, financial standing, and past performance of officers and members of clubs could be considered.

3. Trusts ⇐218(1)

An honest trustee is not liable to make good the loss sustained by retaining an authorized security in a falling market, if he did so honestly and truthfully, in the belief that it was best course to take in interest of all parties.

4. Trusts ⇐217(1)

Whether trustee has acted properly in making investment depends on circumstances at time investment is made and not on subsequent events.

5. Trusts ⇐217(1)

A trustee must use due care and skill and the caution of a prudent man in making investments, and, in absence of provision in trust or statute, he can make those investments which a prudent man would make in investing in property outside of ordinary business risks and with a view to safety of principal and to securing of an income rea-

sonable in amount and payable with regularity.

6. Trusts ⇐179

Usually trust is created to preserve property intact and to earn income for beneficiary, and ordinarily trustee is directed to administer funds in order to substitute supposedly superior judgment of trustee for that of beneficiary.

7. Trusts ⇐217(1)

A trustee is neither expected to bury his talents nor to exercise infallible judgment in investment of funds, but he must exercise skill and judgment of reasonably prudent business man in preserving estate and at the same time make the estate productive.

8. Trusts ⇐217(1)

In investing trust funds, trustee should consider aggregate value of trust estate, nature of other investments of funds of trust, and advisability of diversifying investments in order to insure against adverse conditions in any particular field.

9. Trusts ⇐217(1)

A financial institution with broad general knowledge of community needs and trends, of character and worth of citizens with whom institution has dealt, and specific knowledge of property values in community, can consider such positive general knowledge in investing trust funds, and is not restricted to letter upon letter and line upon line conformity with prescribed ritual in estimating value of proposed investment in order to avoid charge of negligently managing such funds.

10. Trusts ⇐262

Evidence warranted denial of liability of trustee for depreciation of trust assets during economic depression, on ground that trustee was not negligent in investment of funds, but exercised care of ordinarily prudent person.

11. Trusts ⇐268

An award to trustee of attorney's fees and court costs, incurred in defending settlor's action to establish trustee's liability for depreciation of trust assets, was proper in view of provision in trust agreement declaring that trustee should be indemnified for costs incurred in connection with trust, notwithstanding that principal obligations of trust had been terminated by agreement of parties, where it was expressly provided that certain aspects of trust relationship should survive, and it was in reliance on such provision that settlor's action was brought.

Appeals from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Actions for damages for alleged breach of trust and for an accounting by George E. Day and others against the First Trust & Savings Bank of Pasadena and others. From judgments for the named defendant, the plaintiffs appeal.

Affirmed.

Loeb & Loeb, of Los Angeles (Milton H. Schwartz and Herman F. Selvin, both of Los Angeles, of counsel), for appellants.

Newlin & Ashburn, of Los Angeles (C. Hudson B. Cox and A. W. Ashburn, both of Los Angeles, of counsel), for respondent First Trust & Savings Bank of Pasadena.

SCOTT, Justice pro tem.

Plaintiffs appeal from judgments for defendant First Trust and Savings Bank of Pasadena (hereinafter referred to as defendant) in three suits for damages for alleged breach of trust and for an accounting. Defendant Title Insurance and Trust Company was joined in two of the actions as defendant for the reason that it declined to join therein as a party plaintiff.

On February 4, 1928, plaintiff George E. Day, who is the principal party in interest in all three suits and to whom we shall hereafter refer merely as plaintiff, entered into a trust agreement with defendant pursuant to which he delivered to it sums totaling about a million and a quarter dollars and allowed about $175,000 in income to be added to the trust, all of which the latter undertook to administer as trustee. This relationship and the dealings thereunder furnish the basis for the principal suit we are about to consider. The next year plaintiff set up with defendant for the benefit of certain relatives two additional trusts, each amounting to about $85,000. These two trusts are the basis of the second and third suits, involve the same transactions and require no separate discussion. On December 26, 1933, the first trust was revoked by agreement of the parties and on January 30, 1934, defendant resigned as trustee in the other two trusts. In conformity with the agreement of December 26, 1933, defendant delivered all of the assets of the trusts to the successor trustee designated by plaintiff, except those which because of their

nature, as will hereafter appear, it was necessary should remain in defendant's hands for administration. As to such subsequent management there is no complaint. At that time defendant also rendered to plaintiff a full, true and correct general accounting of its administration of the trust estate. Plaintiff reserved only any right he might have to establish liability of defendant for specific losses claimed by him to have been incurred prior to December of 1933 through negligence or other misconduct of defendant, but agreed to wait three years before instituting any suit to recover therefor.

After waiting slightly more than three years plaintiff brought these actions seeking a general accounting and damages for alleged negligence constituting a breach of trust, claiming as to certain investments which had suffered a reduction in market value during the period in question that defendant should never have made them and that "the beneficiary may reject an improvident investment even though realized loss has not taken place", and claiming further that as to certain bonds defendant should have sold them before their prices went as low as they did. Neither bad faith nor illegality were charged against defendant. The plaintiff was refused an accounting and was denied damages by the trial court.

On appeal plaintiff expresses dissatisfaction with the court's finding that defendant was not negligent in its management of certain trust funds, its finding that plaintiff was guilty of laches and its award to defendant of an amount to compensate it for its attorney's fees and expenses in defending these suits.

[1] It is not our province on appeal to weigh and evaluate the evidence, but merely to determine whether there is material, credible evidence to support the findings of the trial court. Albaugh v. Mt. Shasta Power Corp., 9 Cal.2d 751, 773, 73 P.2d 217; Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 55 P.2d 870.

The trial court in its findings alluded to the abnormal economic conditions prevailing during the years from 1929 up to the bank holiday in 1933 and thereafter, and noted the fact that the total administration of the trusts had netted plaintiff three and nine-tenths per cent on investments on his behalf over the difficult period in question.

The general nature of the transactions to which plaintiffs take exception, in order of discussion in their briefs, are as follows:

(1) Pasadena Golf Club mortgage. Defendant bank held a $300,000 mortgage on the club property, appraised at $700,000 and valued even in February of 1933 at $555,000. It sold to the trust participation certificates in the mortgage amounting to $54,400, which totaled about four per cent of the trust, the last one being placed in the trust June 30, 1931. These and other participation certificates were issued and dealt with by the bank as permitted by the provisions of section 104 of the Bank Act (Act 652, Deering's Gen.Laws, St.1909, p. 108), under which the bank, as trustee, could buy these certificates for the trust, buying them from the bank itself as mortgage holder. On October 26, 1932, the bank took a deed to the real property securing the mortgage in lieu of foreclosure. The participation certificates were turned over to the successor trustee. The loan was in good standing at all times when participation certificates were sold to the trust.

(2) Flintridge Golf Club mortgage. A mortgage loan in the sum of $225,000 had been made by the bank on the Flintridge property, appraised as being worth $725,000. Participation certificates were sold to the trust during 1931 and were turned over to the successor trustee.

[2] In the case of both these golf club properties it was within the province of the trial court to consider, as defendant had, not only the appraised value of the real property but also the character, financial standing and past performance of the officers and members of the clubs. No claim is made that golf club mortgages in all cases and under all circumstances were improper investments for trust funds, and it appears that participation in a mortgage on the property of another golf club in the same community had been approved by plaintiff.

(3) H. L. Stowell mortgage. The bank loaned $30,000 to Stowell, secured by a mortgage on a two-story building on the corner of Colorado and Raymond streets in the city of Pasadena which had been appraised at $112,000. On September 25, 1928, $3,400 in trust funds were invested in participation certificates in this mortgage, which were later turned over to the successor trustee.

(4) B. O. Kendall mortgage. A loan of $35,000 secured by a mortgage on a storage

warehouse appraised at $83,400 was made to Kendall by the bank in 1925. Participation certificates for $2,200 were purchased for the first trust and $800 for one of the other trusts. Interest was paid to April, 1936, but the following year the mortgage was foreclosed, was bought in by the bank and has been managed by it since that date.

(5) John T. Young mortgage. In November, 1928, the bank loaned Young $20,000 to build a motion picture theater and store building on Eagle Rock boulevard in Los Angeles, three or four blocks from the Eagle Rock business district. When completed the property was valued at $40,000. A participation certificate for $2,500 was sold to the trust and is still held by the successor trustee, although November, 1938, it had been reduced to $1,532.22.

(6) Bennett Investment Company mortgage. In September of 1928 the bank loaned $60,000 to the Bennett company, secured by a mortgage on a partly planted citrus ranch in San Diego county appraised at $124,000. Participation certificates were sold to the trust to the extent of $2,800 and were delivered to the successor trustee.

(7) Ethel M. Dennis mortgage. In June, 1930, the bank loaned $15,000, secured by a mortgage on a two-story Class C building on West Colorado street in Pasadena, appraised at $37,000. In March, 1931, a participation certificate for $2,500 was sold to the trust and is now held by the successor trustee.

(8) T. S. UpdeGraff mortgage. In June of 1924 the bank loaned $42,500, secured by a mortgage, on a four-story and basement building on South Main street in Los Angeles occupied by the Army and Navy Store and appraised at $119,000. In August, 1928, participation certificates for $3,100 were sold to the trust and are now held by the successor trustee.

(9) William H. Bennett mortgage. In March, 1929, the bank loaned $25,000, secured by a mortgage on a two-story Class C building on Santa Monica boulevard in Los Angeles, appraised at $48,500 and yielding an annual income of $9,600. In September of 1931 a participation certificate for $1,000 was purchased for the trust and later was delivered to the successor trustee. Plaintiff's assertion that in July, 1938, this loan was finally liquidated with a relatively small loss does not affect the issues now before us.

(10) Charles A. Davey mortgage. In August, 1929, the bank loaned $5,000 on a duplex house and garage appraised at $10,150 and later sold the mortgage to the trust. It passed to the successor trustee, who foreclosed the mortgage, bought in the property and took a deficiency judgment which was fully satisfied.

(11) John R. Lee mortgage. In March, 1928, following an introduction by plaintiff, $15,000 was loaned at seven per cent on vacant property in Pasadena appraised at $30,000. Before the termination of the trust, title to the property was taken in lieu of foreclosure and this was later transferred to the successor trustee.

(12) Powers and Durston mortgage. In May, 1929, a loan of $3,500 was made out of the trust funds upon a double residence appraised at $7,125. The mortgage was foreclosed prior to the termination of the trust and title to the property later transferred to the successor trustee.

(13) C. Kern Fiedler mortgage. In June, 1928, the bank loaned $5,000, secured by a mortgage on vacant property on South Broadway in Pasadena and located in the "heavy industrial zone", appraised at $9,500. A year later the bank sold the mortgage to the trust. It was later reduced to $4,000 and was transferred to the successor trustee, who foreclosed it and bid it in for the full amount.

(14) Bastanchury Ranck Company bonds. In February, 1928, the bank bought for the trust $4,950 worth of bonds. On appeal the purchase of these bonds is not attacked, but their retention after June, 1930, is declared to have been improper. The total issue of bonds was $1,500,000, supported by property then appraised at $4,235,000. The trust deed was later foreclosed, a new corporation was formed and stock issued to former bondholders. This stock at the time of trial was held by the successor trustee.

(15) Central Oakland Block bonds. From November, 1928, to October, 1929, these bonds of a value of $11,955 were purchased for the trust. There was an issue of $1,500,000 of bonds, supported by an appraisal of $2,577,000 on property securing it. Plaintiff complains of the failure of defendant to sell the bonds after November of 1931, when it disposed of them at a loss.

[3] In connection with the two latter transactions involving bonds, it should be borne in mind that "there is no rule of law which compels the Court to hold that an

honest trustee is liable to make good loss sustained by retaining an authorized security in a falling market, if he did so honestly and prudently, in the belief that it was the best course to take in the interest of all parties". In re Clark's Will, 257 N.Y. 132, 177 N.E. 397, 398, 77 A.L.R. 499.

[4, 5] The trial court found that defendant had furnished plaintiff with frequent statements of receipts and disbursements and statements of investments on hand in said trust, and any and all other information requested by plaintiff pertaining thereto. The court further found that plaintiff, with full knowledge thereof, acquiesced in the transactions, speculated on the outcome of the depression and then chose to retain the benefits of investments of the same character costing over a million dollars, to attack those here in question and to seek to throw upon defendant all of the burden of his losses; that decrease in value of certain investments "was proximately caused by the then existing economic depression and not by the character of said investments or any negligence of defendant". "Whether the trustee has acted properly in making an investment depends upon the circumstances at the time when the investment is made and not upon subsequent events." Restatement of the Law of Trusts, sec. 227, sub. m; In re Clark's Will, supra. "In making investments not only is the trustee under a duty to use due care and skill, but he must use the caution of a prudent man. In the absence of provisions in the terms of the trust or statutory provisions the investments which a trustee can properly make are those which a prudent man would make in investing his property outside of ordinary business risks and with a view to the safety of the principal and to the securing of an income reasonable in amount and payable with regularity." Restatement of the Law of Trusts, sec. 227, sub. e. The court found that in its dealings on behalf of the trust defendant "exercised its best judgment, which was a careful judgment, and that it also exercised reasonable care such as an ordinarily prudent person takes with respect to his own affairs and which such an ordinarily prudent person, whether individual or trust company, performing the same trust functions as defendant and under the same conditions, would have exercised with respect to said and each of said matters". These findings are adequately supported by the evidence.

Plaintiff was a sagacious business man, interested in the profitable administration of the trust by defendant. The original trust agreement reserved to him the right to direct it in making investments, and required advance notice of intended sales or reinvestments. This last requirement was not fully observed by the parties, and on August 23, 1930, they amended the trust agreement to read as follows: "The trustor reserves the right to direct the trustee in writing as to the sale, investment and/or reinvestment of all or any part of the corpus or principal of the trust estate. The trustee shall be fully protected in following such directions when received by it, but shall not be required to ask for or demand such directions in any case, which in the judgment of the trustee requires the sale, investment or reinvestment of all or any part of the trust estate. In making investments for the trust estate the trustee shall not be restricted to securities of the character authorized by the laws of the state of California for trust investments."

This is not the case of a beneficiary who is a helpless infant or an incompetent, nor even one unversed in the intricacies of business administration, but is one of an experienced and resourceful man of mature years. It may have been an indication of his emphasis on enhancing the value of the trust rather than on elements of extraordinary security that he voluntarily, after two and a half years relationship with defendant acting as trustee, undertook to remove any restriction imposed by law as to the character of the investments to be made out of trust funds. But nearly two years thereafter, and from June, 1932, to December, 1933, perhaps due to misgivings of plaintiff as to the outcome of the severe economic readjustment which was taking place, relations between plaintiff and defendant were less amicable, and culminated in the termination of the trust in the latter month. Then by voluntary agreement of the parties in December, 1933, after the passing of this year and a half in which plaintiff knew that a critical analysis of the body of the trust was necessary and proper, an accounting between the parties was had, a reduced fee for services as trustee was accepted by defendant and any action for alleged negligence prior to that time was deferred for

a period of three years. All of this shed light on the conduct of defendant and aided the trial court in reaching a conclusion as to the relationship of the parties in the administration of the trust. Defendant of course does not contend that it would have been justified in negligently administering the trust merely because of silent acquiescence of plaintiff in ill-advised investments; but it is obvious that the knowledge and experience of plaintiff made it inevitable that his views as to properties, persons and trends, even when casually imparted, would merit and receive appropriate consideration by defendant together with advice, recommendations and information from other sources.

[6-8] In People's State Bank & Trust Co. v. Wade, 269 Ky. 89, 106 S.W.2d 74, 75, it is said: "The two usual purposes for the creation of a trust are (1) to preserve the property intact, and (2) to earn an income for the beneficiary. In either event, the purpose of setting up a trustee to administer a fund or estate is to substitute the supposedly superior judgment of the trustee for that of the beneficiary. It is not expected that the trustee shall 'bury his talents,' nor is the law such a hard master as to require that he exercise an infallible judgment in the investment of funds entrusted to his care. He must exercise the skill and judgment of a reasonably prudent businessman in preserving the estate, but at the same time make the estate productive." Among matters which a trustee should consider are the aggregate value of the trust estate, the nature of his other investments on its behalf and the advisability of diversifying his investments in order to insure against adverse conditions in any particular field. Restatement of the law of Trusts, vol. 1, sec. 227, sub. m.

In the case of In re Westfield Trust Co., 117 N.J.Eq. 429, 176 A. 101, 103, the court said: "The treacherous path that lay before the investor, whether trustee or otherwise, in the spring and summer of 1931 * * * is apparent when, with the advantage of retrospection, we look upon the debacle that ensued. Favored forms of trust investment were sucked into the maelstrom—mortgage investments, corporate bonds, and even cash in bank. Following, came the widespread apprehension of money inflation in company with which was the doctrine, well received even in conservative circles, that participation in ownership equities was extremely desirable because of its proportionate share in the potential inflation of capital and earnings. However loudly it may now be said that people should have foreseen, most men of that degree of prudence and caution that we call ordinary did not foresee." In this case, as in the case of In re Heyl's Estate, 331 Pa. 202, 200 A. 617, 618, 117 A.L.R. 867, "it is easy now in view of the happenings to values in the past eight years, to conclude that the appraisements placed upon the properties are too high, measured by today's market price, but no one had the prescience and judgment at the time these loans were made to forecast the conditions which exist today".

[9, 10] We deem it unnecessary to review the evidence which warrants the conclusion that defendant considered not only the appraised value of the various properties but also the character, business record and financial resources of those with whom it was dealing. A financial institution with broad general knowledge of community needs and trends, of the character and worth of its citizens with whom it has dealt and specific knowledge of property values in that community, may include in its considerations such positive general knowledge, and it is not restricted to letter upon letter and line upon line conformity with a prescribed ritual in estimating the value of a proposed investment in order to avoid a charge of negligently managing funds under its control. It was the province of the trial court to weigh and evaluate the evidence, and it reached a conclusion, on adequate proof, which is adverse to plaintiff's contentions and which is set out in the findings above quoted.

A discussion of the question of laches on the part of plaintiff appears needless in view of our determination that the court's findings that defendant was not negligent are supported by the evidence.

[11] Nor does it appear that plaintiff's resistance to the trial court's award of attorney's fees and court costs to defendant is well founded. The trust agreement provided that the trustee should be indemnified for costs incurred by it in connection with the trust. While it is true that the principal obligations of the trust terminated by agreement of the parties in December, 1933,

it was expressly provided that certain aspects of that relationship should survive and it is in reliance upon that provision that this suit was brought. It was a just and reasonable construction of the agreement by the trial court that defendant should not be made to suffer loss at the hands of any person, least of all the plaintiff, in properly defending acts done for the benefit of plaintiff in the administration of the trust. See Ellis v. Kelsey, 241 N.Y. 374, 150 N.E. 148.

The judgments are affirmed.

WOOD, Acting P. J., and McCOMB, J., concurred.

18 Cal.2d 860

BIGSBY v. JOHNSON, State Treasurer.

Sac. 5278.

Supreme Court of California.

Oct. 28, 1941.

1. Licenses ⇐15(1)

A sale by printer of secondhand equipment that he had previously used in operation of his printing plant constituted a "sale at retail", within Retail Sales Tax Act defining a "sale at retail" to be a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property. Gen.Laws Supp.1935, Act 8493, §§ 2(b, c), 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale at Retail".

2. Licenses ⇐19(3)

Although most jurisdictions imposing retail sales taxes specifically exempt casual or isolated sales, a majority of the jurisdictions hold that the exemption does not include casual retail sales made in course of business operations by one who is engaged in the retail sales business.

3. Licenses ⇐15(1)

The retail sales tax is imposed upon retailers for the privilege of doing a retail sales business, and the measure of the tax is the gross receipts of any such retailer from sale of all tangible personal property sold at retail. Gen.Laws Supp.1935, Act 8493, § 3.

4. Licenses ⇐15(1)

A printer who sold secondhand equipment that he had previously used in operation of his printing plant could not claim an exemption from liability for retail sales tax merely by virtue of fact that the sale was not the kind of retail sale ordinarily made by him. Gen.Laws Supp.1935, Act 8493, §§ 2(b, c, e), 3.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

On rehearing.

Judgment reversed.

For prior opinion, see 99 P.2d 268.

Earl Warren, Atty. Gen., and H. H. Linney, James J. Arditto, and A. A. Kragen, Deputy Attys. Gen., for appellant Charles G. Johnson.

Roscoe R. Hess, of Los Angeles, and Philip Ray and Robert H. Walker, both of San Francisco, for respondent Bigsby.

Charles D. Thompson, of Hollywood, for The Citizen-News, amicus curiae.

Guthrie & Curtis, of San Bernardino, for Acme Color Paint Co., Ltd., and The McClure Newspaper Syndicate, amicus curiae.

Brobeck, Phleger & Harrison and McCutchen, Olney, Mannon & Greene, all of San Francisco, for Matson Nav. Co., amicus curiae.

Lawler, Felix & Hall and Oscar Lawler, all of Los Angeles, for Hearst Publications, Inc. (L. A. Examiner Department) amicus curiae.

Cosgrove & O'Neil and T. B. Cosgrove, all of Los Angeles, for The Times Mirror Co. (Los Angeles Times), amicus curiae.

O'Melveny & Myers and Pearce Works, all of Los Angeles, for Southern California Associated Newspapers (Alhambra Post Advocate, Culver City Star News, Glendale News Press, Monrovia News Post, Redondo Beach Breeze, San Pedro News Pilot), amicus curiae.

Binford & Binford and L. B. Binford, all of Los Angeles, for Stockholders Pub. Co. (Los Angeles News) amicus curiae.

Stephen W. Downey, of Sacramento, for California Newspaper Publishers Ass'n, amicus curiae.

Flint & MacKay and H. S. MacKay, Jr., all of Los Angeles, for Hearst Publications, Inc. (Los Angeles Evening Herald Express Dept.), amicus curiae.

Grove J. Fink, of San Francisco, for Hearst Publications, Incorporated (San Francisco Examiner Dept., San Francisco Call-Bulletin Dept., Oakland Post-Enquirer Dept.) amicus curiae.

Percy E. Towne, of San Francisco, for Chronicle Pub. Co. (San Francisco Chronicle), amicus curiae.

Calkins, Hall, Linforth & Conard and Jno. U. Calkins, Jr., all of San Francisco, for Daily News Co., Ltd. (San Francisco News), amicus curiae.

Alexander Ashen, of Sacramento, for James McClatchy Pub. Co. (Sacramento Bee, Fresno Bee, Modesto Bee), amicus curiae.

Elystus Hayes, of San Francisco, for Mercury Herald Co. (San Jose Mercury Herald) amicus curiae.

Robinson, Price & Mcdonald and H. L. Price, all of Oakland, for Tribune Pub. Co. (The Oakland Tribune), amicus curiae.

GIBSON, Chief Justice.

The plaintiff brought this action to recover taxes paid under protest under the Retail Sales Tax Act of 1933. Stats. 1933, p. 2599; Deering's Gen.Laws Supp.1935, Act 8493; now Revenue and Taxation Code, part I, Stats.1941, ch. 36. The complaint contained twenty-one causes of action upon five of which judgment was rendered for the plaintiff. The plaintiff originally appealed on all causes of action in which the decision was adverse to him, but the appeal brought on his behalf has subsequently been dismissed. The only issue remaining in the case, therefore, is raised by defendant's appeal from a judgment in favor of plaintiff upon his seventeenth cause of action.

The plaintiff, Carl M. Bigsby, is engaged in the business of operating a printing establishment under the fictitious name of the Compton Printing Company. During the quarter-annual period ending December 31, 1935, he sold certain second-hand equipment that he had previously used in the operation of his printing plant. The equipment, which was sold for $25, consisted of a so-called Monomelt pot and its accessories. Plaintiff alleged that the sale of this equipment was purely incidental to the operation of his business and that he was not engaged in any way in the business of selling machinery or equipment. Plaintiff urged that since the sale of used equipment was merely incidental to his principal business and was made in order to salvage the investment upon machinery that he could no longer use, it was not the kind of sale that the legislature intended to tax under the retail sales tax statutes. From a judgment in favor of the plaintiff upon this cause of action the defendant appeals.

[1] The defendant contends, upon this appeal, that the plaintiff was properly required to pay a retail sales tax upon his sale of used printing equipment. During the period with which we are concerned, the statute provided: "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers * * * at the rate of three per cent of the gross receipts of any * * * retailer from the sale of all tangible personal property sold at retail in this State * * *." Deering's Gen. Laws Supp.1935, Act 8493, sec. 3; see Revenue & Taxation Code, sec. 6051. "Retailer" is defined by the statute to be "every person engaged in the business of making sales at retail * * *." Deering's Gen.Laws Supp.1935, Act 8493, sec. 2(e). Under the circumstances of the present case, there can be no question but that the sale involved was a "sale at retail" within the statute since such a sale is defined to be "a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property * * *." Deering's Gen. Laws Supp.1935, Act 8493, sec. 2(c).

Admitting that this transaction constitutes a retail sale within the tax statute, plaintiff relies upon the argument that the sale of the used Monomelt pot was merely a casual and incidental sale to which the retail sales tax was never intended to apply. Defendant points out, however, that plaintiff held a permit to engage in the business of making sales of any kind at retail and that he was clearly a "retailer" within the meaning of the statute, so far as the bulk of his business operations was concerned. Deering's Gen.Laws Supp.1935, Act 8493, sec. 2(b); Revenue & Taxation Code, sec. 6006; People ex rel. Walker Engraving Corp. v. Graves, 243 App.Div. 652, 276 N.Y.S. 674, affirmed 268 N.Y. 648, 198 N.E. 539; People ex rel. Foremost Studio, Inc., v. Graves, 246 App.Div. 130, 284 N.Y.S. 906; Cusick v. Commonwealth, 260 Ky. 204, 84 S.W.2d 14; Long v. Roberts & Son, 234 Ala. 570, 176 So. 213. Since plaintiff can be classified generally as a "retailer," it is urged by defendant that *any* sale at retail by such a person is taxable under the statute, whether a sale of the kind ordinarily made in the course of his business or not. This is said to follow from the fact that section 3, supra, measures the tax which it places upon retailers by gross receipts from the sale "of *all* tangible * * * property."

[2-4] The question arises, therefore, whether the legislature intended to include in the measure of the tax the receipts from those retail sales of a retailer that are incidental and casual, as well as from the retail sales that are made in the ordinary course of business. Although most jurisdictions imposing sales taxes specifically exempt casual or isolated sales, a majority of them hold that the exemption does not include casual retail sales made in the course of business operations by one who is engaged in the retail sales business. Prentice-Hall, State & Local Tax Service, par. 92.572, 92.953. The tax is imposed upon re-

tailers for the privilege of doing a retail sales business (Western Lithograph Co. v. State Board of Equalization, 11 Cal.2d 156, 164, 78 P.2d 731, 117 A.L.R. 838), and the measure of the tax is the gross receipts of any such retailer from the sale of "all tangible personal property sold at retail * * *". Act 8493, sec. 3. The plaintiff is a retailer. He sold the personal property in question at retail as a part of his business operations, and the plain language of the act requires the inclusion of the gross receipts therefrom in the measure of the tax. He can claim no exemption merely by virtue of the fact that the sale of used printing equipment was not the kind of retail sale ordinarily made by him. Our statute creates no exemption covering the situation, and however forceful may be plaintiff's contention that this type of sale should be exempted from the operation of the statute, such arguments must be directed to the legislature rather than to the courts.

We are not required, under the facts of this case, to decide the question raised in the briefs as to the taxability under the statute of gross receipts from casual retail sales that have no relation whatever to a retailer's business operations.

The judgment is reversed.

SHENK, CURTIS, EDMONDS, and CARTER, JJ., concurred.



UNIVERSAL SALES CORPORATION, Limited, v. CALIFORNIA PRESS MFG. CO.

CALIFORNIA PRESS MFG. CO. v. SAN FRANCISCO MILLING CO., Limited.

S. F. 15988.

Supreme Court of California.

Oct. 28, 1941.

Rehearing Granted Nov. 27, 1941.

1. Appeal and error ⇐1008(3)

If a contract is ambiguous, court of review cannot reject reasonable construction given writing by trial court and supplant it by another construction of which the instrument is susceptible.

2. Contracts ⇐170(1)

Where language of contract raises questions of doubtful construction, and parties have by their acts practically interpreted contract, the courts should follow that practical construction.

3. Appeal and error ⇐1008(3)

The rule that trial court's construction of ambiguous written contracts should not be disturbed by appellate court applies only where, on face of the contract itself, there is doubt, and evidence is used to dispel that doubt.

4. Contracts ⇐170(1)

The rule that courts should follow parties' practical construction of their own written contracts where language thereof is doubtful applies only in cases where on face of contract itself there is doubt and evidence is used to dispel that doubt.

5. Evidence ⇐458

The statute providing that circumstances under which a contract was made, including the situation of the subject of the instrument and of the parties thereto may be shown, may only be invoked to explain an ambiguity appearing on face of writing itself. Code Civ.Proc. § 1860.

6. Appeal and error ⇐842(6)

Whether an uncertainty or ambiguity exists in a written contract so as to permit parol evidence of circumstances to be shown is "question of law", and lower court's finding on this issue is not binding on appeal. Code Civ.Proc. § 1860.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

7. Appeal and error ⇐1008(3)
Evidence ⇐448

If a contract is clear and unambiguous, evidence is inadmissible to explain its terms, and trial court's findings based on such evidence of extraneous matters cannot be sustained on appeal. Code Civ.Proc. § 1860.

8. Evidence ⇐450(8)

Written contract for sale of feed pellet press machine, providing that if machine did not operate properly or with sufficient capacity buyer should be under no obligation to pay therefor, and that seller's liability should be limited to accepting return of machine and refunding payments made, and that in consideration of purchase of machine and the advantages of demonstration and adver-

tising from buyer's use thereof, seller would give buyer 20 per cent. of gross selling price, and 20 per cent. interest in any patents and improvements, was clear and unambiguous, and parol evidence was inadmissible to explain it. Code Civ.Proc. § 1860.

9. Sales ⇐131

Where contract for sale of feed pellet press machine provided that if machine did not operate properly buyer should be under no obligation to pay therefor, and limiting seller's liability to accepting return of machine and refund of payments made, and that in consideration of the purchase and advantages of demonstration and advertising seller would derive from use of machine by buyer, seller would give buyer 20 per cent. of all further sales and an interest in any patents or improvements, and buyer, after using machine, found it unsatisfactory and returned machine, buyer thereby terminated the contract and all rights and obligations thereunder, except restoration of purchase money paid.

10. Sales ⇐131

Where contract for sale of feed pellet press machine provided that in consideration of the purchase and advantages of demonstration and advertising defendant would derive from plaintiff's use of machine defendant would pay plaintiff 20 per cent. of all sales, a further provision that defendant would endeavor to patent the machine or improvements thereon, and that plaintiff should have 20 per cent. interest in the patents and in any improvements thereon that might thereafter be made by either party, was not a plan for a co-operative effort by both parties to produce a machine, so as to entitle plaintiff to 20 per cent. of sales and an interest in patents after plaintiff terminated contract.

11. Contracts ⇐217

A contract may validly provide that it shall come to an end at the option of one or either of the parties.

12. Appeal and error ⇐1026

Where written contract, clear on its face, was terminated by actions of the parties, as provided therein, error of trial court in construction of contract did not require new trial.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the Universal Sales Corporation, Limited, against the California Press Manufacturing Company on a written contract for sale of machine and for accounting of profits on sales of other machines, in which action defendant filed a cross-complaint. From certain parts of a judgment for plaintiff, defendant appeals.

Judgment, in so far as appealed from, reversed, with directions.

Molkenbuhr & Molkenbuhr, of San Francisco, Charles O. Bruce, of Berkeley, and Walter H. Linforth and Wm. M. Cannon, both of San Francisco, for appellant.

Carl R. Schulz, of San Francisco, and Hugh S. Center and Arthur G. Shoup, both of San Jose, for respondent.

PER CURIAM.

This is an appeal by defendant from certain parts of a judgment in favor of plaintiff.

The action is based on a written contract dated March 2, 1931, between plaintiff, a subsidiary of the San Francisco Milling Co., a producer and distributor of poultry and animal feeds, and defendant, a manufacturer of various types of presses. Because the rights of the parties and the disposition of this cause depend primarily on the contract, it is advisable to set out its more important provisions in some detail. It contains in the first place three introductory "Whereas" clauses, which state that the defendant has manufactured and has for sale a certain pellet press; that the defendant believes it has manufactured a machine which will produce the results of a cuber press now operated by the plaintiff, and with a like or greater capacity; and that the defendant desires the plaintiff to purchase and operate said machine so as to be able to demonstrate its advantages. (The cuber press referred to is an English pellet-making machine that at that time was being used by the plaintiff to produce feed pellets.)

It is then agreed that the defendant shall sell and the plaintiff shall purchase the machine for $2,000—$500 payable on delivery and the balance in installments of $500 per month. It is further agreed that if the machine does not operate properly or with sufficient capacity, the plaintiff shall be under no obligation to pay for it, but defendant shall not be liable for consequential damages, and the liability of defendant shall be exclusively limited to accepting from the plaintiff the return of the machine and the

refund of payments made. In this connection it is also provided that before rejection of the machine the defendant shall have the privilege, *should it so desire,* of making such adjustments as will enable it to make the machine operate satisfactorily.

The contract further provides that *in consideration of the purchase of the machine and the advantages of demonstration and advertising* the defendant will derive from the use of the machine by the plaintiff, the defendant agrees that as to all further sales of presses made by it, based upon the press sold to the plaintiff, and whether such sales be negotiated by the plaintiff or otherwise, 20 per cent of the gross selling price shall belong to the plaintiff. The plaintiff agrees to foster the sales of the manufactured machines. The defendant further agrees to endeavor to patent the machine, or the improvements thereon. If successful in such endeavor, the plaintiff shall have a 20 per cent interest in such patent or patents and in any improvements thereon that may be thereafter made by either party, the expense in prosecuting said patents to be borne 20 per cent by the plaintiff and 80 per cent by the defendant.

The plaintiff operated the machine until December, 1931. The record discloses that the machine never did operate with sufficient capacity to satisfy plaintiff. During the period of operation much effort was put forth by the officers and employees of each of the companies both in repair work and in attempts to increase the productive capacity of the machine, but apparently to no avail. Without attempting to describe in detail the machine delivered to plaintiff, it is sufficient to state that the meal, after being mixed and heated, is fed to a die-plate, through the holes of which the material is extruded in solid form by pressure. The material is fed to and pressed through the perforated die-plate by means of a worm laid horizontally and enclosed in casing. The main difficulty was that the material tended to solidify into a hard cake and would not pass properly or uniformly through the holes of the die, and the machine frequently clogged and had to be taken apart and cleaned numerous times daily.

In July, 1932, the plaintiff notified the defendant of its rejection of the machine, tendered it back and demanded the return of two installments, amounting to $1,000, which had been paid on account of the purchase price. At that time defendant refused to accept the tender or to return the amount paid, although after suit was commenced and by way of an amended answer, defendant conceded the right of rejection and admitted its liability for the $1,000, with interest.

On September 14, 1932, plaintiff instituted this action and in an amended complaint alleged the contract and the other facts related above. Further allegations were that subsequent to the date of the contract defendant had manufactured and sold eight presses under the trade name of California Pellet Mill; that such presses were merely improvements on and were based on the pellet press sold to plaintiff; and that plaintiff had demanded 20 per cent of the gross selling price of the pellet mill presses and a 20 per cent interest in patents obtained thereon, or improvements thereon. In a supplemental complaint plaintiff alleged further sales by defendant of pellet mill presses and asked for an accounting. It is further alleged that plaintiff fully performed all conditions to be performed by it under the contract.

After an extended hearing the trial court found, among other things, that the contract was a mutual agreement of the parties to cooperate and work together and pool their inventive ideas in an endeavor to perfect the pellet press agreed to be sold and the improvements thereon and to manufacture, market and introduce it into general use; and that in the dealings of the parties under the contract, they did so practically construe it in their operations and transactions thereunder. Further findings were that the "pellet mill press" was based on the "pellet press" originally delivered to plaintiff and any changes were merely improvements on the "pellet press". The court found that plaintiff fully performed all matters and conditions to be performed by it under the contract; that plaintiff at all times acted in accordance with and insisted upon its rights under the terms of the contract; that plaintiff did not fail, refuse or neglect to foster the sales of similar machines; and that plaintiff did not abandon or rescind the contract by the rejection of the original machine and the demand for the return of the installments paid.

Defendant appeals from such portions of the judgment as declare that plaintiff is entitled to a 20 per cent interest (1) in a so-called "pellet press", (2) in a so-called "pellet mill press", (3) in any patents heretofore or hereafter obtained by defendant

thereon, (4) in any patents heretofore or hereafter obtained by defendant on any improvements thereon, (5) in the gross selling price of any and all future sales of both pellet presses or pellet mill presses, and (6) from such portion thereof as awards judgment against defendant for $24,884.70, and interest in the sum of $5,665.69. These sums are made up of 20 per cent of the gross proceeds of machines sold plus the $1,000 paid by plaintiff on the purchase price of the machine delivered to it.

The main difference between the "pellet press" originally delivered to plaintiff and the "pellet mill press" subsequently developed and sold to others by the defendant lies essentially in the means used to force the mash through the perforations in the die-plate. As previously stated, in the press delivered to plaintiff the prepared material was fed to and forced through the perforated die-plate by means of a worm laid horizontally and enclosed in casing. In the new type of press a roller mechanism, standing vertically and without casing, takes the place of the horizontal encased worm. The mash is fed by gravity and forced into the die-plate by rotary action of the roller, which exerts its form of pressure without actual contact with the face of the die. The roller takes the place of the worm and the casing is no longer necessary.

Reference to the memorandum opinion of the trial court appended to the respondent's brief discloses that the trial court considered the primary question in the case to be whether, within the meaning of the contract, the new model is "based upon" the press made for plaintiff so as to be treated as an "improvement thereon", as contended by plaintiff, or embodies, as defendant contends, a new invention which in no way concerns the plaintiff. However, we are of the opinion that a more basic question is whether the action of the plaintiff in rejecting the machine and demanding the return of the installment payments made was not a termination of the contract, thus relieving defendant of all liability under the contract except acceptance of the rejected machine and return of the payments made. The first issue becomes controlling only if the latter question is answered in the negative.

That portion of the judgment decreeing that the plaintiff is entitled to 20 per cent of the gross proceeds of sales made or to be made and a 20 per cent interest in all patents issued or to be issued is apparently based on the finding that "under the terms of the said contract it was the mutual agreement of plaintiff and defendant to cooperate and work together and pool their inventive ideas in an endeavor to perfect the 'pellet press' agreed to be * * * sold and the improvements thereon and to manufacture, market and introduce it into general use; and the Court finds that in the dealings of said parties under said contract, they did so practically construe it in their operations and transactions thereunder; the Court further finds that with the exception of failure on the part of defendant to disclose to plaintiff defendant's ideas and plans with reference to certain improvements in substituting roller pressure for screw pressure in pressing the feed through the die, plaintiff and defendant freely exchanged, for their mutual benefit, their ideas and plans with reference to said 'pellet press' pursuant to the provisions of said contract, and finds in addition that the above-mentioned ideas and plans were the result of said cooperation and working together of plaintiff and defendant, and of the demonstration of needful changes by plaintiff's use of said 'pellet press', delivered to plaintiff for the purpose of said contract".

[1-7] There is no express provision in the contract for such cooperative plan; therefore, such finding must be based on the testimony of the witnesses and other evidence introduced during the trial of the case. After a thorough review of the record we doubt that the evidence justifies such finding. However, that question need not be considered in any detail here. If a contract is ambiguous or uncertain, then it is not within the proper or legal functions of a court of review to reject the construction given the writing by the trial court, if such construction be a reasonable one, and supplant it by another construction of which the instrument is susceptible. Adams v. Petroleum Midway Co., Ltd., 205 Cal. 221, 270 P. 668; Slama Tire Protector Co v. Ritchie, 31 Cal.App. 555, 161 P. 25. Where the terms or language of the contract raise questions of doubtful construction and the parties themselves have by their acts practically interpreted the contract, the courts should follow that practical construction. Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L.R.A.,N.S., 275; Skousen v. Herz, 135 Cal.App. 116, 26 P.2d 498; Work v. Associated Almond Growers, 102 Cal.App. 232, 282 P. 965. However, such rules apply only in cases where upon

the face of the contract itself, there is doubt and evidence is used to dispel that doubt. United Iron Works v. Outer Harbor Dock & Wharf Co., 168 Cal. 81, 141 P. 917; Harrison v. McCormick, 89 Cal. 327, 26 P. 830, 23 Am.St.Rep. 469. The rule stated in section 1860 of the Code of Civil Procedure, to the effect that the circumstances under which a contract was made, including the situation of the subject of the instrument and of the parties to it, may be shown, can only be invoked to explain an ambiguity which appears upon the face of the document itself. Barnhart Aircraft, Inc., v. Preston, 212 Cal. 19, 297 P. 20. The question of whether an uncertainty or imbiguity exists is one of law, and the lower court's finding on this issue is not binding on appeal. If a contract is clear and unambiguous, then the admission of evidence to explain its terms is not permissible, and a trial court's findings based on such evidence of extraneous matters cannot be sustained on appeal. Brant v. California Dairies, Inc., 4 Cal.2d 128, 133, 48 P.2d 13; O'Connor v. West Sacramento Co., 189 Cal. 7, 207 P. 527; Wall v. Equitable Life Assur. Society, 33 Cal.App. 2d 112, 91 P.2d 145.

[8] The contract in the instant case is complete, clear and unambiguous. Under its terms the defendant agrees to sell and the plaintiff agrees to purchase a certain machine. In consideration of such purchase, the advantages of demonstration and advertising that the seller will derive from the use of the machine by the purchaser, and the fostering of sales by the purchaser, the seller promises to pay to the purchaser 20 per cent of the gross selling price of machines based on the press sold to the purchaser. In addition the purchaser will be entitled to 20 per cent of any patents obtained on the machine or improvements thereon. There are no express warranties as to the productive capacity of the machine. It is merely stated that the seller believes the machine will produce the results of the cuber press. However, it is provided that if the machine does not operate properly or with sufficient capacity, the purchaser need not pay for it, and the liability of the seller will be limited to the acceptance of the return of the machine and the refund of the payments received. Before any rejection of the machine the seller had the privilege, *if it so desired,* of making such adjustments as would enable it to make the machine operate satisfactorily.

If the machine had produced satisfactorily as originally constructed or as it might have been improved and if the purchaser had continued to use the machine and foster sales of other machines, then, and only then, would the purchaser have been entitled to the 20 per cent interests under the contract. However, this was not the case here. The machine did not produce satisfactorily and the seller did not exercise its privilege of making such adjustments as would make it operate properly. On the other hand, the purchaser exercised its right of rejection and thus, with the exception of the duty on the part of the seller to accept return of the machine and refund the installments paid, it terminated all the rights and obligations under the contract.

[9] The result of the judgment rendered is due to the erroneous construction of the agreement of the parties by the trial court. Whether or not the new machine is an "improvement on" or is "based upon" the one delivered to the plaintiff, the fact is that the plaintiff never did possess the new machine. Yet if the judgment is allowed to stand, the plaintiff will receive 20 per cent of the gross proceeds of machines sold or to be sold and a 20 per cent interest in any patents on such machines. This will be true even though the contract expressly provides that the 20 per cent interests are in consideration of purchase, advantages of demonstration and advertising, and fostering of sales of the machine. It is impossible to imagine how the purchaser could demonstrate, advertise or foster the sales of a machine it never possessed. It is true that the purchaser used the pellet press for some time, but it is difficult to understand how the defendant profited from the use or advertising of an unsatisfactory machine. The record discloses that plaintiff mentioned certain companies as prospective purchasers to the defendant, and that these companies later purchased the new pellet mill press, but in contacting such prospective purchasers and notifying the defendant, the plaintiff could not have had the new machine in mind because by its own allegations it knew nothing of the new machine until shortly before this action was commenced. But even if there were some way of reconciling this conflict, the actions of

the plaintiff prior to the rejection become immaterial because the rejection was a termination of the rights and obligations under the contract, and the liability of the defendant was expressly limited to restoration of the purchase money paid.

[10] The case of Hamer v. MacClatchie, 220 Cal. 720, 32 P.2d 620, 621, relied on by plaintiff, is in no way decisive of the issue involved here. In that case a cooperative plan providing for royalty payments was entered into because it was believed that a device for which one party was making application for patent infringed certain claims of another's application. There was a written contract between the parties and it was expressly stated therein that "* * * the party of the second part * * * agrees to cooperate with and render whatever assistance is necessary respecting the mode and use of said device, and that they further agree to turn over any and all improvements of said inventions, invented or devised by any either or all of them collectively or individually, such improvements to be for the benefit of all the parties herein mentioned, * * *". The court properly held at page 724 of 220 Cal., at page 621 of 32 P.2d: "It [the contract] sets forth the mutual agreement of these parties to co-operate and work together in an endeavor to perfect the device and improvements thereto and to manufacture, market, and introduce it into general use." As previously stated, there is no such express provision for a cooperative plan in the instant case. In support of its contention that the contract provided for a "pooling" of inventive ideas, the respondent relies heavily on that portion of the contract providing that "The party of the second part (defendant and appellant) does hereby further agree to endeavor to patent said machine, or the improvements thereon, in which event, if successful, the party of the first part shall have a twenty per cent interest in such patent or patents and in any improvements thereon that may be thereafter made by either party; the expense in prosecuting said patents to be borne twenty per cent by first party and eighty per cent by second party". This provision is clearly not a plan for a cooperative effort on the part of both parties to produce a machine similar to the situation in the Hamer v. MacClatchie case, supra. The 20 per cent interest in patents was to be received "in consideration of the purchase of said machine and the advantages of demonstration and advertising that second party will derive from the use of said machine by first party", and for the further consideration of the fostering of sales by the respondent, just as respondent was to receive a 20 per cent interest in the gross selling price of future machines. The 20 per cent interest in patents provision was obviously dependent on the existence of the contract. The contract having been terminated, such provision can now have no effect.

[11] A contract may provide that it shall come to an end at the option of one or either of the parties. 17 C.J.S., Contracts, p. 888, § 399. Provision for termination by either party is valid and binding. Cline v. Smith, 96 Cal.App. 697, 274 P. 761. There was provision for termination in the contract being considered here, and there was termination by rejection of the machine and demand for refund of the installments paid. The findings made and the judgment rendered by the trial court are contrary to the express provisions of the contract and cannot be upheld.

[12] This being an action on a written contract, clear on its face, and the contract having been terminated by the actions of the parties, as hereinbefore discussed, nothing could be gained by the granting of a new trial in this case. Therefore, that portion of the judgment appealed from is reversed, with directions to the trial court to enter judgment in favor of the defendant. Fraser v. Carman-Ryles, 8 Cal.2d 143, 64 P.2d 397; Scudder v. Perce, 159 Cal. 429, 114 P. 571. The remainder of the judgment in favor of plaintiff and against defendant for the sum of $1,000, with interest thereon from July 27, 1932, said sum being that amount paid by plaintiff to defendant on account of the contract price of the rejected machine, is in no way affected by the reversal of that portion of said judgment appealed from.

CALIFORNIA PRESS MFG. CO. et al. v. SUPERIOR COURT OF SANTA CLARA COUNTY et al.

S. F. 16558.

Supreme Court of California.

Oct. 28, 1941.

Rehearing Granted Nov. 27, 1941.

1. Prohibition ⇐10(1)

Prohibition lies to restrain one court from assuming jurisdiction over controversy when another tribunal having concurrent jurisdiction has assumed and is exercising control over same action.

2. Prohibition ⇐10(2)

The fact that second action in respondent superior court was based on same written sales contract as action in another superior court which had previously acquired jurisdiction did not warrant issuance of writ of prohibition against respondent superior court on ground that it had no jurisdiction, where the second action included a request for an accounting for sales made subsequent to the filing of the first action.

3. Judgment ⇐744

Supreme Court's judgment on appeal, in action on written sales contract and for an accounting, determining that contract was terminated by actions of parties could be pleaded as "res judicata" in another action on same contract for an accounting for sales made subsequent to the filing of the first action, notwithstanding Supreme Court's denial of writ of prohibition to restrain superior court from taking jurisdiction in the subsequent action.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

Original proceeding for writ of prohibition by the California Press Manufacturing Company and others against the Superior Court of Santa Clara County and others, to restrain respondent Superior Court from taking any action in the case on the ground that another tribunal having concurrent jurisdiction had assumed and was exercising control over the same action.

Alternative writ discharged and peremptory writ denied.

Molkenbuhr & Molkenbuhr, of San Francisco, and Charles O. Bruce, of Berkeley, for petitioners.

Hugh S. Center and Arthur G. Shoup, both of San Jose, and Carl R. Schulz, of San Francisco, for respondents.

PER CURIAM.

This is a petition for a writ of prohibition to restrain the respondent Superior Court from taking any action, step or proceeding in that action entitled Universal Sales Corporation, Ltd., a corporation, Plaintiff, v. California Press Manufacturing Company, a corporation, et al., Defendants, filed in the Superior Court of Santa Clara County on January 31, 1941. This latter action and another similar action filed on February 2, 1938, in the Superior Court of the City and County of San Francisco, are both based on the contract involved in the case of Universal Sales Corporation, Ltd., a Corporation, v. California Press Manufacturing Company, a Corporation, S. F. No. 15988, 118 P.2d 291, filed today. Reference is made to the opinion in the latter case for a full discussion of the provisions of the contract.

While the main case (S. F. No. 15988) was pending in this court and while the second San Francisco action was apparently being held in abeyance until final decision by this court on appeal from the main case, the Santa Clara Court proceeded to order the taking of certain depositions of certain officers of the defendant companies. The defendants objected to the taking of the depositions and to the court's taking any action in the case on the ground of lack of jurisdiction. On application to this court for a writ of prohibition, an alternative writ was issued.

[1-3] Petitioners' application for the issuance of a peremptory writ of prohibition is based on the proposition that prohibition will lie to restrain one court from assuming jurisdiction over a controversy when another tribunal, having concurrent jurisdiction, has assumed and is exercising control over the same action. This proposition is basically sound, but it is not applicable here for the reason that although the Santa Clara action is based on the same contract, it includes a request for an accounting for sales made subsequent to the filing of the second San Francisco action. The Santa Clara Court, therefore, had jurisdiction to proceed with the taking of the depositions. But because of the opinion of this court, as expressed in the main case, that the contract was terminated, this application for a writ of prohibition

becomes relatively unimportant. On the denial of this writ the petitioners here may, after the decision in the main case has become final, plead the defense of res judicata in the Santa Clara action. On such plea the respondent court can properly have no alternative but to rule in favor of petitioners.

The alternative writ heretofore issued is discharged and the petition for a peremptory writ of prohibition is denied.



47 Cal.App.2d 464

In re BURNETT'S ESTATE.

Civ. 13285.

District Court of Appeal, Second District, Division 1, California.

Oct. 24, 1941.

1. Executors and administrators ⇐46

Proceeds of life insurance policies, made payable to named individuals, do not become part of assets of estate of deceased insured subject to payment of insured's debts.

2. Insurance ⇐587

Where insured under three life policies wrote to local office of each insurer, asking that beneficiary in each policy be changed from insured's estate to named individuals, but insured died after letters were mailed and before receipt thereof by insurers, such letters were nevertheless effective to change beneficiaries under the policies, so that proceeds of policies never became assets of insured's estate subject to payment of his debts.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Proceeding in the matter of the estate of Robert Neel Burnett, deceased, upon the petition of Sylvester Hoffmann, as executor, etc., for instructions concerning payment of claims against decedent's estate out of proceeds of life insurance policies, in which decedent's estate was originally named beneficiary, but which were claimed by Mrs. L. M. Hand and another. From a judgment, directing payment of creditors' claims out of proceeds of life insurance, the executor and claimants of proceeds of insurance appeal.

Reversed, with directions.

Frank E. Jenney, Sylvester Hoffmann, and Joseph Lewis, all of Los Angeles, for appellants.

DORAN, Justice.

The executor of the last will of the decedent herein appeals from a judgment and decree of the probate court ordering payment of claims against the estate and embodying certain instructions to the executor. The appeal is taken upon a bill of exceptions and is in reality only an appeal from that portion of the decree which seeks to subject the proceeds of certain insurance policies to the payment of creditors' claims.

The deceased was insured under three policies of life insurance, his estate being named beneficiary thereof. Just before he died, Mr. Burnett, the decedent, wrote to the head office of each of the life insurance companies concerned asking that they change the beneficiary in each policy from his estate to Mrs. C. G. Macaulay and Mrs. L. M. Hand, in equal shares; but Mr. Burnett died after the letters were mailed and before they were received by the insurance companies, and the insurance companies refused to make payment to either Mrs. Macaulay or Mrs. Hand, as beneficiaries, on the ground that the requested change of beneficiary had reached the companies after the death of the insured. Mrs. Macaulay was decedent's sister. Mrs. Hand was not related to decedent but was a former, divorced wife. In his will Mr. Burnett bequeathed one-half of his insurance to Mrs. Macaulay and one-half to Mrs. Hand. The proceeds of the policies were paid by the insurers to the executor, who set these funds aside through deposit in a special bank account for the purpose.

By the decree here appealed from, the court ordered the executor to pay all claims against the estate out of all moneys in his hands belonging to the estate, irrespective of the source thereof; and the executor was specifically instructed that none of the moneys belonging to the said estate in his possession were exempt from the claims of the creditors, and that the creditors were entitled to receive payment out of the said moneys, whether received by the executor as proceeds of any life insurance policy or

policies upon the life of the deceased, or otherwise.

It is the contention of appellant that the proceeds of the life insurance policies in question are exempt from the claims of creditors of the estate, and that the court erred in so far as its decree purported to subject such proceeds to the payment of claims and to instruct the executor accordingly.

[1] Appellant takes the position that proceeds of life insurance payable to the estate of the insured, in the hands of the executor, are exempt from the claims of creditors. Such a position is not fully supported by the authorities in this state. See Estate of Pillsbury, 175 Cal. 454, 166 P. 11, 3 A.L.R. 1396; Estate of Starr, 183 Cal. 121, 190 P. 625. However, the pivotal question in the case at bar is whether the efforts of the insured prior to his death were effective to change the beneficiaries under the policies so as to make the proceeds of the life insurance policies payable to the beneficiaries attempted to be substituted. If so, then the insurance proceeds would be the property of the substituted beneficiaries and not that of the estate; and such proceeds would consequently be exempt from the debts of the insured. Prudential Ins. Co. v. Beck, 39 Cal.App.2d 355, 360, 103 P.2d 241. The annual premiums for the insurance in question did not exceed $500.

[2] It should be noted that the insurance companies are not parties to any controversy here, will not be affected by the outcome, and are in much the same position they would be in had they filed an interpleader and paid the proceeds of the insurance into court. Under the circumstances here presented and upon the facts, about which there is no dispute, the law is well settled; and Mr. Burnett's efforts made prior to his death were effective to change the beneficiaries under the policies in question. Johnston v. Kearns, 107 Cal.App. 557, 290 P. 640; Aetna Life Ins. Co. v. Wood, 2 Cal.App.2d 579, 38 P.2d 853; Filcher v. Cox, 4 Cal.App.2d 486, 40 P.2d 864; Beaumond v. Prudential Ins. Co., 5 Cal.App.2d 632, 43 P.2d 820; Ætna Life Ins. Co. v. Hanes, 15 Cal.App.2d 348, 59 P.2d 462; Shaw v. Johnson, 15 Cal.App.2d 599, 59 P.2d 876. A full discussion of the rule and the reasons therefor may be found in Johnston v. Kearns, supra.

There is nothing in the record to indicate that the probate court did not view the proceeds in question as the property of the estate. In any event, in so far as the judgment and decree here appealed from purport to subject such proceeds to the payment of claims of creditors of the estate, the judgment is in error.

For the foregoing reasons the judgment is reversed with directions to modify the same in accord with the views herein expressed

YORK, P. J., and WHITE, J., concurred.



47 Cal.App.2d 566

JONES et al. v. WALKER et al.

Civ. 13301.

District Court of Appeal, Second District, Division 2, California.

Oct. 31, 1941.

Rehearing Denied Nov. 25, 1941.

Hearing Denied Dec. 29, 1941.

1. Taxation ⇐627

Tax sale notices which failed to contain word "penalties" in stating amount due were defective for failure to comply with statute requiring delinquent tax lists to contain amount of taxes, penalties, and costs due, and the sales thereunder were void. Pol.Code, § 3764.

2. Constitutional law ⇐196

A retrospective statute may validate a tax which is void for failure to comply with any statutory requirement that the legislature may have originally dispensed with, but power to validate tax sale so as to make it effectual to transfer title is much more limited and, where proceedings are so fatally defective that no title passes, the Legislature cannot by a curative act transfer the property from one person to another.

3. Constitutional law ⇐193

The Legislature is not authorized to pass healing statutes curing jurisdictional defects whereby vested rights may be taken away.

4. Taxation ⇐614

A partial compliance with statute authorizing sale of property for delinquent

taxes as to jurisdictional matters is wholly ineffectual for any purpose.

5. Constitutional law ⇐196

Defects in tax proceedings or omission altogether of proceedings that might originally have been dispensed with may be cured by the Legislature, but if the defect or omission is "jurisdictional", that is, if it goes to the root of the authority to act, or if it involves the omission of a step which the legislature could not have dispensed with, it is beyond the reach of curative statute.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdictional".

6. Constitutional law ⇐196

The failure to give owner of property requisite notice of assessment or subsequent proceedings or of the tax sale, whether by advertisement or otherwise, is a "jurisdictional" defect and is not one which can be cured by Legislature.

7. Constitutional law ⇐285
Taxation ⇐658(2)

The giving of notice of tax sale as required and in manner prescribed by statute was a "jurisdictional" prerequisite to the making of a valid sale, and purported notice which did not comply with the statute was insufficient to constitute "due process of law" under which owner could be deprived of his property by tax sale. Pol.Code, § 3764.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

8. Constitutional law ⇐285
Taxation ⇐688

A holding that curative act of 1929 amending statute relating to tax sale notices had effect of validating tax sale which was void because of failure of tax sale notice to comply with requirements of statute would be to deprive the taxpayer of his estate without "due process of law" by mere legislative rescript, pronouncing to be valid a sale which under the law of the land was absolutely void when it was made. Pol.Code, § 3764.

9. Taxation ⇐688

A tax sale which was void because of failure of tax sale notice to show amount of penalties due was not validated by the 1929 curative act amending the statute relating to tax sale notices. Pol.Code, § 3764.

10. Judgment ⇐12
Quieting title ⇐31

Where suit to quiet title was brought after death of the defendant and summons was served by publication against him, the court acquired no jurisdiction and the judgment entered in the cause was void.

11. Judgment ⇐485

Where the parties admit facts which show that a judgment in a former suit is void, then as a question of law upon such facts, the case is like that in which the judgment is void upon its face.

12. Quieting title ⇐10(1)

In suit to quiet title, plaintiff must recover on the strength of his own title rather than on any weakness of the title of the defendant, and a plaintiff who has no title cannot complain that someone else, even though without title, asserts an interest in the land.

13. Taxation ⇐814(1)

In suit to quiet title wherein plaintiffs failed to establish title in themselves in view of invalidity of tax deed under which they claimed, plaintiffs were not entitled to repayment of amount paid out by plaintiffs' predecessor who had purchased the property at void tax sale.

14. Taxation ⇐814(1)

The owner of property is required to reimburse purchaser at void tax sale only when such owner is afforded affirmative relief quieting his title as against the void tax deed or removing the cloud thereof.

15. Taxation ⇐804

In suit to quiet title wherein plaintiffs offered only a void judgment purporting to quiet title, and a void tax deed as basis of their claim of title, neither the doctrine of "laches" nor a limitation statute could supply the lack of affirmative proof so as to entitle the plaintiffs to judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Suit by Harry Lee Jones, as executor, etc., and others, against V. O. Walker, as administrator, etc., and others, to quiet title to realty. From an adverse judgment, plaintiffs appeal.

Affirmed.

Arthur J. Edwards and Frank D. McClure, both of Los Angeles, for appellants.

Alfred E. Cate, of Los Angeles, for respondents.

SCOTT, Justice pro tem.

From an adverse judgment in a suit to quiet title to certain real property plaintiffs appeal.

The property originally belonged to Marcellus W. Brady, who died in 1902. It was sold to the state of California for nonpayment of taxes in 1918 and was bought in at public auction by Chester A. Bell in 1923. A suit to quiet title was brought by Bell in 1928, with summons served by publication against the deceased Brady. A decree quieting title was entered thereon in favor of Bell. The complaint in this case to quiet title to the same property was filed in January, 1939, being brought by the executors of the will of Bell against the administrator and heirs of Brady. The trial court found that neither Bell nor plaintiffs had any right or title in the property and entered its decree accordingly.

The principal point on appeal concerns the legal sufficiency of the notices preceding the tax sale to Bell. In June, 1918, the tax collector of Los Angeles county published the delinquent tax list of the year 1917 together with a notice stating that on June 27, 1918, he would sell to the state of California the real estate upon which the taxes were a lien "unless the taxes delinquent as appear by said list, together with costs and penalties are paid". At the end of the notice appeared the following: "Public notice is hereby given that the figures appearing opposite, following and last after each description of property in the foregoing Delinquent Tax List for 1917, and for the County of Los Angeles, were intended to and do represent respectively in Dollars or Cents, or in Dollars and Cents, as the case may be, *the amount due for taxes and costs* in the manner, as follows, towit: When or where two figures appear therein, Cents were intended to be and are represented, when or where more than two figures thus appear, therein, Cents were intended to be and are represented by the last two figures, and the figures occupying and appearing at the left of the said last two figures, and separated therefrom by a space, were intended to and do represent Dollars, so that *the amount due for taxes and costs in the respective cases* aforesaid are thus expressed in Dollars and Cents." (Italics added.) A similar notice preceded the sale in July, 1923, and it stated that property theretofore sold to the state, as shown by the list, was to be offered for sale to the highest bidder for cash.

[1] Plaintiffs contend that the notices as given were sufficient to comply with the provisions of section 3764 of the Political Code, which in 1918 required that the delinquent list "must contain the names of the persons and a description of the property delinquent, and the amount of taxes, penalties, and costs due, opposite each name and description", St.1913, p. 556, and in 1923 made the same requirement in substantially the same language. Defendants dispute the adequacy of the notice because the word penalties was not included after the word taxes in the italicized portion of the notices above quoted which were published in this case. The same question was raised in the case of Bussenius v. Warden, 71 Cal.App. 717, 236 P. 371, and it was held that the omission of the word "penalties" was fatal to the validity of the notices and that sales pursuant thereto were void. This ruling was approved in Snodgrass v. Errengy, 86 Cal. App. 664, 261 P. 497; Myran v. Smith, 117 Cal.App. 355, 4 P.2d 219; Redman v. Newell, 114 Cal.App. 215, 299 P. 746, and Knoke v. Knight, 206 Cal. 225, 273 P. 786. We must therefore approve the ruling of the trial court in this case that the notices were defective and the sales were void. See, also, Fleishman v. Davis, 128 Cal.App. 174, 16 P.2d 776; Ayars v. Faust, 131 Cal. App. 154, 20 P.2d 963, and Trozera v. McDonell, 131 Cal.App. 473, 21 P.2d 706.

[2-6] The legislature of this state at its session in 1929 adopted a curative act (Stats.1929, p. 742, chap. 422, sec. 2) amending section 3764 of the Political Code and intending thereby to retroactively make certain notices of tax sales legally sufficient and to make tax sales thereunder valid. "A retrospective statute may validate a tax void for failure to comply with any statutory requirement that the Legislature might have originally dispensed with, but the power to validate a tax sale so as to make it effectual to transfer a title is much more limited. Where the proceedings are so fatally defective that no title passes, the Legislature cannot by a curative act transfer the property of one person to another. Cromwell v. MacLean, 123 N.Y. 474, 25 N.E. 932." People v.

Inman, 197 N.Y. 200, 90 N.E. 438, 441. The legislature is not authorized to pass "healing statutes curing jurisdictional defects whereby vested rights may be taken away. * * * A partial compliance with the statute as to jurisdictional matters is wholly ineffectual for any purpose. * * As said in Black, Tax Titles, § 484: 'Defects in tax proceedings, or the omission altogether of proceedings that might originally have been dispensed with, may be cured by the legislature; but if the defect or omission is jurisdictional (i.e., if it goes to the root of the authority to act; if it involves the omission of a step which the legislature could not have dispensed with), then it is beyond the reach of curative statutes.'" McCord v. Sullivan, 85 Minn. 344, 88 N.W. 989, 991, 89 Am.St.Rep. 561. See, also, 26 R.C.L. sec. 363; 61 C.J. 1681-1684; Rafferty v. Davis, 54 Or. 77, 102 P. 305, and Conway v. Cable, 37 Ill. 82, 87 Am.Dec. 240. "Failure to give the owner of the property the requisite notice of the assessment or subsequent proceedings or of the sale, whether by advertisement or otherwise, is a jurisdictional defect and not one which can be cured." 37 Cyc. 1379, 1380.

[7] The giving of the notice as required and in the manner prescribed by the legislature was a jurisdictional prerequisite to the making of a valid sale herein. The notice published was unauthorized and therefore constituted no notice. The only notice to the owner which could constitute due process and under which he could be deprived of his property was that set out in the law at the time the sale was made, and it is evident that such notice was not given. Warden v. Broome, 9 Cal.App. 172, 98 P. 252.

[8, 9] To hold that the act of 1929 had the effect of validating the void tax sale in this case "would be to deprive the taxpayer of his estate without due or any process of law, by a mere legislative rescript, pronouncing to be valid a sale which, under the law of the land, was absolutely void when it was made. The day after the sale, the title of the owner was as valid at law and in equity, and to all intents and purposes, as though no sale had occurred" (Harper v. Rowe, 53 Cal. 233, 237, 238), and the force of the legislature's declaration is all that purports to make valid a sale which theretofore was void. The legislature could not thus in the year 1929 validate a void tax sale in 1918, and the deed pursuant to the sale in 1923 conveyed no title to the predecessor of plaintiffs herein.

A careful reading of Clayton v. Schultz, 4 Cal.2d 425, 50 P.2d 446, does not indicate an intention by the Supreme Court to announce a rule or establish a principle at variance with those herein expressed.

[10, 11] The judgment against Marcellus W. Brady in 1928 was a void judgment. Because of Brady's death in 1902 the court in that case had acquired no jurisdiction over the defendant. In the case now before us plaintiffs' complaint alleges and the answers of Bray's administrator and heirs admit the fact and date of his death. Where the parties admit the facts which show that the judgment is void, then as a question of law upon such facts the case is like that in which the judgment is void upon its face. Akley v. Bassett, 189 Cal. 625, 639, 209 P. 576. See, also, Garrison v. Blanchard, 127 Cal.App. 616, 16 P.2d 273.

[12-14] Plaintiffs complain of the failure of the trial court to make a finding on defendants' affirmative defense claiming title, and further assert that as a condition precedent to a judgment adverse to plaintiffs, defendants should have been required to repay any sum paid out by Bell at the tax sale for the deed to the property. Since we have held the tax deed void, plaintiffs failed to make a prima facie case that they were owners of the said real property. In an action to quiet title plaintiffs must recover on the strength of their own title rather than any weakness of defendants'. Knoke v. Knight, supra. Having no title, plaintiffs cannot complain that someone else, even though without title, asserts an interest in the land. Williams v. City of San Pedro et al., 153 Cal. 44, 94 P. 234. Having failed to establish any title in themselves, plaintiffs' case utterly failed. Our attention has not been directed to any authority or evidence which would justify or require either a finding as to the amount paid out by plaintiffs' predecessor or a provision in the judgment that defendants should repay the same. "The owner of property is required to reimburse a purchaser at a void tax sale only when such owner is afforded affirmative relief quieting his title as against the void tax deed or removing the cloud thereof." Warden v. Ratterree, 215 Cal. 215, 217, 218, 9 P.2d 215, 216, 86 A.L.R. 1204.

[15] Since plaintiffs have offered only a void judgment and a void tax deed as bases of their claim of title, neither the doctrine of laches nor the statute of limitations could supply the lack of affirmative proof so as to entitle plaintiffs to judgment. The failure of defendant heirs to pay taxes when due would not furnish plaintiffs with title to the property, and the record does not disclose when, if at all, prior to this suit defendants learned of any claim thereto by plaintiffs or their predecessor.

Judgment affirmed.

WOOD, Acting P. J., and McCOMB, J., concurred.



47 Cal.App.2d 502

CITY OF SANTA CLARA v. IVANCOVICH et al.

Civ. 11707.

District Court of Appeal, First District, Division 1, California.

Oct. 29, 1941.

Hearing Denied Dec. 22, 1941.

1. Dedication ⇐15

To constitute "dedication" of land to public, owners thereof must clearly and unequivocally manifest intention to dedicate.

See Words and Phrases, Permanent Edition, for all other definitions of "Dedication".

2. Dedication ⇐17

The recording of subdivision map of spouses' homestead property, with appended certificate expressly dedicating streets shown thereon to public use, by husband only, without wife's signature, did not constitute complete "dedication" of such streets.

3. Dedication ⇐1

A "dedication", considered as voluntary transfer of interest in land, partakes of nature of both a grant and a gift and is governed by fundamental principles controlling such transactions.

4. Dedication ⇐1, 31, 44

A "dedication", like a contract, consists of offer and acceptance, and is not binding until acceptance, proof of which must be unequivocal.

5. Dedication ⇐35(1), 37

Acceptance of offer to dedicate land to public may be actual, as when formal acceptance is made by proper authorities, or implied, as when public has used land for such time as to evidence intention to accept dedication.

6. Dedication ⇐31

A dedication without acceptance thereof is, in law, merely an offer to dedicate, and such offer does not impose any burdens nor confer any rights, unless accepted.

7. Dedication ⇐31

Acceptance by public of offer to dedicate is necessary to valid dedication of land as highway.

8. Courts ⇐92

A holding by Supreme Court, in case wherein acceptance of dedication appeared, that landowner laying off town, making map thereof showing its division into streets, alleys and lots, and selling lots with reference to such map, makes irrevocable dedication of space represented on map as streets to public use, and that no formal acceptance thereof by town authorities is necessary, was mere "dictum".

See Words and Phrases, Permanent Edition, for all other definitions of "Dictum".

9. Dedication ⇐29, 31

The rule that landowner, laying off town, making map thereof showing its division into streets, alleys and lots, and selling lots with reference to such map, makes irrevocable dedication of streets to public, without necessity for formal acceptance thereof by town authorities, is one of "constructive dedication", which may be invoked in action between dedicator and his grantees, but not in municipality's ejectment suit for possession of land dedicated, as there is distinction between rights accruing to public generally and those of purchasers of lots according to map on offer of dedication.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Dedication".

10. Dedication ⇐1

The courts will not lightly declare a dedication of land to public use.

11. Dedication ⇐35(2), 37

An acceptance of offer to dedicate land to public use may take place through user thereof by public or by formal resolution of acceptance.

12. Dedication ⇐45

Whether city, using portion of street, accepted offer to dedicate another portion thereof to public use, is purely fact question to be determined by particular circumstances, including extent of use of area in length or width and time elapsing between such offer and express or implied acceptance thereof.

13. Dedication ⇐45

Whether there was implied acceptance of offer to dedicate strip of land as street through passage of city ordinances, adopting official grade map and assessment district map showing such street, and adoption of resolutions, fixing street grades, creating assessment district for street work, etc., was question of fact in city's ejectment suit for possession of land.

14. Dedication ⇐35(2)

A resolution and ordinance of city board of trustees, accepting all streets dedicated or offered for dedication by landowners, did not constitute formal acceptance of offer to dedicate particular strip of land to public for street.

15. Dedication ⇐45

In city's ejectment suit for possession of strip of land claimed to have been dedicated to public for street purposes, evidence that city took over portion of street, of which such strip constituted extension, by user and installed water mains therein, that street was graveled at public expense and used for public travel, and that city Board of Trustees passed ordinances adopting official grade map and assessment district map, showing such street for its full length, and resolution accepting all streets dedicated or offered for dedication by landowners, did not require holding, as matter of law, that offer to dedicate such strip was accepted, where it was never actually improved as street and city made no objection to its enclosure by fence for forty years.

16. Appeal and error ⇐1008(1)

In ejectment by city for possession of strip of land claimed to have been dedicated to public for street purposes, District Court of Appeal, on appeal from judgment for defendants, may not interfere with trial court's reasonable determination of facts not showing as matter of law that purported offer to dedicate strip was accepted by city.

17. Adverse possession ⇐90

Where no taxes are assessed on strip of land claimed by city to have been dedicated to public for street purposes, failure to pay taxes thereon will not prevent acquisition of title thereto by adverse possession.

18. Dedication ⇐19(5)

The conveyance of lots with reference to a recorded map may be considered as evidence of ratification of previous dedication of streets shown thereon to public use.

19. Dedication ⇐34

Acceptance of offer to dedicate land to public use must be within reasonable period after such offer.

20. Dedication ⇐34

What constitutes reasonable time for acceptance of offer to dedicate land to public use depends on circumstances of each case.

21. Dedication ⇐34

Resolutions of city board of trustees, formally accepting all streets dedicated or offered for dedication to public use within city limits, fixing street grades, approving diagram for water system, and creating assessment district for street work, 47, 24, 38, and 40 years, respectively, after filing of landowner's map showing such streets, were not passed within reasonable time after filing of map, purported ratification of dedication, or new offer to dedicate evidenced by conduct, as required to show acceptance of disputed strip by user.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Action in ejectment by the City of Santa Clara against Luke Ivancovich, Katherine Ivancovich, and others, to recover possession of a strip of land claimed to have been dedicated to the public for street purposes, in which defendant Katherine Ivancovich filed a cross-complaint to quiet her title to such strip as against plaintiff. From a judgment for defendants and cross-complainant, plaintiff appeals.

Affirmed.

Charles A. Thompson and Robley E. Morgan, both of Santa Clara, and L. D. Bohnett, of San Jose, for appellant.

Owen D. Richardson, of San Jose, for respondents.

WARD, Justice.

Plaintiff and appellant, a municipal corporation, brought suit in ejectment against defendants and respondents to recover possession of a strip of land which appellant claims was dedicated to the public for street purposes. The present appeal is taken from a judgment for defendants which found against the dedication, and, upon the cross-complaint of defendant Katherine Ivancovich, decreed her to be the owner of the property in question and quieted her title thereto against plaintiff.

The strip of land involved is located in the city of Santa Clara. It is 241 feet long and 40 feet wide, and, commencing at Scott street, constitutes a cul-de-sac at the northerly end of Alviso street. It has never been improved or used as a street, and for a long period of years has been fenced with adjoining land.

The facts as set forth by appellant are undisputed and appear chronologically as follows: F. Garrigus and Avis Garrigus, his wife, filed a declaration of homestead upon the property occupied by them as a home June 8, 1867. The property described in this homestead was later subdivided as the Garrigus Addition, and included the strip of land involved in this action. On April 14, 1890, F. Garrigus recorded in the office of the county recorder of Santa Clara county a map of the Garrigus Addition to the town of Santa Clara. Appended to the map, and a part of said record, is a certificate reading as follows: "I hereby certify that I am the proprietor of the tract of land shown and delineated on the map hereto attached, that said tract has been laid out and the blocks and lots numbered according to my instruction; that the attached map fully and faithfully represents said tract, its name and its subdivisions, and I hereby dedicate the streets, (roads), alleys and squares as shown on the accompanying map to the use of the public forever." At the time of the filing of the map purportedly dedicating the street to the use of the public, Avis Garrigus, the wife of F. Garrigus, was living.

On April 25, 1891, Finley Garrigus and Avis H. Garrigus, his wife, made and acknowledged a deed to J. L. Ivancovich, which was recorded April 25, 1891. In this deed the land conveyed is described by lot numbers, referring to the recorded map of the Garrigus Addition, and also by metes and bounds, and in the metes and bounds description one boundary consists of the line of that portion of Alviso street which is the subject of this action. On the 28th day of March, 1893, Finley Garrigus and Avis H. Garrigus, his wife, made and acknowledged a deed to J. and L. Ivancovich, which deed was thereafter recorded. In this deed, as in that above mentioned, the property conveyed was described by lot numbers, referring to the map of the Garrigus Addition, and also by metes and bounds; and in the metes and bounds description one boundary constitutes a boundary of that portion of Alviso street which is the subject of this action. Neither of these deeds includes within the description any part of said strip of land here involved. At various other times Finley Garrigus and Avis H. Garrigus, his wife, made and acknowledged deeds to various grantees wherein the property conveyed, as in the deeds above, is described by reference to the aforesaid map of the Garrigus Addition.

On January 11, 1915, the board of trustees of the town of Santa Clara adopted an ordinance determining and fixing the grades of streets in the town of Santa Clara, which ordinance adopted an official grade map of the streets showing the extension of Alviso street through the Garrigus Addition. On the first day of October, 1928, the board of trustees of the city of Santa Clara passed a resolution approving a diagram prepared by the city engineer in connection with the building of a water distribution system for the city of Santa Clara. On the 18th day of December, 1930, the board of trustees of the city of Santa Clara passed a resolution adopting plans and specifications and map of assessment district in connection with certain street work. The map of the assessment district so adopted shows Alviso street open its full length, including the strip of land here in question. On the 20th day of September, 1937, the board of trustees of the city of Santa Clara adopted a resolution "accepting all streets, alleys, lanes and ways within the corporate limits of the city, which have been dedicated or offered for dedication by owners."

On March 12, 1937, L. Ivancovich, also known as Luke Ivancovich, being one of

the grantees in the above mentioned deeds from Garrigus and his wife, conveyed to the respondents herein, other than L. Ivancovich, the property theretofore acquired by him in the Garrigus Addition. In this deed between respondents, the property conveyed is described both by metes and bounds, and by lot numbers and reference to the above mentioned map of the Garrigus Addition. In the metes and bounds description one boundary is described as "the northeasterly line of Alviso street." No part of the strip of land here involved is included within the description, but the property is described by reference to the map and by metes and bounds bordering upon each side of said strip of land. On the 23d day of October, 1937, Hazel Call, successor in interest of the above mentioned Finley Garrigus and Avis H. Garrigus, made a quitclaim deed of the property involved to Katherine Ivancovich, one of the respondents, which deed was recorded on the 16th day of November, 1937.

The land here involved was never assessed for either city or county taxes during the twenty-five years next preceding the trial of the case, nor was it ever returned for assessment by any party claiming ownership thereof. Nor was said strip assessed for improvements upon other streets in the neighborhood although it was within the assessment district. It is not disputed that all streets shown upon the map of the Garrigus Addition, *except that portion of Alviso street which is in dispute herein,* have been used by the public for many years, presumably from the time the first lots were sold, and that said streets have been graded and graveled by the city of Santa Clara, and water and other utilities installed therein and street lights maintained thereon. It is also undisputed that utilities have not been installed on or within the strip of land in question, which has not been graded or graveled, and *has been separated from the remaining portion of Alviso street by a fence.*

The judgment of the trial court quieting title to the strip upon the cross-complaint of Katherine Ivancovich as owner, was based in part upon the above mentioned Call quitclaim deed to the property. The question involved on this appeal is stated by appellant as follows: "When an owner of land within an incorporated city records a subdivision map of his lands, designating thereon certain streets, being extensions of existing streets, and expressly dedicates said streets to public use, and said owner and his wife thereafter join in executing deeds which describe the property conveyed by reference to said map, and also by bounding the lands conveyed on streets shown on said maps, and the streets so shown are opened and used except for a short section of one of them, and the City Council, before any revocation of the offer to dedicate, passes a resolution accepting all streets which have been dedicated or offered for dedication—is not dedication of the entire street complete?"

[1, 2] Owners must clearly and unequivocally manifest an intention of dedication. Manhattan Beach v. Cortelyou, 10 Cal. 2d 653, 76 P.2d 483. The certificate appended to the map recorded in 1890 contained express words of dedication. However, the recording of the map, or the certification alone by the husband in the present case, did not constitute a complete dedication, assuming acceptance by the city. The land shown on the map recorded in 1890 was impressed with a homestead. Avis H. Garrigus, the wife of Finley Garrigus, sometimes referred to as F. Garrigus, did not participate in the execution of the purported dedication. Cordano v. Wright, 159 Cal. 610, 115 P. 227, Ann. Cas. 1912C, 1044; San Francisco v. Grote, 120 Cal. 59, 52 P. 127, 41 L.R.A. 335, 65 Am.St.Rep. 155.

As stated, subsequent to the purported dedication without the signature of the wife, various lots were conveyed by the husband and wife to other parties, deeds for which described the land conveyed by reference to the map. In two of the deeds to respondents' predecessors in interest, the conveyances setting forth the descriptions by metes and bounds referred to Alviso street as a boundary line. Appellant contends that when owners of land convey portions thereof by deeds containing a reference to a recorded map, such map is thereby adopted as their own, and the adoption includes an irrevocable express dedication as set forth on the face of the map regardless of whether they made and recorded the map.

[3-10] In County of Inyo v. Given, 183 Cal. 415, 418, 419, 191 P. 688, 690, the court said: "Considering a dedication as a voluntary transfer of an interest in land, it partakes both of a nature

of a grant and of a gift, and is governed by the fundamental principles which control such transactions. Hence a dedication, like a contract, consists of an offer and acceptance, and it is settled law that a dedication is not binding until acceptance, proof of which must be unequivocal. 18 Cor. Jur., p. 72. The acceptance may be actual or implied. It is actual when formal acceptance is made by the proper authorities, and implied when a use has been made of the property by the public for such a length of time as will evidence an intention to accept the dedication. Elliott v. McIntosh [41 Cal.App. 763], 183 P. 692. Two things, however, are necessary to a complete dedication, an offer and acceptance. A dedication without acceptance is, in law, merely an offer to dedicate, and such offer does not impose any burdens nor confer any rights, unless there is an acceptance. The rule therefore is that acceptance on the part of the public is necessary to a valid dedication of land as a highway. 1 Elliott on Roads and Streets, § 122; 8 Rul.Cas.Law, p. 898. * * * That some confusion exists in the authorities in this state where the subject has received consideration there can be no doubt. Some of the cases confuse the doctrine of dedication with other doctrines pertinent only to private inter-relations growing out of sales. The case of San Leandro v. Le Breton, 72 Cal. 170, 13 P. 405, is of such a character. It is there held that where an owner of land lays off a town and makes a map thereof showing it to be divided into streets, alleys, and lots, and then sells lots with reference to such map, he thereby makes an irrevocable dedication of the space represented on the map as streets, to the use of the public, and that in such a case no formal acceptance is necessary by the town authorities. The rule announced in this case is mere dictum, as it appeared that there was an acceptance. The rule declared in that case is one of constructive dedication, and undoubtedly could be invoked in an action between the dedicator and his grantees. But the purchasers here, if there be any, are not complaining. * * * There is a distinction between the rights accruing to the public generally and the purchasers of lots according to a map upon an offer of dedication. Eltinge v. Santos, 171 Cal. 278, 152 P. 915 [Ann. Cas. 1917A, 1143]; People v. Reed, 81 Cal. 70, 79, 22 P. 474, 15 Am.St.Rep. 22. As before stated, so far as the public is concerned, there must be an acceptance to complete an offer of dedication." Manhattan Beach v. Cortelyou, supra; Diamond Match Co. v. Savercool, 218 Cal. 665, 24 P.2d 783; Brown v. Bachelder, 214 Cal. 753, 7 P.2d 1027; People v. Rio Nido Co., Inc., 29 Cal.App. 2d 486, 85 P.2d 461. "It is not a trivial thing to take another's land, and for this reason the courts will not lightly declare a dedication to public use." San Francisco v. Grote, supra, 120 Cal. page 62, 52 P. page 128; Manhattan Beach v. Cortelyou, supra.

[11] Conceding that the deeds to various parcels executed by the husband and wife were sufficient evidentially upon which to base a conclusion that there was an offer of dedication, the question arises, was there an acceptance? An acceptance may take place through user by the public or by formal resolution of acceptance.

[12-16] The question of actual use by the city of the particular strip in dispute may be disposed of immediately. It was never actually improved as a street. It has been enclosed by a fence, and no objection in that regard has been made by the city during a period of forty years. Appellant calls attention to the fact that the city has taken over Alviso street, south of Scott street, by user; that water mains have been installed; that the street has been graveled at public expense and is being used for public travel; that where there has been an acceptance by user of a portion of a road, there is an acceptance of the road in its entirety. The question is purely a factual one (Yuba City v. Consolidated Mausoleum Syndicate, 207 Cal. 587, 279 P. 427) to be determined by the circumstances in each case, including the extent of use of the area in length or width, and the time that may have elapsed between an offer to dedicate and acceptance, express or implied. In the present case there was no use of the strip at all and no express acceptance until 1937, a question which will be hereafter discussed. In San Francisco Sulphur Co. v. Contra Costa County, 207 Cal. 1, 276 P. 570, it was held that ordering work "done" and the actual completion thereof constituted an acceptance of an offer of dedication. In the present case no improvement of the strip for street purposes was performed. This is not a case wherein it was necessary to obtain sufficient width to install improve-

ments for a street, but a matter of the prolongation of a street. Its continuation would not result in a street beyond the strip, but simply result in a so-called blind street. The rule that the acceptance of a portion of the road is an acceptance of it in its entirety (Santa Ana v. Santa Ana Valley Irr. Co., 163 Cal. 211, 124 P. 847; Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 P. 1094) is dependent upon the facts of the case.

Appellant contends that there were many formal acceptances of the purported offer to dedicate the strip. Attention is called to an ordinance passed in 1915 adopting an official grade map, including therein Alviso street for its full length as delineated on the Garrigus map. In 1928 an official assessment district map was adopted for the purpose of levying assessments to pay for water mains; this also showed Alviso street as outlined on the Garrigus map. In 1930 another map giving to Alviso street the same length as the Garrigus map was adopted for the purpose of levying assessments to pay for street improvements. Whether there was an implied acceptance through passage of ordinances and the adoption of resolutions was a question of fact. The trial court in the findings followed to a great extent the issues raised by the pleadings. There is no direct finding that there was not a formal or implied acceptance. Appellant's contention that the resolution and ordinance constituted a formal acceptance is untenable. Whether there was an implied acceptance is a question of fact. It would appear that the city intended and prepared to accept, but the acceptance was not final. Nor does the evidence establish essential elements as set forth in San Francisco Sulphur Co. v. Contra Costa County, supra [207 Cal. 1, 276 P. 572], namely, "ordering of the work 'done' and the completion thereof". The existing facts do not require a holding as a matter of law that the purported offer was accepted, and we may not interfere with the trial court's reasonable determination of such facts.

[17] No taxes were paid on the strip. Where no taxes are assessed, the failure to make tax payments will not prevent title by adverse possession. Brown v. Bachelder, supra.

[18] Respondents or some of them were parties to a deed inter se, dated March 12, 1937, in which a boundary is given as Alviso street. The conveyance of lots with reference to a recorded map may be considered as evidence of a ratification of a former dedication. The evidence in this case does not show a completed dedication. The original purported dedication was insufficient.

[19-21] Subsequent to the last mentioned deed the Board of Trustees of appellant city adopted a resolution in which it is declared that all streets, lanes, etc., "which have been dedicated or offered for dedication by the owners thereof for the use of the public are hereby accepted and declared to be public streets".

Appellant's final argument is that this resolution, sufficient in form (City of Eureka v. Armstrong, 83 Cal. 623, 22 P. 928, 23 P. 1085), accepting dedication and offers to dedicate, was a valid and sufficient acceptance of the disputed area as a public street. Up to this period there was neither dedication, offer to dedicate, nor an acceptance, express or implied. Assuming that the evidence introduced warranted a deduction that there had been an offer to dedicate, the acceptance thereof must be within a reasonable period. "Of course, there can be no acceptance of an offer of dedication before it is made or which has never been made. * * * It is the rule that an acceptance of an offer of dedication must take place within a reasonable time after the offer was made. What constitutes a reasonable time depends, of course, upon the circumstances of each case. It has been held, however, that a delay from two to four years was not, but that a delay of nine years or longer was, unreasonable." 9 Cal. Jur., pp. 55, 56; Los Angeles City High School Dist. v. Kennard, 94 Cal. App. 450, 271 P. 342; Niles v. City of Los Angeles, 125 Cal. 572, 58 P. 190; City of Anaheim v. Langenberger, 134 Cal. 608, 66 P. 855; Inyo County v. Given, supra.

The property being impressed with a homestead, and, in filing the map, the wife having failed to join in the dedication, such attempted dedication was void. Assuming that the actions of respondents and their predecessors in interest may have given some color to the claim of ratification, the formal acceptance by the Board of Trustees of the municipality of the streets so dedicated to public use, the resolution fixing the grade of the streets, the approval of a diagram for a water system, and the creation of an assessment

district for street work, made respectively forty-seven, twenty-four, thirty-eight and forty years after the filing of the map, cannot be said to have taken place within a reasonable time after the filing of such map or the purported ratification, or a new offer to dedicate evidenced by conduct. There was never an acceptance of the disputed strip by user.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.



47 Cal.App.2d 547

HUGHES et al. v. FIRST NAT. BANK IN OAKLAND et al.

Civ. 11703.

District Court of Appeal, First District, Division 1, California.

Oct. 31, 1941.

Rehearing Denied Nov. 28, 1941.

Hearing Denied Dec. 29, 1941.

1. Trusts ⇐95

If a trust is revoked as a result of undue influence, the beneficiary may hold those who received the property gratuitously from the trustor as constructive trustees, even though such persons did not participate in the undue influence.

2. Trusts ⇐59(1)

Where gratuitous remainderman of revocable trust brought action against trustee to recover full value of trust estate on theory that no valid revocation had taken place and that trustee consented to revocation knowing that it had been procured by undue influence, action of the trustor, in treating the trust estate as her own property for five years after the removal of the undue influence and apparently exercising testamentary control over any part thereof that was left at time of her death, constituted a "ratification" of the action of the trustee in consenting to the allegedly improper revocation.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratification".

3. Trusts ⇐59(1)

A trustee owes some duty to a gratuitous remainderman of a revocable trust.

4. Trusts ⇐59(1)

In action by gratuitous remainderman of revocable trust to recover from trustee the value of trust estate on theory that no valid revocation had taken place and that trustee consented to a revocation knowing that it had been procured by undue influence, evidence sustained finding that revocation of trust was valid.

5. Appeal and error ⇐996, 1011(1)

Where evidence and reasonable inferences therefrom are in conflict, finding based thereon cannot be disturbed.

6. Trusts ⇐59(1)

Gratuitous remainderman of revocable trust could not recover from trustee the value of trust estate on theory that trustee's consent to revocation was improperly executed because neither the trust committee of trustee nor its board of directors specifically consented by resolution to the revocation, where trust officer and cashier consented to the revocation and, by formal resolution, the trustee bank had specifically authorized trust officer and cashier to transact business of the trust department.

7. Trusts ⇐59(1)

Gratuitous remainderman of revocable trust could not recover from trustee value of trust estate on theory that trustee's consent to revocation was fraudulently given and invalid because certain officers of the trustee bank kept the fact that such consent had been given from the president of the trustee, where the president's testimony that he had no knowledge of the matter was directly contradicted, since the conflict was to be resolved in favor of the trustees for whom judgment had been rendered.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Dr. Walter R. Hughes and others against the First National Bank in Oakland, as trustee, and another for the enforcement of a trust, for an accounting, and for damages for breach of trust. From an adverse judgment, plaintiffs appeal.

Affirmed.

Hearing denied; CARTER, J., dissenting.

W. S. Andrews and Harold M. Sawyer, both of San Francisco, Clifton Hildebrand and Fred J. Bills, both of Oakland, and Gladstein, Grossman, Margolis & Sawyer, of San Francisco, for appellants.

C. Leonard Rosenberg and Errol C. Gilkey, both of Oakland, for respondents.

PETERS, Presiding Justice.

Sarah R. Yoakum on February 8, 1929, created a trust in which the First National Bank of Oakland was named as trustee. The trust provided for the payment of the income to the trustor for life and upon her death the remaining trust estate was to be conveyed to her grandnephew, plaintiff Dr. Walter R. Hughes. The trust further provided that it could be revoked, altered or amended by the trustor with the consent of the trustee. In January of 1935 the life tenant, the trustor, died. In February of 1936 Dr. Hughes, and his three children, assignees of Dr. Hughes, commenced the present proceeding. The complaint alleges that the trust was created; that it is still in force and effect; that Miss Yoakum has died; that a demand has been made upon defendants (the original trustee and its successor in interest) to turn over the principal of the trust; that defendants have refused to do so. It is further alleged, on information and belief, that the defendants, in violation of the trust, have delivered a considerable portion of the trust property to persons unknown, "and that as to any such property defendant First National Bank has been guilty of fraud, implied malice, and oppression." The facts constituting the alleged fraud are not set forth. Plaintiffs ask that the trust be enforced, for an accounting, for compensatory damages for breach of trust, and for exemplary damages.

In the answer of the trustee and its successor it is admitted that the trust set forth in the complaint was created in February, 1929, but it is denied that such trust is still in full force and effect. It is alleged that on June 21, 1929, the trust, upon the demand of the trustor and with the consent of the trustee, was revoked and terminated and that thereafter the entire trust estate was delivered to the trustor. As a second defense it is alleged that on February 6, 1930, Sarah R. Yoakum obtained a judgment in the superior court of Tulare county against the plaintiff, Dr. Hughes, quieting her title to the property in the trust estate; that such judgment has become final; that such judgment determined that Dr. Hughes has no interest in the estate of Sarah R. Yoakum.

Several Does were named as fictitious defendants by plaintiffs. In due course, M. Louise Herod, individually and as special administratrix of the will of Sarah R. Yoakum, and her husband, Lester Herod, individually and as executor of the will, were substituted as defendants. These two defendants were granted a judgment of nonsuit.

The trial court found that the trust was created as alleged in the complaint; that such trust was revocable by the trustor with the consent of the trustee; that on June 21, 1929, the trust was revoked by the trustor with the consent of the trustee; and that thereafter the entire trust estate was delivered to the trustor. No findings were made on the affirmative defense of estoppel based on the Tulare judgment. Based on these findings, judgment was entered that plaintiffs take nothing by their action. From this judgment, plaintiffs prosecute this appeal.

Neither at the trial nor on this appeal do appellants challenge the fact that in June of 1929 the trustor demanded, and the trustee went through the form of consenting to, the revocation of the trust. It was the theory of the appellants on the trial, and it is their main contention on this appeal, that the uncontradicted evidence shows that the alleged revocation was secured as a result of the influence of certain designing persons by the name of Feyler, and that this fact was well-known, or should have been well-known, to the trustee. Based on these premises, it is urged that no valid revocation of the trust took place; that the trust is still in existence; that the trustee unlawfully and improperly returned the trust estate to the trustor; that the trustee is liable to the remainderman.

[1-3] Preliminarily, something should be said about the nature of the cause of action here involved. If it be assumed that the evidence introduced by appellants tended to show that in June of 1929 Miss Yoakum was under the influence of Mr. and Mrs. Feyler, and that the demand for a revocation was the result of undue influence exercised by the Feylers, and further, if it be assumed, that such evidence tended to show that the trustee gave its consent to the revocation with knowledge of such undue influence (and disregarding, for the moment, all conflicts in the evidence), nevertheless, there is something anomalous about the present cause of action. This is not an action against those persons who are alleged to have exercised the undue influence, nor against the persons who succeeded to the

trust property upon the death of Miss Yoakum. It is true that if a trust is revoked as a result of undue influence, the beneficiary may hold those who receive the property gratuitously from the trustor as constructive trustees, and this even though such persons did not participate in the undue influence. But the present action is not against those who have succeeded to the title of the trust estate. It is an action to recover from the trustee the value of the trust estate on the theory that the trustee consented to a revocation of the trust knowing that such revocation had been procured by undue influence. This action was instituted upon the death of the trustor, and some six years after the property had been returned to the trustor. If the Feylers did exercise undue influence over Miss Yoakum, the uncontradicted evidence shows that such influence terminated in December of 1929. Yet Miss Yoakum remained in complete possession and control of the trust estate for the next five years without objection by the appellants. Miss Yoakum was apparently fully satisfied with the revocation during this period and made no effort to reinstate the trust. Then she died testate, convinced, apparently, that the trust had been validly revoked. Then appellant, Dr. Hughes, a gratuitous remainderman of a revocable trust, brought this action against the trustee to recover the full value of the trust estate on the theory that no valid revocation had taken place. Certainly, if the trustee was guilty of a breach of duty, it was a duty owed primarily to the trustor who was also the life tenant, and who had reserved the power to revoke, alter, or amend the trust with the consent of the trustee. Yet Miss Yoakum, after ridding herself of the influence of the Feylers as early as December of 1929, approved the action of the trustee by keeping the property and apparently disposing of what was left of it by will. To say the least, such actions on her part constituted a ratification of the actions of the trustee in consenting to what we have assumed was an improper revocation. It must be remembered that the contract creating the trust was between Miss Yoakum and the bank, and that Dr. Hughes was simply a gratuitous beneficiary of that contract. If there was a breach of contract by the bank it would seem quite anomalous that the gratuitous beneficiary should have a cause of action where the contracting party, under the circumstances, clearly would not have such an action. No doubt the trustee owes some duty to a gratuitous remainderman of a revocable trust. But this action is not based on the theory of breach of duty (an action which would probably long since have been barred by the statute of limitations), but on the theory that the trust has never been revoked, even though the trustor after all undue influence had been removed, treated the trust estate as her own, and apparently exercised testamentary control over any left at the time of her death. The basic theory of appellants is that the consent to the revocation under the circumstances was a fraud on the rights of the beneficiary and of the trustor. But the trustor, the one primarily interested, has never complained. Under such circumstances we have grave doubts as to whether the evidence introduced by appellants, giving to it the most favorable interpretation possible, proved a cause of action against respondents.

This was not the theory upon which the trial court proceeded. It simply held that the revocation of the trust in June of 1929 was valid. On this basic question the evidence, and the reasonable inferences therefrom, is in conflict. Under such circumstances, this court, under well-settled principles, cannot interfere with the finding of the trial court.

In 1929 Sarah R. Yoakum was over seventy-five years of age. The evidence shows that for many years prior to this time she had been on most friendly terms with her grandnephew, Dr. Hughes, and his family. It is conceded that she was keen of mind and mentally competent. Sometime in 1928 she had become the owner of an orange ranch in Tulare county, and had gone there to manage the property, intending to live thereon. While living there she had as a companion a certain Miss Joy. Dr. Hughes testified that he heard reports from Miss Yoakum's then attorney, John Preston King, that Miss Yoakum was being imposed upon by Miss Joy. The then wife of the doctor visited the ranch and convinced herself that Miss Joy was an undesirable character. The next week Dr. Hughes visited Miss Yoakum, and, after some difficulty, succeeded in getting her to visit Attorney King. He convinced her that she had been imposed upon by Miss Joy, and the latter was dismissed. According to Dr. Hughes, Miss Yoakum then asked him and King how she could protect herself against designing persons. King advised her to put her property in

trust with the income payable to her for life. Miss Yoakum advised King to prepare the documents, to name Mr. S. E. Biddle, or the bank of which he was then president, respondent First National Bank of Oakland, as trustee, and to name Dr. Hughes as remainderman. Biddle was well-known to Miss Yoakum, having advised her for many years. King prepared such a trust, naming the bank as trustee, and giving the trustor power of revocation. Biddle suggested that in order to protect Miss Yoakum from designing persons there should be some limitation on the right of revocation. At his suggestion, the trust as originally drafted was amended to provide that the power of revocation should be subject to the consent of the trustee. The trust was executed, together with a will naming Dr. Hughes as legatee, and the documents delivered to the bank. Miss Yoakum then returned to her ranch. This was in February, 1929.

Sometime in 1928 Miss Yoakum had become acquainted with Mr. and Mrs. Feyler, then residents of San Francisco. Mr. Feyler worked for a carnival and Mrs. Feyler was a medium and card reader. Miss Yoakum frequently visited the Feylers. Mrs. Feyler was dead at the time of the trial, but Mr. Feyler was called as a witness by the plaintiffs. He testified that Miss Yoakum informed them about the Tulare ranch and invited them to make their home with her. The Feylers moved to the ranch in March of 1929. He testified that the arrangement was that he was to work the ranch on a 50-50 basis for Miss Yoakum; that the Feylers were to live with Miss Yoakum on the ranch; that because Miss Yoakum was short of cash he put five or six hundred dollars of his own money into the ranch. Also living with Miss Yoakum at this time, as companion, was a Mrs. Vermillion. The Feylers admittedly started a campaign to get rid of Mrs. Vermillion. He testified that this was done because Miss Yoakum was paying Mrs. Vermillion too much, and Mrs. Feyler could perform the services rendered by Mrs. Vermillion. In a short time Mrs. Vermillion was discharged. Feyler testified very frankly that when they discovered that Miss Yoakum's money was tied up in a trust they commenced a program to induce her to revoke the trust. Whether this was done with an improper motive, and whether Miss Yoakum was improperly influenced to revoke the trust, is one of the vital issues in the case. Feyler testified that the house on the ranch was in very poor condition and not at all suitable for Miss Yoakum; that Miss Yoakum needed more cash than the income of the trust to properly operate the ranch. He also testified that neither he nor Mrs. Feyler ever conspired to get Miss Yoakum's money for themselves, or to deprive her of her property; that it was always their belief that the property should go to Dr. Hughes upon the death of Miss Yoakum, but that they felt that Dr. Hughes had succeeded in getting the property tied up in trust and that this was not fair to Miss Yoakum. There is not one word of evidence that the Feylers ever received any of the property from Miss Yoakum. Miss Yoakum was undoubtedly short of cash. Pursuant to their plan to get Miss Yoakum to revoke the trust, Mrs. Feyler took over all of the financial affairs of the ranch, writing all of the checks, and nearly all correspondence, Miss Yoakum merely signing documents presented to her. The Feylers undermined Dr. Hughes by telling Miss Yoakum that the doctor had induced her to tie up her property in a trust, and thus deprived her of her own property. Miss Yoakum had purchased a Stutz automobile from Dr. Hughes and undoubtedly the Feylers fostered the idea that Miss Yoakum had been defrauded in the deal. Mrs. Feyler wrote various "spirit" letters to Miss Yoakum and one to Dr. Hughes in furtherance of her plan to break the trust.

About a week after the Feylers arrived at the ranch, under date of March 30, 1929, Miss Yoakum wrote to the bank demanding the return of her will. This letter was in the handwriting of Miss Yoakum and was signed by her. The bank did not immediately comply. Under date of April 9, 1929, Miss Yoakum wrote to the trust officer of the bank demanding the return of the will. This letter, in addition, stated that she was dissatisfied with the Stutz and felt that Dr. Hughes had defrauded her. Clark notified Dr. Hughes of the receipt of this letter, and Dr. Hughes sent his wife to see Mr. Clark. She showed him the "spirit" letters, and specimens of Mrs. Feyler's handwriting which she had procured. She testified that she showed these documents to Mr. Clark of the trust department of the bank and gave him other information about the activities of the Feylers. The bank, upon the advice of its counsel, Mr. Eliassen, returned the will to Miss Yoakum.

There can be no doubt that during this period Miss Yoakum was short of the cash

necessary to operate the ranch. She finally retained the legal firm of Dorsey and Campbell of Bakersfield, and requested them to prepare the proper documents so that she could revoke the trust. They communicated with the bank, and finally tendered a formal revocation of the trust signed by Miss Yoakum. Mr. Dorsey, about June 21, 1929, came to Oakland and personally delivered the request for a revocation to the bank. Dr. Hughes testified that Clark telephoned him and told him about the request and promised him the bank would not consent to a revocation. Dr. Hughes' then wife testified that Clark, Richardson, Eliassen and Biddle had, on several occasions, promised her that the bank would not consent to a revocation. Clark, Richardson and Eliassen denied making such promises.

Various letters passed between the bank and Dorsey. Finally, under date of June 29, 1929, Eliassen wrote Dorsey that the bank would give its consent to the revocation if the bank were properly indemnified. Thereafter, a suitable indemnification agreement was executed, and consent to the revocation given by the bank. The first such consent was signed by Clark, the trust officer who had signed the declaration of trust on behalf of the bank, and is dated June 21, 1929. When it was delivered to Miss Yoakum or to her attorneys does not appear. On August 15, 1929, a formal consent to the revocation was signed by F. B. Richardson as vice-president of the bank, and by Clark as trust officer. Eliassen testified that when he had discovered that Miss Yoakum had independent competent legal advice, and had been assured by her counsel that she was mentally competent, he agreed to the revocation.

Biddle, who has since severed his relationship with the bank, testified he never was consulted about the consent to the revocation and knew nothing about it, and would not have consented to it had he known about it. In this regard he was directly contradicted by Eliassen, Richardson and Clark. Clark testified that Biddle knew of the revocation and directed him to sign the consent thereto. Richardson testified to the same effect. Eliassen testified he discussed the matter only with Richardson and Clark and not with Biddle because the latter was angry at Mrs. Hughes and referred to her as a "pest", and had stated that he wanted nothing more to do with the trust.

About the middle of September, 1929, Miss Yoakum, through Dorsey and Campbell, commenced a quiet title action in Tulare county naming Dr. Hughes and the bank as defendants. Biddle, as president of the bank, signed a disclaimer. Dr. Hughes appeared in that action and was represented by Attorney King, who had drawn the trust. Dr. Hughes was present at the trial. The trial court quieted Miss Yoakum's title as against any claims of the bank or of Dr. Hughes. This decree was entered in February of 1930. After this decree became final all of the trust property was returned by the bank to Miss Yoakum. Neither Miss Yoakum, during her lifetime, nor her representatives, since her death, have complained concerning the actions of the bank.

One other matter should be mentioned. The record shows that in December of 1929 the Feylers and Miss Yoakum parted company. In that month Feyler and his wife were forced to leave the ranch and later he sued Miss Yoakum. It is perfectly clear that whatever influence the Feylers had upon Miss Yoakum terminated at this time.

Miss Yoakum remained in full possession and control of her estate until her death in January of 1935. The value of her estate does not appear. In February of 1936 this action was instituted.

[4, 5] Under this state of facts it must be apparent that there is evidence in the record to support the finding of the trial court that there was a valid revocation. While there is evidence that would have supported a finding that the revocation was the result of the undue influence of the Feylers, and that the bank knew, or should have known this fact, there is also evidence to the contrary. There is evidence that Miss Yoakum needed cash badly and that she had independent and competent legal advice on the matter. While it is true that the bank did not investigate the situation in detail, they knew that Miss Yoakum had competent counsel and that such counsel had informed its officers that Miss Yoakum was competent, and was not acting under the undue influence of any person. The case is simply one where the evidence and reasonable inferences therefrom are in conflict. Under such circumstances, the finding cannot be disturbed.

[6] The appellants argue at length that the consent to the revocation was improperly executed and was not the corporate act of the bank. The point is made that neither the trust committee of the bank nor its board of directors specifically consented by resolution to the revocation. It is urged

that Mr. Clark, the trust officer, and Mr. Richardson, cashier and vice-president, had no legal authority to consent to the revocation. Clark had signed the original declaration of trust on behalf of the bank. There is no evidence that the board of directors specifically authorized him to do so. If only the board could consent to a revocation, then only the board could consent to accepting the trust. If appellants are correct in their contention the trust would be invalid from its inception.

The complete answer to this contention of appellants is that in 1927, by formal resolution, the bank had specifically authorized Richardson and Clark to transact the business of the trust department. The consent to the revocation was part of the regular business of that department and well-within Clark's and Richardson's express authority.

[7] The contention is made that the consent was fraudulently given, therefore invalid, in that Clark, Richardson and Eliassen kept the fact that such consent had been given from Biddle, the president. His testimony that he had no knowledge of the matter was directly contradicted by Richardson, Clark and Eliassen. This conflict must be resolved in favor of respondents.

The other contentions of appellants are too unsubstantial to require comment.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concurred.



47 Cal.App.2d 542

PEOPLE v. SCHUNKE et al.

Cr. 3478.

District Court of Appeal, Second District, Division 2, California.

Oct. 30, 1941.

Hearing Denied Nov. 27, 1941.

1. Criminal law ⇐1172(1)

In prosecution under indictment charging robbery and violation of dangerous weapons control law, and charging accused with being habitual criminal, wherein accused pleaded not guilty and admitted prior convictions, there was no prejudicial error committed when clerk read to jury charges contained in counts charging violation of dangerous weapons control law, in which it was set forth that accused had previously been convicted of specific felonies named in such counts. Gen.Laws 1937, Act 1970; Pen. Code, § 1025.

2. Criminal law ⇐1202(4)

Penal Code provisions that in case defendant pleads not guilty and answers that he suffered previous conviction with which he is charged, charge of previous conviction must not be read to the jury or alluded to on trial, refer exclusively to cases in which previous convictions are alleged for purpose of enabling court to impose greater punishment, and have no reference to cases in which a prior conviction is an essential element of the offense for which the accused is on trial. Pen.Code, § 1025.

3. Robbery ⇐24(1)

Evidence sustained conviction for robbery.

4. Criminal law ⇐1144(13)

In passing on contention that evidence is insufficient to sustain a conviction, the reviewing court must assume in favor of the verdict the existence of every fact which jury could have reasonably deduced from the evidence and then determine whether such facts are sufficient to support the verdict.

5. Criminal law ⇐1159(2)

If circumstances reasonably justify conviction of accused, verdict must not be disturbed because it could be argued that the circumstances also could be reasonably reconciled with the innocence of the accused.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Verne John Schunke and another were convicted of robbery, and they appeal.

Affirmed.

Robert E. O'Neill, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendants were charged in count I of the information with the crime of robbery, in that they forcibly took from the person of Otto E. Sporrer the sum of $893 in cash and checks. In count II

of the information defendant Nickel was charged with the violation of the Dangerous Weapons Control Law of 1923, as amended, Gen.Laws 1937, Act 1970, in that he had in his possession a sawed off shot gun, he having theretofore been duly convicted of the crime of forgery on January 19, 1931, in the superior court of Los Angeles county. In count III defendant Schunke was accused of the violation of the Dangerous Weapons Control Law of 1923, as amended, in that he had in his possession an automatic pistol, he having theretofore been convicted of the crimes of robbery and burglary on March 30, 1934, in the superior court of Los Angeles county.

It was also charged that defendant Nickel had previously been convicted of the crime of burglary in the state of Texas on March 15, 1927, and of the crimes of forgery and robbery on January 12, 1931, in the superior court of Los Angeles county. It was also charged that defendant Schunke had previously been convicted of the violation of the Dyer Act in the state of Utah on May 10, 1929, and of the crime of burglary in the state of North Dakota on July 5, 1932, and of the crime of robbery on December 18, 1934, in the superior court of Los Angeles county. Both defendants admitted the prior convictions charged in the information. The jury found both defendants guilty of robbery, the charge contained in count I. Defendant Schunke was found not guilty on count III. The jury failed to agree on count II and this count was dismissed. Both defendants were sentenced to the state penitentiary and were declared to be habitual criminals. Both defendants have appealed from the judgments and from the order denying a new trial.

[1, 2] It is now contended that prejudicial error was committed when the clerk read to the jury the charges contained in counts II and III, in which possession of dangerous weapons was charged against defendants and in which it was set forth that they had previously been convicted of the specific felonies mentioned in the two counts. As required by section 1025 of the Penal Code, the clerk refrained from reading to the jury that part of the information which contained allegations of previous convictions of the felonies which had been admitted by defendants. Defendants were on trial, not only on count I but also on counts II and III. Each of these counts contained two essential elements, the previous conviction of a felony and the possession of a dangerous weapon. It was necessary for the prosecution to establish both of these elements and it was also necessary for the jury to be informed of the issues which they were obligated to pass upon. The provisions of section 1025 were complied with when the clerk refrained from reading the allegations concerning the previous convictions which had been admitted. These provisions refer exclusively to cases in which previous convictions are alleged for the purpose of enabling the court to impose a greater punishment. They have no reference to cases in which the prior conviction is an essential element of the offense for which the accused is on trial. People v. Oppenheimer, 156 Cal. 733, 106 P. 74. We see no error in the conduct of the clerk in reading the information.

Defendant Schunke contends that the evidence is insufficient to justify his conviction and asserts that the evidence of his identification as a participant in the crimes is unsatisfactory. We find in the record, however, much evidence pointing to Schunke's guilt in addition to the testimony of the witnesses who observed the commission of the robbery.

[3] In the evening of February 16, 1941, Reverend Otto Sporrer and three other priests were dining in the parish house in Santa Monica, having several persons as their guests. As they were all seated two robbers entered the room, placed a shot gun at the back of Reverend Sporrer and compelled him to open the safe. Defendant Nickel wore no mask and was easily identified. While defendant Nickel compelled Reverend Sporrer to open the safe defendant Schunke kept the others in the dining room covered with an automatic revolver which he held in his right hand. His left hand remained concealed in his pocket and one of the witnesses testified that, "when he backed through the kitchen he used his elbow to feel out the doorway, bumping into it slightly." It was stipulated that defendant Schunke's left hand was deformed and the jury was given an opportunity to examine it. At the time of the robbery the upper part of his face was covered by a cloth. Witnesses who had been present at the robbery testified that the robber with defendant Nickel wore a dark

overcoat; that Schunke was "similar in appearance" to the robber; and that "his height, the slope of his forehead and his general body build are about the main things that resemble the man who accompanied Mr. Nickel."

Betty Strack testified that in the afternoon of the day of the robbery she went with Schunke to the residence of Nickel; that Nickel came out and had a conversation with Schunke at the car; that Schunke then told Nickel that they should go and "shoot craps" for awhile; that Schunke then took the witness to a theater and Nickel followed in his car; that Schunke gave the witness the keys to his car, leaving her at the theater and driving away with Nickel; that before leaving her he said that if he won anything at craps he would buy her a dress; that when he returned at about 7 o'clock p. m. he told her he had made between $60 and $70 and could buy her two dresses; that during this time Schunke wore a "brownish green" overcoat. It was also shown in evidence that the day following the robbery defendant Shunke bought an automobile and paid over $200 in cash for it. When questioned by the officers Schunke denied that he was acquainted with defendant Nickel or that he had ever heard of him. Defendant Schunke was not sworn as a witness in his own defense.

[4, 5] The rule to be followed by an appellate court in passing upon the contention that the evidence is insufficient to justify the conviction is well established. We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence and then determine whether such facts are sufficient to support the verdict. If the circumstances reasonably justify the verdict, it must not be disturbed because it could be argued that the circumstances also could be reasonably reconciled with the innocence of the accused. People v. Newland, 15 Cal. 2d 678, 104 P.2d 778. When the circumstances established are measured by this rule, it cannot be held that the verdict of the jury is lacking in evidentiary support.

The judgments and the order denying a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concurred.

YORK v. BECK et al.

BECK v. TAGGART.

Civ. 11868.

District Court of Appeal, First District, Division 2, California.

Oct. 24, 1941.

Hearing Granted Dec. 22, 1941.

1. Partnership ⇐53

Conflicting evidence which contained clear, direct, and positive showing of creation, continuance, and nature of a partnership relation, sustained finding that a partnership relation had been created between decedent and person claiming to be surviving partner.

2. Appeal and error ⇐1010(1)

Trial judge's finding regarding existence of partnership cannot be disturbed by court of review where there is substantial evidence supporting finding of existence of partnership.

3. Partnership ⇐258(8), 328(3)

Evidence that partnership was formed in 1914, and that thereafter deceased partner had no individual funds and possessed only partnership moneys, showed that loan made by deceased partner after 1914 was with funds belonging to partnership as regards surviving partner's right to recover money loaned from deceased partner's estate or from borrower. Probate Code, § 571.

4. Partnership ⇐69

A partner cannot by making a loan of partnership funds divest copartner of his interest in the funds.

5. Partnership ⇐258(8)

Evidence sustained finding that surviving partner had no knowledge of and did not consent to transfer of partnership funds by deceased, and hence was not precluded from recovering from borrower such funds which were loaned or given by deceased partner. Probate Code, § 571.

6. Partnership ⇐258(2)

A surviving partner may enforce his right to possession of partnership assets transferred by deceased partner without surviving partner's knowledge or consent. Probate Code, § 571.

7. Judgment ⇐252(2)

Where defendant had filed an answer in surviving partner's action to obtain possession of partnership assets, trial court was

authorized to grant each party any relief consistent with case made by complaint and embraced within the issue, notwithstanding relief granted varied from relief asked in the prayer of complaint. Code Civ.Proc. § 580.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by Augustus York against Gretchen Beck, administratrix of the estate of Sophie Miller, deceased, and another, to recover property in possession of the administratrix, and an action by Gretchen Beck, administratrix of the estate of Sophie Miller, deceased, against Jean Taggart, to recover on a note. From adverse judgments the defendants in first-mentioned action and the plaintiff in the last-mentioned action appeal.

Affirmed.

Hearing granted; HOUSER, J., not participating.

Stewart G. Manson, of San Francisco (Letitia Farber, of San Francisco, of counsel), for appellant Gretchen Beck, etc.

W. L. A. Calder, of San Francisco, for respondent Taggart.

George K. Ford and Simpson Finnell, Jr., both of San Francisco, for respondent York.

STURTEVANT, Justice.

Sophie Miller died leaving an estate consisting of real and personal property. Thereafter the plaintiff, Gretchen Beck, was appointed administratrix of said estate. One of the assets which came into her possession was a promissory note in the sum of $10,000 payable to decedent, which had been executed by Jean Taggart, one of the defendants. As such administratrix, Gretchen Beck commenced action No. 285,050 to recover the amount due on said note. The defendant Jean Taggart appeared and answered. In said answer she inserted numerous denials and then she inserted affirmative allegations to the effect that by the terms of the contract between Sophie Miller and herself, the said note for $10,000 became discharged upon the death of said decedent.

Shortly before the above-mentioned action was commenced, Augustus York commenced an action, No. 283,762, against Gretchen Beck, as administratrix of the estate of Sophie Miller, deceased, and Jean Taggart. In his complaint he alleged that in 1914 he and Sophie Miller formed a copartnership which continued down to the date of her death on February 5, 1938; that Gretchen Beck was appointed administratrix of the estate of said decedent; that later she qualified and is now acting as administratrix; that at the time of the death of Sophie Miller said copartnership owned numerous items of real and personal property which he enumerated; that after her appointment as administratrix Gretchen Beck took possession of all of said properties, including the above-mentioned promissory note, and claims to hold said properties as administratrix; that the value of the said copartnership property is $25,000; that the plaintiff Augustus York is the surviving partner of said copartnership and is entitled to the possession of all of its property. The complaint was answered by both defendants.

After the two actions were at issue the trial court, acting on the stipulation of the parties, consolidated said actions for the purposes of trial. Later both actions were tried before the court sitting without a jury. After the trial the court made findings of fact in favor of Augustus York. From the judgment entered thereon the defendant Jean Taggart and the plaintiff Gretchen Beck, as administratrix of the estate of Sophie Miller, have appealed.

The findings of fact and conclusions of law were as follows:

"Findings of Fact

"I. That in or about the year 1914, plaintiff and Sophie Miller entered into and formed a copartnership for the purpose of acquiring real and personal property and dealing with the same, their joint earnings contributing thereto; each partner having an equal interest in and to said copartnership assets and profits; that said copartnership continued until the 5th day of February, 1938, when the said Sophie Miller died.

"II. That thereafter such proceedings were had and taken in the matter of the estate of Sophie Miller, deceased, in the Superior Court of the State of California, in and for the County of San Mateo, that the defendant, Gretchen Beck, was appointed the administratrix of said estate of said Sophie Miller, deceased, and thereafter duly qualified as said administratrix and ever since has been and is

now the duly appointed, qualified and acting administratrix of the estate of Sophie Miller, deceased.

"III. That at the time of the death of said Sophie Miller, there was owned and possessed by said copartnership and of record in the name of said Sophie Miller, the following described property free and clear of all liens and incumbrances, towit: (Enumerating the items of real and personal property mentioned) that said Gretchen Beck, as administratrix of the estate of said Sophie Miller, deceased, as aforesaid, at the death of said Sophie Miller, obtained and possessed all of said copartnership property and ever since has been and now is in possession of the same.

"IV. That said Sophie Miller during her lifetime made a gift of the sum of Ten Thousand ($10,000.00) Dollars, belonging to said copartnership to the defendant, Jean Taggart, without the knowledge and consent of plaintiff, the said copartner; that in consideration thereof the said Jean Taggart executed and delivered to said Sophie Miller her promissory note in the sum of Ten Thousand ($10,000.00) Dollars, and interest at the rate of six per cent (6%) per annum payable monthly; that it was agreed by and between said Sophie Miller and the said defendant, Jean Taggart, on the execution of said promissory note, that said Jean Taggart was obligated to pay the interest on said note to said Sophie Miller up to the time of the death of said Sophie Miller, whereupon the liability of said defendant, Jean Taggart to pay said promissory note ceased as to the one-half interest of said Sophie Miller therein.

"V. That plaintiff as the surviving partner of said copartnership is entitled to recover of and from the said Gretchen Beck, the administratrix of the estate of said Sophie Miller, deceased, all of said copartnership property and after an adjustment and settlement of the affairs of said copartnership, to account to the administratrix of the estate of said Sophie Miller, deceased, for whatever interest is due her from said copartnership, and deducting from said interest the sum of Five Thousand ($5,000.00) Dollars, together with interest at the rate of six per cent (6%) per annum from February 5, 1938, the subject of a gift as aforesaid from Sophie Miller to Jean Taggart and if the copartnership interest of said Sophie Miller is less than Five Thousand ($5,000.00) Dollars, then and in that event plaintiff shall have judgment against said Jean Taggart for the deficiency.

"Conclusions of Law

"That plaintiff is the surviving partner of a copartnership of plaintiff and Sophie Miller, deceased, and as such surviving partner is entitled to a judgment against the defendant, Gretchen Beck, administratrix of the estate of Sophie Miller, deceased, for the recovery of the possession of the copartnership property described in Paragraph III of the Findings herein, together with all interest, profits, dividends and income derived by said administratrix from said copartnership property or the value of the personal property in case a delivery cannot be had.

"That after the adjustment and settlement of the copartnership affairs by plaintiff he shall account to the said administratrix of the estate of said Sophie Miller, deceased, her interest therein after deducting therefrom the sum of Five Thousand ($5,000.00) Dollars, together with interest at the rate of six per cent (6%) per annum from February 5, 1938, the subject of the gift from said Sophie Miller to said Jean Taggart, and if there is less than Five Thousand ($5,000.00) Dollars, belonging to said Sophie Miller as her said copartnership interest, then plaintiff shall have judgment against said Jean Taggart for the deficiency."

Appeal of Gretchen Beck as Administratrix

[1, 2] In her briefs the administratrix does not set forth any statement of error on the part of the trial court. But we infer, and acting on that inference, in what follows, we will assume that she is complaining of some of the findings and in particular of the finding (1) that a partnership relation was created between the decedent and Augustus York and that (2) the said promissory note was executed in consideration of the loan of $10,000 of the partnership funds by the decedent to Jean Taggart. Such attacks are not supported by the record. Conceding that there was some conflict in the evidence, nevertheless there was clear, direct, and positive evidence of the creation, continuance, and nature of a partnership relation between the decedent and Augustus York. The findings thereon may not be disturbed by a court of review. Lyon v. MacQuarrie, Cal.App., 115 P.2d 594.

[3, 4] That the decedent made the loan of $10,000 to Jean Taggart, and the terms of the loan were shown by written instruments which directly support the findings. That the said funds belonged to the partnership necessarily follows as a conclusion from other facts. The partnership was formed in 1914. There was evidence that after that date the decedent had no individual funds and that she possessed only partnership moneys. The decedent could not by making the loan divest her copartner of his interest in the fund. Simmons v. Rowe, 4 Cal.App. 752, 759, 89 P. 621. And, in substance, such was the holding of the trial court.

Appeal of Jean Taggart

[5] The defendant Jean Taggart contends the finding that the fund of $10,000 was the property of the alleged copartnership is not supported by the evidence. We have shown above it was supported. Continuing, this defendant asserts that the finding that the decedent "made a gift of the sum of $10,000 belonging to the said copartnership to the defendant Jean Taggart without the knowledge and consent of the plaintiff, the said copartner; * * *" was not supported by the evidence. That assertion is likewise unfounded. As to the knowledge Augustus York had of and concerning said loan the evidence was conflicting, but there was no evidence that he ever knew the decedent gave, or that he ever authorized the decedent to give, or attempt to give, to the defendant any part or portion of his interest in the partnership funds.

[6] The defendant argues that it should have been established that, when she executed the contract in suit, she knew the money did not belong to the decedent but belonged to the partnership consisting of the decedent and Augustus York. She cites and relies on Babcock v. Standish, 53 N.J.Eq. 376, 33 A. 385, 30 L.R.A. 604, 51 Am.St.Rep. 633. That case involved the act of one partner paying his personal debt with partnership funds. It is not claimed in the instant case that the decedent did such a thing. This plaintiff is suing as the surviving partner to enforce his rights to the possession of the partnership assets. He has the clear right to do so. 20 Cal.Jur. 807, "Partnership", sec. 105; Prob. Code, sec. 571; Gray v. Palmer, 9 Cal. 616, 636, 637.

[7] The defendant complains because the relief granted by the judgment varied from the relief asked in the prayer of the plaintiff's complaint. However, as the defendant had filed an answer the trial court was authorized to grant each party any relief consistent with the case made by the complaint and embraced within the issue. Code Civ. Proc., sec. 580.

We find no error in the record. The judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



47 Cal.App.2d 481

DIECKMANN v. SIGNORINI et al.

Civ. 11627.

District Court of Appeal, First District, Division 1, California.

Oct. 25, 1941.

Rehearing Denied Nov. 24, 1941.

Hearing Denied Dec. 22, 1941.

1. Automobiles ⇐169

"Reasonable safety" within statute prohibiting drivers from turning vehicles unless such movement may be made with reasonable safety imports taking advantage of all facilities with which vehicle is provided for safe use, including a rear vision mirror if one is installed. Vehicle Code, § 544, St. 1935, p. 185.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable Safety".

2. Automobiles ⇐150

The installation of a mirror in an automobile is not a statutory requirement but if available, failure to use it may be negligence, depending upon circumstances with which driver is confronted. Vehicle Code, § 544, St.1935, p. 185.

3. Trial ⇐165

On motion for nonsuit, plaintiff's testimony must be assumed to be true.

4. Automobiles ⇐245(81)

In action for injuries to motorist who in making left turn at highway intersection was struck by overtaking automobile passing to his left, contributory negligence of motor-

ist who glanced into rear vision mirror some 360 feet from intersection and did not again look into mirror was for jury. Vehicle Code, §§ 540, 544, St.1935, pp. 184, 185.

5. Automobiles ⇐245(81)

In action for injuries to motorist who in making left turn at highway intersection was struck by overtaking automobile passing to his left, whether motorist continued to give the left turn signal until he reached proper turning point was for jury. Vehicle Code, §§ 540, 544, St.1935, pp. 184, 185.

6. Automobiles ⇐245(90)

Whether violation of statute by motorist making left turn at highway intersection in slightly cutting the corner in commencing to turn before reaching center of intersection constituted proximate cause of collision with overtaking automobile or a contributing proximate cause was for jury. Vehicle Code, §§ 540, 544, St.1935, pp. 184, 185.

7. Automobiles ⇐245(60)

Whether motorist's violation of statute in attempting to pass another automobile at intersection was proximate cause of collision was for jury. Vehicle Code, § 530, St. 1939, p. 2198.

8. Negligence ⇐121(5)

Negligence per se is subject to proof that claimed negligence must proximately cause or contribute to the injury.

9. Trial ⇐165

When evidence is substantially without conflict and different inferences may reasonably be drawn therefrom, deducible inferences unfavorable to person making motion for nonsuit must be adopted in passing upon such motion.

10. Negligence ⇐136(26)

Ordinarily the subject of plaintiff's contributory negligence is a matter of fact for jury.

Appeal from a judgment of the Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Harold F. Dieckmann against Angelo Signorini and others to recover for injuries sustained in an automobile collision. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Gregory P. Maushart, of Los Banos, for appellant.

Rodgers, Wollitz & Carmody and George C. Carmody, all of Martinez, for respondents.

WARD, Justice.

This is an appeal from a judgment of nonsuit granted defendants in an action for personal injuries suffered by plaintiff as the result of an automobile collision. The judgment was granted on the ground that plaintiff was guilty of contributory negligence as a matter of law.

The scene of the accident was on a main highway in Contra Costa county known as the Marsh Creek-Clayton road, which runs in a general easterly and westerly direction from Clayton on the east to Concord on the west. Treat Lane, sometimes called the Walnut Creek road, is also a highway and intersects the Clayton road at approximately right angles from the south, terminating at the southerly boundary thereof. On the north, and to the west of the intersection 400 feet, is a school house and yard. To the east of the intersection about 185 feet is a sign "School Zone"; and still further to the east, about 360 feet from the intersection, is another sign bearing the words "Side Road".

On the afternoon of the accident plaintiff left the town of Clayton and drove westward on the Marsh Creek-Clayton road intending to turn left at Treat Lane. The weather was clear and the road dry. As he approached the sign "Side Road", he looked into his rear vision mirror. In response to a question, "You didn't look again before you made the turn?", appellant answered: "I looked ahead and into the Treat Lane." When he reached this sign, anticipating turning left at Treat Lane, he decreased his speed from forty or forty-five miles an hour to approximately twenty-five miles. He testified that some time after he passed the next sign "School Zone", he decreased his speed to about fifteen miles an hour, testifying further in this regard: "I put out my hand some time after I had passed the School Zone sign. I couldn't say exactly when, up until the time that I had intended to turn, because I couldn't very well make a left-hand turn with my right hand and I brought my hand in at that time." Respondent Angelo Signorini, who had been driving behind him, noticing the decreased speed of appellant's car, decided to pass him, on the left. For this purpose, just before reaching the intersection, and with-

in twenty feet thereof, he honked his horn and accelerated his speed, coming into collision with appellant's car which was negotiating the left-hand turn into Treat Lane. Appellant testified that he did not see respondent's car until he, appellant, in anticipation of his turn to the left, crossed from the right to the left side of the road; that respondent "was behind me and partly in the left lane". He testified as to seeing respondent's car: "It was just a glimpse and the accident happened immediately." Following the accident the cars came to rest in a vineyard about 100 feet west and to the north of the point of collision. Appellant testified that "there were marks in the form of an arc that went into the vineyard and into the walnut tree"; that they commenced "at the white line, about 20 feet back or 25 feet back from the intersection"; that from a "gouge" mark in the pavement "practically at the property line of Treat Avenue if it were extended * * * right at the intersection line" * * * the impact occurred when "my car * * * was three feet five inches over [to the left of] the white line".

For the sole purpose of considering this appeal it may be conceded that the respondent was negligent. Vehicle Code, § 530, St.1939, p. 2198. A jury might have been justified in determining that appellant failed to further avail himself of the use of the rear vision mirror, or that his left-hand signal had been insufficiently given, or that his turn into Treat Lane had been started prior to reaching the proper point in the intersection; that one or more of such acts, or failure to act, constituted negligence, which in fact was the proximate cause, or a proximate contributory cause of the accident. In Bauer v. Davis, 43 Cal.App.2d 764, 111 P.2d 715, considering the actions of an appellant defendant, the court said 43 Cal.App.2d 764, 111 P.2d page 718: "Performing the requirement of giving the appropriate hand signal does not necessarily relieve a driver of the duty to also make proper observations. As is often the case, the driver of a car preceding another may suddenly give a hand signal and turn his car quickly to the right or left without observing traffic to the rear. Such action certainly constitutes negligence, and the hand signal cannot be deemed to have been sufficient warning." The court also said: "Contributory negligence and the determination as to whether a plaintiff has by his conduct proximately contributed to his own injuries, like the question of negligence upon the part of a defendant, is ordinarily a question of fact for the jury. Conduct of a plaintiff, even though admittedly careless in some respect, does not necessarily constitute contributory negligence as a matter of law."

[1-5] Drivers are not permitted to turn vehicles unless such movement may be made "with reasonable safety" Vehicle Code, § 544, St.1935, p. 185. A "signal of intention to turn right or left shall be given continuously during the last fifty feet traveled by the vehicle before turning". Vehicle Code, § 544. The approach for a left turn "shall be made in that portion of the right half of the roadway nearest the center line thereof and the left turn shall be made by passing immediately to the right of the center of the intersection before turning * * *. Vehicle Code, § 540, St.1935, p. 184. Needless to say, "reasonable safety" imports taking advantage of all facilities with which the vehicle is provided for its safe use, including a rear vision mirror if one is installed. The installation of a mirror in a vehicle such as appellant operated is not a statutory requirement, but if available, failure to use it may be negligence, depending upon the circumstances with which the driver of the vehicle is confronted. Appellant testified that when he glanced into the mirror some 360 feet from Treat avenue, respondent was not in his line of vision. If this testimony is true—and we must so assume on a motion for nonsuit —it is possible that a jury would determine it was not necessary on this straight road that appellant before he reached Treat Lane should have again resorted to the mirror. A construction might well be placed upon appellant's testimony that he continued to give the left turn signal until he reached the proper turning point.

[6, 7] It appears that appellant commenced to turn before reaching the center of the intersection as required by the code; there was not a marked, but rather slight, cutting of the corner. We may assume that in this respect he was violating the statute, but whether such violation was the proximate cause of the accident or a contributing proximate cause, or whether respondent's violation of the law in attempting to pass at an intersection a vehicle

going in the same direction, was the proximate cause of the accident, are questions of fact to be passed upon by the jury.

[8,9] In reaching the conclusion that the judgment on the nonsuit should be reversed, we have borne in mind that negligence per se is subject to proof that the claimed negligence must proximately cause or contribute to the injury. Dewhirst v. Leopold, 194 Cal. 424, 229 P. 30; Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675; Ingram v. Wessendorf, 14 Cal.App.2d 16, 57 P.2d 989; Morehead v. Roehm, 118 Cal.App. 312, 4 P.2d 995; Summers v. Dominguez, 29 Cal.App. 2d 308, 84 P.2d 237; Mora v. Favilla, 186 Cal. 199, 199 P. 17; Flores v. Fitzgerald, 204 Cal. 374, 268 P. 369; Scalf v. Eicher, 11 Cal.App.2d 44, 53 P.2d 368. We have adhered strictly to the rule that when the evidence is substantially without conflict, as in the present case, and different inferences may reasonably be drawn therefrom, the deducible inferences unfavorable to the moving party must be adopted in passing upon the motion. Mitchell Camera Corp. v. Fox Film Corp., 8 Cal.2d 192, 64 P.2d 946; Barnett v. La Mesa Post No. 282, 15 Cal.2d 191, 99 P.2d 650; Gish v. Los Angeles Ry. Corp., 13 Cal.2d 570, 90 P.2d 792; Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25; Gomez v. Lindberg, 11 Cal.App.2d 730, 54 P.2d 1153; Bate v. Los Angeles Ry. Corp., 30 Cal.App.2d 604, 86 P.2d 856; Blesser v. Thomas Haverty Co., 3 Cal.App.2d 199, 38 P.2d 873; National Auto Ins. Co. v. Cunningham, 41 Cal.App.2d 828, 107 P.2d 643; Martin v. Fox W. C. Theatres Corp., 41 Cal.App. 925, 108 P.2d 29.

[10] Respondent does not question the fact that ordinarily the subject of plaintiff's contributory negligence is a matter of fact for the jury, but claims that plaintiff did not make the left turn in accordance with statutory provision and that he failed "to look at all". Respondent is mistaken on the claim of failing to look. The record shows that appellant looked into the rear vision mirror at a point some distance from the intersection. Without stating our views as to whether appellant acted as a reasonably prudent person would have acted under the circumstances, still the question is not one for this court or the trial court to pass upon, but wholly a question of fact for the jury. Respondent cites cases which are not in point or may be readily differentiated. In Peel v. California Belting Co., Inc., 108 Cal.App. 93, 96, 291 P. 219, 220, the court said: "Appellant's difficulty is that he never looked to his left at any time * * *." In Solko v. Jones, 117 Cal. App. 372, 3 P.2d 1028, plaintiff's actions savored of gross negligence. At page 378 of 117 Cal.App., at page 1031 of 3 P.2d the court said: "Upon analysis, appellant's argument in this behalf is to the effect that it was easier and more direct to make the crossing direct than it was to make it in compliance with the statute. * * * The turning of his automobile, as he did, directly and suddenly across the street immediately in front of defendant's on-coming automobile, was an act of rashness, which even in the absence of the statute constituted gross negligence and an utter disregard for the safety of himself, the plaintiff, or the defendant." In Young v. Cerrato, 2 Cal.App.2d 421, 37 P.2d 1063, a left hand turn was made without giving any signal of intention to turn.

The judgment is reversed.

PETERS, P. J., and KNIGHT, J., concurred.



47 Cal.App.2d 572

PALOMAR REFINING CO. v. PRENTICE et. al.

Civ. 2673.

District Court of Appeal, Fourth District, California.

Oct. 31, 1941.

1. Appeal and error ⇐339(2)

Where notice of appeal from order denying defendant's motion for change of venue was not filed until some 133 days after entry of such order, appeal was not taken within time permitted by statute. Code Civ. Proc. § 939.

2. Appeal and error ⇐348(1)

Notice of entry of judgment or order is not required in order to start running of time within which appeal may be taken therefrom. Code Civ.Proc. § 939.

3. Appeal and error ⇐348(1)

The fact that notice of entry of order denying defendant's motion for change of venue was mailed by plaintiff to defendant at erroneous address and never received by defendant did not render inapplicable the rule that notice of entry of order is not required to start running of time for appeal therefrom, in absence of showing that defendant's delay in perfecting appeal from such order was caused entirely by plaintiff's counsel's deliberate concealment of fact that order had been entered or that defendant was deceived by mailing of notice to erroneous address. Code Civ.Proc. § 939.

4. Appeal and error ⇐937(1)

The District Court of Appeal cannot imply that appeal, expressly taken too late from order denying defendant's motion for change of venue, was really appeal from subsequent order, setting aside default judgment and permitting defendant to answer, on ground that later order impliedly denied motion to vacate previous order. Code Civ.Proc. § 939.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by the Palomar Refining Company against B. H. Prentice and others for the price of merchandise sold and delivered. From an order denying named defendant's motion for a change of venue, he appeals. On a motion to dismiss the appeal.

Motion granted, and appeal dismissed.

B. H. Prentice, in pro. per.

Brittan & Mack, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is a motion to dismiss the appeal on the ground that it was not taken within sixty days after the entry of the order appealed from.

The action was one to recover $361.02 for merchandise sold and delivered. The appellant moved for a change of venue to Los Angeles county on the ground that he resided there and that the goods had been delivered pursuant to a contract, "the greater portion of which" was to be performed in that county. On October 31, 1940, the court entered its order denying this motion. Apparently, a default judgment was thereafter entered against the appellant as the record shows that the court, under date of February 10, 1941, entered an order granting appellant's motion "to vacate default, set aside judgment, and recall execution". Thereupon, the appellant filed an answer to the complaint and thereafter and on March 13, 1941, he served and filed a notice of appeal from the order of October 31, 1940, refusing to change the place of trial of said action.

Notice of the entry of the order of October 31, 1940, was mailed by the respondent to the appellant but at an erroneous address and it is conceded that this notice was never received by the appellant.

[1, 2] Notice of this appeal was not filed until some 133 days after the entry of the order in question, and it follows that the appeal was not taken within the time permitted by the statute. Sec. 939, Code Civ.Proc. It has been frequently held that notice of the entry of a judgment or order is not required in order to start the running of the time within which an appeal may be taken. Lawson v. Guild, 215 Cal. 378, 10 P.2d 459; Cook v. Cook, 208 Cal. 501, 282 P. 385; Schainman v. Kierce, 199 Cal. 249, 248 P. 905; Kocher v. Fidelity & Deposit Co., 137 Cal.App. 474, 30 P. 2d 535.

[3] The appellant concedes this rule and the effect of these authorities but contends that the rule should not be applied under the facts here appearing for two reasons. It is first argued that to apply the rule here would be to give the court's sanction and approval to an intentional concealing of a fact for the express purpose of depriving the appellant of a right of appeal. It is stated that any delay in perfecting this appeal was due not to any omission or negligence upon appellant's part but was caused entirely by a deliberate concealment on the part of respondent's counsel of the fact that the order had been entered. Not only is this contention entirely unsupported by the record, but it is difficult to see how the mailing of a notice to an erroneous address could have misled the appellant when he never received it. The appellant was not deceived in any way, and was not relieved of the duty resting upon him to keep himself informed of the court's action upon his motion. This is merely a case where no notice was given of the entry of the order, and the usual rule applies.

[4] The appellant further contends that this appeal is "in reality" from the order

made on February 10, 1941, setting aside his default and the default judgment and permitting him to answer. It is argued that appellant's motion which led to the order of February 10, 1941, "impliedly" asked the vacation of the former order of October 31, 1940, and that the court's order of February 10, 1941, relieving the appellant from his default "operated by implication as a denial of the motion to vacate". Based upon these implications we are asked to further imply that this appeal is actually an appeal from the order of February 10, 1941. Not only is there nothing in the record to justify any such inference in connection with the proceedings which led to the order of February 10, 1941, or with that order itself, but whatever its effect that order was not appealed from. This appeal was expressly taken from the order of October 31, 1940, and nothing else can be implied.

Although not controlling here it may be observed that so far as is disclosed by appellant's opening brief there is no merit in the appeal in any event.

The motion is granted and the appeal is dismissed.

MARKS and GRIFFIN, JJ., concurred.



47 Cal.App.2d 456

SMITH et al. v. GROVE et al.

Civ. 11858.

District Court of Appeal, First District, Division 2, California.

Oct. 24, 1941.

1. Appeal and error ⇐1010(1)

The reviewing court was not at liberty to disturb findings of trial court sitting without a jury, made on evidence even though it might disagree with such findings.

2. Partnership ⇐22

The legal effect of an instrument claimed to be a contract of partnership must be measured by the rules of law applicable thereto and cannot be determined by what the parties called it.

3. Partnership ⇐1

The statutory rule that a partnership is an association of two or more persons to carry on as co-owners a business for profit was adopted from the common law. Civ. Code, § 2400.

4. Partnership ⇐12

A partnership agreement between the parties must provide for the sharing of the profits and losses, or what is the same thing, of sharing the net pronts.

5. Partnership ⇐1

To constitute a "partnership" there must be such a community of interest as empowers each party to make contracts, incur liabilities, and to manage the whole business which is a right which, on dissolution of partnership, passes to survivor and not to representatives of deceased, and association must be one for purpose of jointly carrying on business.

See Words and Phrases, Permanent Edition, for all other definitions of "Partnership".

6. Partnership ⇐22

An agreement between inventors and third party reciting in effect that inventors desired third party to manage, patent, manufacture, sell or otherwise dispose of invention and in consideration for such service and for past services "we, the inventors, and the third party, do enter into partnership, each of the three parties to share equally with the others in any benefits to accrue from the invention," did not constitute a "partnership" agreement, notwithstanding that it was so called, where one of the inventors who was sole owner of invention did not agree to assign any part of his interest to other inventor or third party upon whom burden of bearing all expenses was imposed. Civ.Code, § 2400.

7. Patents ⇐312(1)

Whether a patent is infringed presents questions of mechanics on which no court is presumptively informed.

8. Patents ⇐312(3)

Where inventors and third party entered into an agreement to exploit an invention patented by inventors and years later third party patented a device used for the same purpose as inventors' invention, evidence was not sufficient to show that the device patented by the third party was the same as that invented by the inventors so as to entitle inventors to an accounting.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Robert S. Smith, Jr., and others against Marvin H. Grove and others for a decree of declaratory relief, the establishment of the existence of a partnership and for an accounting and other relief. From a judgment for the defendants, the plaintiffs appeal.

Affirmed.

Stanley J. Cook, of San Francisco, for appellant Robert S. Smith, Jr.

Carroll Single, of San Francisco, for appellant Rufus G. Thayer.

Harold C. Faulkner, of San Francisco, for both appellants.

H. O. Hepperle, Justin M. Jacobs, and Orrick, Dahlquist, Neff & Herrington, all of San Francisco, for respondents.

STURTEVANT, Justice.

Claiming that a partnership existed between the plaintiffs Robert S. Smith, Jr., and Rufus G. Thayer, and the defendant Marvin H. Grove, the plaintiffs commenced an action to obtain a decree of declaratory relief, the establishment of the existence of the partnership, for an accounting and other relief. The defendants answered. In their answer the defendants set forth many denials and many affirmative defenses. A trial was had before the court sitting without a jury. The court made findings in favor of the defendants and from the judgment entered thereon the plaintiffs have appealed.

For some time prior to the year 1929, Robert S. Smith, Jr., Rufus G. Thayer and Marvin H. Grove were lieutenants in the navy and attached to Mare Island Navy Yard. While so acting the plaintiff Robert S. Smith, Jr., became interested in developing a regulating valve. The navy was in need of a more efficient and satisfactory valve than was then on the market. Later he developed a device which he thought had merit. Thereafter he consulted Rufus G. Thayer, the co-plaintiff, and the two of them worked together on the device. Still later they consulted with the defendant Marvin H. Grove. Shortly prior to October 30, 1930, both Lieutenant Smith and Lieutenant Thayer were ordered to report for sea duty. Before leaving Mare Island the parties executed a written instrument as follows:

"The parties to this agreement are Robert S. Smith, Rufus G. Thayer, and Marvin H. Grove.

"Our subject of consideration is a reducing valve, known as the 'Smith-Thayer Reducing Valve', for which a patent application has been filed. The inventors of this device are Robert S. Smith and Rufus G. Thayer. Our object is to manufacture and sell this reducing valve or to dispose of the contemplated patent rights or otherwise exploit this invention to best advantage.

"We, the undersigned, to our mutual interest and benefit subscribe to the following conditions and agreements. The inventors desire the services of the third party in managing, patenting, manufacturing, selling or otherwise disposing of the invention. In consideration for this service, and for past services of the third party in designing, refining, patenting, proving in service and exploiting the invention, we, the inventors, and the third party, do enter into partnership, each of the three parties to share equally with the others in any benefits to accrue from the invention.

"Robert S. Smith,
"Rufus G. Thayer,
"Marvin H. Grove."

In the trial court the plaintiffs introduced in evidence that writing, and a great deal of evidence explanatory thereof, and the circumstances surrounding its execution. They contended said written instrument and the evidence they had introduced showed a partnership of the three persons signing it. That contention was vigorously controverted by the defendant Lieutenant Grove. In view of the conclusions reached by us the solution of the controversy just mentioned is determinative of the action. However, before proceeding it becomes necessary to state additional facts to be found in the evidence.

The uncontradicted evidence is that the invention mentioned in said writing was invented by Lieutenant Smith; that through a mistake of law an application for a patent, No. 370,879, was filed June 14, 1929, in the names of Lieutenant Smith and Lieutenant Thayer; and that later, when they were informed of the mistake they had made, the said application was amended to make it an application solely by Lieutenant Smith. Said invention was the sole piece of property which was the subject of said instrument. There is not a particle of evidence that Lieutenant Smith ever assigned or agreed to assign any interest in

the invention to either Lieutenant Thayer or to Lieutenant Grove. At the time said instrument was written a single unit was being made in the Mare Island Navy Yard. It was generally called the Smith-Thayer valve. The federal government furnished the labor and materials gratis. No one of the parties possessed any tools, materials, or any other properties which he contributed to the undertaking. No plan for the manufacture of the valve was ever adopted. Except as contained in said writing, nothing was ever agreed upon as to the payment of losses or expenses, or by whom they were to be paid. There were conversations relative to obtaining financial backing for the purpose of exploiting the invention, but if such backing was obtained the exact nature of the contract to be made with the backer was left for future determination. It is clear that the parties contemplated that Lieutenant Grove would endeavor to negotiate a contract to dispose of rights to use the invention but the terms of that contract were never settled. It is also clear that Lieutenant Thayer expected to interest Mr. Jackling as a backer but there was no evidence that he ever succeeded in doing so. There was evidence that in attempting to interest backers, Lieutenant Grove incurred expenses, but at no time did he claim Lieutenant Smith and Lieutenant Thayer were obligated to share in the payment, nor did they ever offer to do so. Lieutenant Grove devoted much time and effort looking toward the improvement of the device and incurred considerable expense in doing so. That expense he did not ask the plaintiffs to pay in part, nor did they offer to do so. Neither Lieutenant Smith nor Lieutenant Thayer ever contributed any sum whatever. After the above written instrument was executed a power of attorney to Lieutenant Grove was executed by the two plaintiffs. Later a second power was executed to him. All of the written instruments show a claim of title to the invention in behalf of the two plaintiffs. Each power of attorney expressly reserved the right in the plaintiffs to assign it.

The first power of attorney was acknowledged by Lieutenant Smith on February 2, 1931, in San Diego. It was acknowledged by Lieutenant Thayer on February 4, 1931, in Los Angeles. In paragraph 7 it was provided: "Nothing in this power of attorney shall be construed as a power or authority to sell, assign, transfer or otherwise dispose of the patent rights in and to the device known as the Smith-Thayer regulating valve if and when the patent to the aforesaid device is granted, nor to sell, assign, transfer or otherwise dispose of the rights in and to the application for a patent to the aforesaid device." On the same date the plaintiffs wrot to Lieutenant Grove a joint letter regarding the power of attorney. In that letter they said: "As to paragraph six the intent is to preserve the patent rights *intact to us.* Arrangements may be made under this provision for participation in profits or for leasing the rights, but the title shall *remain in our name.*" (Italics ours.)

[1-6] The plaintiffs call to our attention the use of the word "partnership" in the instrument written October 30, 1930, and to the same word used in the letter from which we have just quoted, and they argue earnestly that therefore the said instrument constituted a partnership agreement. We may not so hold. The trial court made a finding directly to the contrary. We are not at liberty to disturb that finding even though we disagreed with the trial court. 6 Cal.Jur. 329. But we do not disagree with the trial court. The nature of the instrument is not to be determined by what the parties called it. Kloke v. Pongratz, 38 Cal.App.2d 395, 402, 101 P.2d 522. Its nature is to be determined by its legal effect. The legal effect of an instrument claimed to be a contract of partnership must be measured by the rules of law applicable thereto. The first rule is statutory. A partnership is "* * * an association of two or more persons to carry on as co-owners a business for profit". Civ.Code, sec. 2400. The rule was at an early date adopted from the common law and has since been followed in this state. Wheeler v. Farmer, 38 Cal. 203, 213; Dempsey-Kearns Theatrical & Motion Picture Enterprises v. Pantages, 91 Cal.App. 677, 682, 267 P. 550. But in the case before us Lieutenant Smith was the sole owner and never assigned nor agreed to assign to Lieutenant Thayer nor Lieutenant Grove any part of his interest. Another rule is that a partnership agreement between the parties must provide for the sharing of the profits and losses, or what is the same thing, of sharing the net profits. Secs. 20 and 21, Story on Partnership. But the agreement made by the parties to this action imposed solely on Lieutenant Grove the burden of bearing all expenses. Such were the facts in the case cited above (Wheeler v. Farmer, supra), and it was

there held that the parties created the relation of principal and agent and not that of a copartnership. Finally, to constitute a partnership relation, in the agreement "'there must be such a community of interest as empowers each party to make contracts, incur liabilities, manage the whole business, * * * a right which, upon the dissolution of the partnership, * * * passes to the survivor, and not to the representatives of the deceased.' * * * The association must be one for the purpose of jointly carrying on the business." Oscar Krenz Copper & Brass Works, Inc. v. England, 109 Cal.App. 747, 752, 293 P. 689, 692. See, also, Auditorium Co. v. Barsotti, 40 Cal.App. 592, 595, 596, 181 P. 413, and cases there cited. The foregoing rules seem to obtain generally. H. H. Worden Co. v. Beals, 120 Or. 66, 250 P. 375. But the agreement in the instant case purported to impose on Lieutenant Grove not only the duty of perfecting the valve but of negotiating sales of rights to the use thereof. It follows, therefore, that the agreement between the plaintiffs and the defendant, Lieutenant Grove, did not create a partnership relation between them.

[7, 8] During the trial plaintiffs contended that the defendant, Lieutenant Grove, had converted the invention of Lieutenant Smith to his own use and should account therefor. Lieutenant Grove vigorously denied that charge and called expert witnesses to sustain him. The trial court made findings on that issue in favor of the defendants. We may not disturb those findings. They were based on a mass of evidence, including that of the experts just mentioned, and on many other facts, including among others the following: About October 30, 1930, Lieutenant Grove was in such poor health that it was necessary for him to take a leave of absence or apply for a discharge. However, both prior and subsequent to the date above mentioned, he worked most earnestly with the plaintiffs in an attempt to perfect the device invented by Lieutenant Smith. At first he continued to work in the shops at Mare Island Navy Yard and later in other shops. The device had such good points that many became interested in it and tried it out. Several models were made. However, no single model was entirely satisfactory. The defects were such that all the parties to this litigation were convinced that the objections were well founded. Lieutenant Grove continued to try. Finally, in the absence of both plaintiffs, without any assistance from either of them, he prepared a device. Being informed that the patent rights to the so-called Fry invention might be infringed upon he personally purchased the patent rights to that invention for the sum of $900. Thereafter he applied for letters patent and i ndue time a patent was issued to him, No. 2,047,101. It is the claim of the plaintiffs that the device so patented is the device invented by Lieutenant Smith, having merely immaterial changes made therein. Obviously that contention presents questions of mechanics on which no court is presumptively informed. The defendants called as a witness Dr. Fuller, an executive head in the department of engineering at the University of California. Having examined the Lieutenant Smith invention and the one invented by Lieutenant Grove, he testified:

"Q. Phrasing it still differently, Doctor, will you tell the court whether the operating principle of the Smith-Thayer is the same in the Grove valve or whether they are radically different? A. The operating principle is radically different. * * *

"Q. Except for that which is covered by prior art, Doctor, what if anything is there in the Smith-Thayer valve that is present as a principle in the Grove valve as shown in Defendants' Exhibit No. 67? A. In my opinion absolutely nothing."

Mr. Flehr, a graduate engineer and patent attorney of years of experience, was also called as a witness by the defendants. He gave testimony corroborating Dr. Fuller. Under these circumstances we think it is clear there was evidence in the record showing that the device patented by Lieutenant Grove was not the one invented by Lieutenant Smith.

In view of the conclusions just expressed, it follows the judgment appealed from should be and it is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

47 Cal.App.2d 444

CITY OF OAKLAND v. PACIFIC GAS & ELECTRIC CO. et al.

Civ. 11613.

District Court of Appeal, First District, Division 1, California.

Oct. 23, 1941.

Rehearing Denied Nov. 22, 1941.

Hearing Denied Dec. 18, 1941.

1. Steam ⇐6

In action against gas company for damages to public library books contained in basement of a building when break occurred in company's steam system at one of the elbows between the house valve and company's valve at its meter, "res ipsa loquitur" doctrine was inapplicable, where company did not have exclusive control and management of the pipe system, and there was no proof of continuing duty to inspect pipes located in the basement which had been in service for a period of approximately 26 years, and there was no substantial evidence that steam pressure caused the break or that an inspection would have indicated a possible break in the pipe.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

2. Appeal and error ⇐1008(1)
Steam ⇐6

Evidence was sufficient to support claim of city that there was an obligation on part of gas company, when informed that steam was escaping from company's steam system in basement containing public library books, to shut off the supply, and reasonableness of company's procedure and whether there was an inexcusable delay on part of company's employee in shutting off the steam, so as to render company liable for damages to the books were factual matters for the trial court to decide.

3. Appeal and error ⇐1010(1)

A reviewing court may not interfere with trial court's findings as to factual matters where findings are supported by substantial evidence.

4. Negligence ⇐125

Evidence of previous accidents similar in character and not too remote in point of time may be admitted to charge one with duty of anticipating a dangerous condition and of taking appropriate steps to avert the danger.

5. Negligence ⇐125

Although absence of previous accidents does not have a reasonable tendency to relieve a tort feasor from liability for invasion of the rights of others or damage resulting therefrom, such evidence is admissible in meeting a prima facie case under the doctrine of res ipsa loquitur, or a plaintiff's claim that an instrumentality had previously been used a reasonable number of times and found to be safe.

6. Negligence ⇐134(1)

The operation of an instrumentality for a reasonable period of time under similar circumstances may have a tendency to show that in ordinary course of things, an accident not having previously occurred, there is no reason to anticipate one.

7. Negligence ⇐134(1)

The rule that the operation of an instrumentality for a reasonable period of time under similar circumstances may have a tendency to show that in the ordinary course of things, an accident not having previously occurred, there is no reason to anticipate one, arises upon the theory of probable responsibility, and such evidence would simply be a circumstance to consider with other evidence in the case.

8. Steam ⇐6

That no previous accident had occurred would not assist trier of facts in determining whether employees of gas company had been negligent in shutting off the flow of steam after notification of breakage in company's steam system in basement containing public library books, so as to render company liable for damages to the books.

9. Damages ⇐163(4)

When several parties successively and independently contribute to a total damage, no recovery may be had unless evidence shows what part of the damage each caused.

10. Steam ⇐6

Where trial court found that part of damage to public library books from escaping steam occurred after time when duty of gas company arose to shut off the steam from company's steam system, company, having been negligent in performance of such duties, was liable for proportionate share of damages which its negligence contributed to, even though it did not appear that proportion of damages could be fixed accurately.

11. Torts ⇐21

One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured.

12. Damages ⇐163(4)

The party alleging injury must prove amount of the damages.

13. Damages ⇐163(4)

In action against gas company for damages to public library books contained in basement of building when break occurred in company's steam system, plaintiff sustained burden of proving amount of damages.

14. Damages ⇐163(2)

In action against gas company for damages to public library books contained in basement of building when break occurred in company's steam system, if damages proven by plaintiff could be reduced proportionately, such burden rested upon defendant company.

15. Damages ⇐184

In action against gas company for damages to public library books contained in basement of a building when break occurred in company's steam system, even if damages proven by plaintiff could have been reduced proportionately, record did not show that defendant company sustained burden of doing so.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by the City of Oakland against the Pacific Gas and Electric Company and another to recover for damages to public library books. From a judgment for plaintiff against the named defendant, the named defendant alone appeals.

Affirmed.

Thomas J. Straub and W. H. Spaulding, both of San Francisco, for appellant.

F. Bert Fernhoff, City Atty., and John W. Collier, Asst. City Atty., both of Oakland, for respondent.

WARD, Justice.

This is an appeal by defendant company from a judgment against it and in favor of plaintiff City of Oakland, for $3,980.43, damages to public library books contained in the basement of a building, the ground floor and basement of which were occupied as an annex to the Oakland Public Library. The owner of the building is also named as a defendant but the trial court gave judgment in his favor.

The upper floors of the building in which the City of Oakland maintained the library consisted of apartments leased to the manager thereof by the owner of the property. The library was heated by means of gas under the control of respondent; the apartments by steam delivered to the building by appellant, through a valve at a meter in the basement, from the main supply line of the company located in the street. By means of this valve the supply of steam going into the building could be regulated or disconnected. From the testimony of the steam engineer of appellant it appeared that only in an emergency was anyone but a company employee permitted to shut off the steam by the use of this valve. Beyond the valve the steam system, the property of the owner of the building, passed through the basement. Its course included several right angle turns and a house valve operated by means of a rod or mechanical device extending to the quarters of the manager of the apartments on the second floor. The break in the system, resulting in damage by steam to respondent's books, occurred at one of the elbows between the house valve and the valve of the company at its meter. It appears that steam going into the building could be shut off not only by means of the company valve at the meter, but by one in a manhole "in the middle of the block".

On the morning of the occurrence of the damage the manager of the apartments turned on the steam at around six o'clock by means of the device in his quarters. He immediately noticed the roar of escaping steam, and rushed to the basement to turn off the valve near the meter. He was, however, unable to reach it on account of the collected steam. He communicated by telephone with appellant company, and a night service man responded, but he too was unable to enter the basement due to the heat. He made no attempt to turn off the valve in the main in the street, explaining that such was not his duty, and that further trouble might result from such action. Neither did he telephone his employer for help, but drove back to headquarters and there reported the matter. The company then communicated by telephone with one of its steam service employees, who thereupon walked from his

home, some five blocks away, to the scene of the trouble. Unable to reach the valve at the meter, after a delay in obtaining a wrench he turned off the main valve in the manhole in the street, which action permitted the steam to clear sufficiently so that the valve in the basement could be reached.

[1] In the first cause of action the complaint alleges that defendant company so negligently and carelessly managed, controlled and regulated the steam and its flow, supply and distribution to said building and into the pipes of the basement as to result in the break in the pipe. In support of this theory plaintiff relied upon the doctrine of res ipsa loquitur, calling attention to the fact that the company was charged with the duty of constant inspection of the pipes, and that on this occasion the steam was delivered at high pressure. There is no substantial evidence that the steam pressure was the cause of the break, and no evidence that there was an excessive pressure of steam on the morning of the accident. Further, there is no substantial evidence that an inspection would have indicated a possible break in the pipe. Finally, there is no proof of a continuing duty to inspect the pipes located in the basement which had been in service for a period of approximately twenty-six years. Appellant company did not have exclusive control and management of the pipe system; and since the damage to the books was primarily due to a break therein, the doctrine of res ipsa loquitur is inapplicable to the facts of this case. The trial court made a direct finding that the owner of the building did not have the management and control of the steam pipes on the day in question.

[2, 3] The evidence is sufficient to support the claim of respondent that there was an obligation on the part of appellant, when informed that steam was escaping in the basement to shut off the supply. The reasonableness of appellant's procedure, and whether there was an inexcusable delay on the part of its employees in shutting off the steam, were factual matters for the trial court to decide. Substantial evidence heretofore related appears to uphold the court's conclusion in this respect. As a reviewing court we may not interfere.

Appellant sought to introduce evidence to the effect that until the accident here involved, in over twenty-four years there had never been a break, leak or accident in a consumer's premises requiring the services of an expert steam man, or necessitating the turning off of steam, by the use of the manhole valve, to cut off its flow into such premises; nor, during such period, had there been any break, leak or accident whatsoever in any consumer's premises where the valve at the meter could not be reached by one familiar with its location, and that such valves were no more and no less accessible than that on the premises in question.

[4-8] It is the rule in this state that evidence of previous accidents similar in character and not too remote in point of time may be admitted to charge one with the duty of anticipating a dangerous condition and of taking appropriate steps to avert the danger. McCormick v. Great Western Power Co., 214 Cal. 658, 8 P.2d 145, 81 A.L.R. 678; Continental Ins. Co. of New York v. Pacific Greyhound Lines, 43 Cal.App.2d Supp. 877, 111 P.2d 37; Gerberich v. Southern California Edison Co., 26 Cal.App.2d 471, 79 P.2d 783; Wills v. Price, 26 Cal.App.2d 338, 79 P.2d 406. The converse of that rule, applicable in the absence of previous accidents, has been approved in some jurisdictions (128 A.L.R. 606), but not unreservedly in California. The absence of previous accidents should not and does not have a reasonable tendency to relieve a tort feasor from liability for the invasion of the rights of others or damage resulting therefrom, but such evidence is admissible in meeting a prima facie case under the doctrine of res ipsa loquitur, or a plaintiff's claim that an instrumentality had previously been used a reasonable number of times and found to be safe. Union Oil Co. v. Rideout, 38 Cal.App. 629, 177 P. 196; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 P. 164. The operation of an instrumentality for a reasonable period of time under similar circumstances may have a tendency to show that in the ordinary course of things, an accident not having previously occurred, there is no reason to anticipate one. This rule arises upon the theory of probable responsibility. Such evidence would simply be a circumstance to consider with other evidence in the case. However, as previously noted, the doctrine of res ipsa loquitur is not applicable in this case. The fact that an accident had not occurred would not assist the trier of the facts in determining whether defendant's employees had been negligent in shutting off the flow of steam after notification of the

breakage in the pipe. Lim Ben v. Pacific Gas & Elec. Co., 101 Cal.App. 174, 281 P. 634; Carty v. Boeseke-Dawe Co., 2 Cal. App. 646, 84 P. 267.

The main question on this appeal is the extent of appellant's liability based upon negligence in delaying the shutting off of the steam. Appellant introduced evidence to show that the deleterious effect of steam on book bindings is rapid, resulting generally in complete disintegration. It may be conceded that at least twenty minutes elapsed before the arrival of the night service man at the scene of the trouble. He not only accomplished nothing, and failed to immediately get in touch with appellant by phone, but reported the matter only on his return to the company headquarters. The second employee, besides walking the several blocks between his home and the building in question, neglected to bring with him a suitable tool to shut off the steam supply.

Appellant's position is that damage to the books occurred prior to its notification of the break, and that it was incumbent upon respondent to prove what portion of such damage was due to the former's negligence. In other words, that appellant is liable only for such damage as may have occurred following the time when it ought to have shut off the steam, less such amount of damages thereafter caused by the steam already in the basement.

[9] When several parties successively and independently contribute to a total damage, no recovery may be had unless the evidence shows what part of the damage each caused. Wade v. Thorsen, 5 Cal. App.2d 706, 43 P.2d 592. In Slater v. Pacific American Oil Co., 212 Cal. 648, 654, 655, 300 P. 31, 33, the court said: "It is only fair, in actions of this character, that the plaintiff be required to produce some evidence from which defendant's proportionate liability might reasonably be deduced. * * * However indefinite the evidence may be as a standard for the measurement of damages, our examination of the record satisfied us that plaintiff sufficiently established that some portion of the oil, salt, and other hydrocarbon substances causing the injury to his land had come from the operation of the defendant's wells."

[10] The amount of damages awarded, $3,980.43, approximately equals the sum fixed by one of appellant's witnesses plus the actual cost, subsequent to the accident and previous to the trial, of the repair of some of the books. The judgment is about $725 less than plaintiff prayed for in the complaint, and some $440 less than one of its witnesses testified would be required to repair the damage. Appellant contends that evidence was introduced showing that the air in the basement was 100 per cent humidity in eleven minutes, and that the bindings on the books would have been practically destroyed in that time. In some instances witnesses supporting such claim were less positive upon cross-examination about complete destruction in such period. The trial court could have concluded, and evidently did, as shown by the implied finding, that part of the damage occurred after the time when appellant's duty arose to stop the flow of steam. Appellant having been negligent in performance of that duty was liable in damages.

It is contended that appellant should pay only a portion of the damages. Assuming that some damage was caused to the bindings on the books before the moment when the duty just mentioned arose, it does not appear that the proportionate damages could be fixed accurately. It is interesting to note that of more than 7,000 books, magazines and newspapers contained in the library annex, the bid by appellant for repair was based only upon 2,302 volumes. This would indicate that all of the books, etc., did not require re-lettering, re-sewing and re-binding, and that disintegration may not have been complete before notification to appellant of the trouble at the building.

[11-15] One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured. Reclamation Dist. No. 833 v. American Farms Co., 209 Cal. 74, 285 P. 688; Stephani v. Abbott, 137 Cal. App. 510, 30 P.2d 1033; Switzer v. Yunt, 5 Cal.App.2d 71, 41 P.2d 974. It is incumbent upon the party alleging injury to prove the amount of damages. Respondent sustained that burden in this case. If the damages proven could be reduced proportionately, that burden rested upon appellant. Vitagraph, Inc., v. Liberty Theatres Co., 197 Cal. 694, 242 P. 709; Andersen v. La Rinconada Country Club, 4 Cal.App. 2d 197, 40 P.2d 571. The record does not show that appellant sustained that burden. Konda v. Frumpkin, 90 Cal.App. 384, 265 P. 955. In Rhodes v. Firestone Tire, etc., Co., 51 Cal.App. 569 at page 574, 197 P.

392, at page 395, an action primarily based upon the amount due for the repair of a car damaged as the result of an automobile collision, the court said: "The reasonable cost of making necessary repairs in such cases as this has been accepted as a proper element in determining the amount recoverable as damages in many other jurisdictions, as has already been pointed out, and we think it proper to accept it as such in the establishment of a prima facie admeasurement of damages, subject to the right of the adverse party to apply to it the test as to whether or not the diminution in value by reason of the injury was less than the repair bill, and if so, to reduce the damages recoverable to equal the sum representing such difference in value."

As far as ascertainable from the record, there is evidence that appellant contributed substantially to the damage, or at least to the aggravation thereof, and that the amount of compensation awarded was "an approximation to accuracy." Slater v. Pacific American Oil Co., supra.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.



47 Cal.App.2d 452

KRAUSS v. STROP et al.

Civ. 2823.

District Court of Appeal, Fourth District, California.

Oct. 23, 1941.

1. Fraudulent conveyances ⇐240

While burden of proving that a conveyance was fraudulent rests upon creditors alleging fraud, and evidence must be such as to show clearly that deed was actually fraudulent as to creditors, if fraud is established and found the right of creditors to complain and to enforce their claims is shown.

2. Fraud ⇐25

Where fraud has been committed and no injury has been sustained by party complaining, no action can be maintained thereon.

3. Appeal and error ⇐1071(6)
Trial ⇐397(1)

In suit to quiet title to land which plaintiff had purchased from estate of which plaintiff's husband was executor, where part of purchase price was paid by husband crediting estate with sums due to husband as monthly allowances under will, and it was claimed that husband received payment by a reduction in his indebtedness to plaintiff, affirmative allegations of answer and cross-complaint by defendants who owned a judgment against husband, who was insolvent, and who had purchased husband's interest in land at execution sale alleging that conveyance to plaintiff was fraudulent raised material issues upon which defendants were entitled to a finding, and failure to find on such issues required reversal of judgment for plaintiff.

4. Trial ⇐397(1)

If facts alleged by defendant constitute a defense to cause of action set forth in complaint, such facts present material issues upon which the trial court should make findings.

5. Executors and administrators ⇐383

An attempt to have it declared that purchaser of land from decedent's estate held land in trust for creditors of purchaser's husband on ground that part of purchase price was paid by husband was not a "collateral attack" on probate order confirming sale.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Suit by Emma R. Krauss against Edward Strop and others to quiet title to land, wherein one Arganbright filed a cross-complaint. From a judgment for plaintiff, defendants Edward Strop and others appeal on the judgment roll.

Reversed.

Liggett & Liggett and Stickney & Stickney, all of San Diego, for appellants.

W. E. Starke, of San Diego, for respondent.

WEST, Justice pro tem.

This action was brought by plaintiff and respondent to quiet her title to several

parcels of real estate, only one of which is involved in this appeal. Said parcel, located in University Heights in the city of San Diego, was a portion of the estate of Sophie Marie Louise Krauss, who died testate leaving surviving her her husband, Louis Lee Krauss, one of the defendants. Said defendant was appointed executor of the will of his deceased wife and was also under its terms provided with an allowance of $200 per month. Thereafter, respondent and Krauss were married. After the marriage and during the administration of the estate Krauss, as executor, gave notice of sale of the parcel of real property here under consideration. Respondent purchased said property for $2,700 and at the time she tendered her bid made the initial or down payment of $270. Thereafter the sale of said property was confirmed to her. The balance of the purchase price was paid by Krauss by means of giving to the estate a credit of $2,430 against amounts due and owing to him on account of the $200 per month allowance provided for him in the will and hereinbefore referred to. No objection was made to the sale or confirmation thereof by appellants or any other persons. Defendant and appellant Arganbright was the assignee of a claim which existed in the hands of his assignor against Krauss at the time of the sale. Subsequently, and after the assignment of said claim to him, Arganbright reduced the same to judgment, recorded an abstract thereof, and thereafter levied upon the real property by virtue of an execution issued on the judgment. The interest of Krauss therein was sold and Arganbright is the holder of a certificate of execution sale of said property. Appellant Strop, after the sale of said property to respondent, took an assignment of a judgment against Krauss, which judgment was based on a claim antedating the conveyance of the property from the estate to respondent. This judgment was recorded in the office of the recorder of San Diego county. At all times since the entry of either of said judgments Krauss was insolvent.

All of the foregoing facts were found by the trial court to be true and in addition it was found that Krauss claimed to be indebted to respondent at the time of the probate sale in a sum in excess of $2,430, and that he reduced his indebtedness to her by the sum of $2,430, in consideration of the transfer. It was not, however, found by the court whether or not such claims were true. The question of consideration was important especially in its bearing on the issue of fraud. The trial court should have found on this question.

Appellants answered the complaint and Arganbright filed a cross-complaint. Both appellants affirmatively alleged fraud in the conveyance from Krauss as executor to respondent, and both contended that their liens were superior to the claims of respondent. Appellant Strop, in his answer, further alleged that any interest of respondent in the property was as trustee for Krauss and for Strop as judgment lienor of Krauss's interest therein. Krauss defaulted, judgment went for plaintiff, and this appeal followed, and is presented on the judgment roll alone.

The court concluded from the facts found as follows:

"That the allegations of defendants herein in their answers and the allegations of the defendant Arganbright in his cross-complaint, to the effect that the aforesaid conveyance from the estate of Sophie Marie Louise Krauss to the plaintiff, in consideration of the cancellation of an indebtedness of the said estate to the plaintiff's husband, Louis Lee Krauss, was fraudulent and void as to said defendants, are immaterial allegations and do not constitute proper issues in this action for the reason that neither of the said defendants are legally entitled to attack the transfer or conveyance of said real property from the said estate to plaintiff herein."

There is no other finding on the issue of fraud.

The principal and only necessary question to be determined here is whether the existence of fraud on the part of Krauss in connection with the probate sale and the conveyance to respondent pursuant thereto was a proper issue upon which the court should have made a finding.

The issue of fraud was raised by the pleadings of appellants. In effect it is contended that the purpose of the conveyance was to put beyond the reach of creditors Krauss's credit with the estate or its property equivalent by means of a dummy probate sale financed almost entirely by him and from his separate funds.

[1] In order for appellants to prevail, the evidence would have to be such as to clearly show that the deed was actually

fraudulent as to such creditors (present or future). While the burden of proof would be on the creditors alleging fraud, nevertheless, if established and found, their right to complain and to enforce their claims is made out. Bush & Mallett Co. v. Helbing, 134 Cal. 676, 66 P. 967; Franck v. Moran, 36 Cal.App. 32, 171 P. 841.

[2, 3] The respondent urges that appellants could not have attached the property or subjected it to their claims while it was in the possession of the executor and therefore the sale to respondent, even conceding it to have been fraudulent, produced no injury or damages. She cites a number of cases to the effect that where fraud has been committed and no injury has been sustained by the party complaining, no action can be maintained thereon. There can be no doubt that this is true. Gaffney v. Graf, 73 Cal.App. 622, 238 P. 1054; Billings v. Farm Development Co., 74 Cal.App. 254, 240 P. 298; Gerini v. Pacific Employers Insurance Co., 27 Cal. App.2d 52, 80 P.2d 499. But the situation presented by the issues raised in the instant case is not answered by the principle just enunciated. The damage contended for here is in transforming a credit of the value of $2,430, which in the hands of Krauss would have been subject to the claims of creditors, into an interest in real estate ostensibly the property of another who paid no substantial consideration therefor. If such was the true fact the contention that any fraud perpetrated was without damage is not tenable. It follows that since the allegations of actual fraud presented, if proved, constitute a defense to the cause of action set forth in respondent's complaint, they raise material issues upon which the court should have made findings and a failure to do so was error which will require a reversal of the judgment.

[4] In Spect v. Spect, 88 Cal. 437, 26 P. 203, 204, 13 L.R.A. 137, 22 Am.St. Rep. 314, the Supreme Court said:

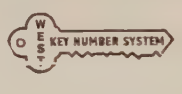
"Inasmuch as the court gives as its reason for not making findings upon these issues that such findings were immaterial, we must assume that evidence was introduced at the trial sufficient to support the allegations, and therefore the rule announced in Himmelman v. Henry, 84 Cal. 104, 23 P. 1098, had no application. If the facts alleged by the defendant constitute a defense to the cause of action set forth in the complaint, they presented material issues upon which the court should have made findings, and a failure to do so was error which will require a reversal of the judgment."

See, also, Reese v. Bald Mountain Consolidated Gold Mining Co., 133 Cal. 285, 65 P. 578.

[5] It is argued, in effect, that this is a collateral attack on the probate order confirming the sale of the property to respondent. There is no merit in this argument as the attempt is made here to have it declared that respondent holds the property in trust for the creditors of her husband, which is not a collateral attack on the probate order. Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P. 184; Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194.

Judgment reversed.

BARNARD, P. J., and MARKS, J., concurred.



47 Cal.App.2d 494

PACIFIC EMPLOYERS INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11831.

District Court of Appeal, First District, Division 1, California.

Oct. 28, 1941.

1. Appeal and error ⇐1011(1)

The rule that reviewing courts cannot invade the field of fact-finding body, and that findings of triers of facts on conflicting evidence are conclusive, is limited to cases where conflict is substantial and real and not fanciful.

2. Workmen's compensation ⇐1939

Findings of Industrial Accident Commission are subject to review only in so far as they have been made without any evidence whatever in support thereof.

3. Workmen's compensation ⇐1177

Where facts show substantially without conflict that there is no evidence to support

finding of Industrial Accident Commission, Commission was without jurisdiction to make such finding.

4. Workmen's compensation ⇐1409

An award of workmen's compensation cannot be based on surmise, conjecture, or speculation.

5. Workmen's compensation ⇐1543

Evidence that recent ulcer is in exact site or in region of original ulcer, standing alone, is not sufficient upon which to base award of compensation on ground that original injury proximately caused a new and further disability.

6. Workmen's compensation ⇐1417

In determining whether varicose ulcer was compensable as a new and further disability proximately caused by leg injury for which claimant had already received medical treatment, location of latest ulcer in region of previous ulcer could be proved by testimony of layman who observed external appearance, but cause of latest ulcer could be best proved by person having expert scientific knowledge.

7. Workmen's compensation ⇐1543

The testimony of compensation claimant that original ulcer site was raw and painful after her release by physician, and that second and third leg injuries did not do any damage, and that sore had healed over at termination of medical treatment, was insufficient to support finding of Industrial Accident Commission that recent ulcer was compensable as a new and further disability proximately caused by original leg injury for which claimant had already received medical treatment.

8. Workmen's compensation ⇐1411

The testimony of compensation claimant that her physician and others had told her that original injury was responsible for present ulcer was "hearsay" and was insufficient to support finding of Industrial Accident Commission that present ulcer was compensable as a new and further disability proximately caused by original injury for which claimant had already received medical treatment, in absence of evidence that physician was qualified to testify on the subject. St. 1937, p. 300, § 5708.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

9. Workmen's compensation ⇐1385

Hearsay evidence is admissible before Industrial Accident Commission when such evidence is best calculated to ascertain substantial rights of the parties. St.1937, p. 300, § 5708.

10. Workmen's compensation ⇐1411

A material finding of Industrial Accident Commission based entirely on hearsay testimony of incompetent witness is insufficient and has no probative force. St.1937, p. 300, § 5708.

11. Workmen's compensation ⇐1167

In enacting provision in Workmen's Compensation Law authorizing admission into record and use as proof of any fact in dispute of any evidence objectionable under common law and statutory rules, legislature did not intend that it would be any the less the duty of Industrial Accident Commission to follow prescribed procedure and rules of evidence, and it remained duty of Commission to conduct proceedings, so that there would be as little occasion as possible for courts to resort to rule of decision announced in such provision. St.1937, p. 300, § 5708.

12. Workmen's compensation ⇐1408

A workmen's compensation award must have for its basis a firm foundation of fact.

13. Workmen's compensation ⇐1411

The weight to be given hearsay evidence is to be determined by Industrial Accident Commission, and if such evidence carries conviction with the Commission, it may be sufficient to uphold an award, but it must be evidence of a substantial character from which Commission may deduce a reasonable inference. St.1937, p. 300, § 5708.

14. Workmen's compensation ⇐1385

The Workmen's Compensation Law does not authorize layman to testify to a scientific fact the competency and credibility of which is derived only on scientific knowledge of some other person. St.1937, p. 299, § 5703.

15. Evidence ⇐474(3, 4), 528(1)

Witnesses of common experience from ordinary observation and obvious facts may testify as to existence of physical or mental condition, but pathological cause of ailment is scientific question upon which it is necessary to obtain scientific knowledge.

16. Workmen's compensation ⇐1411, 1417

Hearsay evidence of statements of an injured party as to manner in which injury occurred, though meager, may be sufficient upon which to base an award of compensation, but where subject-matter is within exclusive knowledge of experts trained in such scientific subject, then expert evidence is essential.

17. Workmen's compensation ⇐1418

In workmen's compensation proceeding, it is within province of Industrial Accident Commission to disregard testimony of medical experts.

18. Workmen's compensation ⇐1417

When facts peculiarly within knowledge of experts are required, even though contradicted by nonexpert evidence, and assuming power of Industrial Accident Commission to reject expert testimony as not conclusive, still when evidence is necessary to show that second injury was recurrence of disability proximately related to original injury, competent evidence should have been produced in support of the claim.

19. Workmen's compensation ⇐1947

An award of workmen's compensation was annulled where there was entire lack of proof of jurisdictional fact that recent ulcer was a new and further disability proximately caused by original injury for which claimant had already received medical treatment.

Petition from Industrial Accident Commission.

Proceeding under the Workmen's Compensation Law by Mrs. Anna Collins, employee, opposed by the Pacific Employers Insurance Company, insurance carrier. The Industrial Accident Commission awarded compensation based on a finding of new and further disability caused by injury for which employee had received medical treatment, and the insurance carrier petitions for writ of review to annul the award.

Award annulled and proceeding remanded.

W. N. Mullen, of San Francisco, for petitioner.

Everett A. Corten and J. Gould, both of San Francisco, for respondents.

WARD, Justice.

A writ of review to determine whether there is any evidence to support an award of compensation by the Industrial Accident Commission based upon a finding that a varicose ulcer from which applicant was suffering constituted a new and further disability proximately caused by an injury for which she had already received medical treatment.

The following facts are admitted: The applicant, Mrs. Anna Collins, on March 15, 1938, in the course of her employment as a maid in a hotel, sustained an accidental trauma to her left leg when she struck it against an article of furniture. In August of the same year she again bumped the same leg in the same way, resulting in an aggravation of the previous injury, and in September in a like manner she again struck it, further aggravating its condition. In October, 1938, she sought treatment from her personal physician. Subsequently, between November 15, 1938, and January 4, 1939, upon which latter date the condition complained of was "completely cleared", petitioner insurance carrier furnished medical treatment for the combined injuries received as a result of the three accidents. On January 20, 1939, applicant again consulted the physician for the insurance carrier with regard to "itching blister-like formations on the posterior surface of her left leg, about the ankle and heel area". Some time thereafter, from September 25, 1940, to October 7, 1940, upon the direction of the insurance carrier Mrs. Collins was hospitalized for a broken toe, also suffered in the course of her employment but entirely unrelated to the injuries of 1938. During the course of this hospitalization applicant was found to be suffering from extensive chronic varicose ulcers on both legs, which, because of the "odor and purulent discharge" were treated by changes of dressing, etc. The patient was advised that the hospitalization of the ulcers was not covered by industrial compensation insurance. Prior to her release from the hospital for the toe injury, the ulcers had completely disappeared except for the scarred areas left by them.

[1-4] On March 26, 1941, applicant was suffering from an ulcerated area on the left leg which she claimed to be at the site of the original injury of 1938; she further claimed the original injury was the cause of such new and further disability. The evidence strongly preponderates in favor

of petitioner. The 1941 examination revealed a chronic varicose ulcer "over the medial aspect of the left lower leg just above the medial malleolus"; that is, just above the ankle. Medical reports written long prior to the 1941 ulcerous disability definitely placed the "site" as "over the crest of the left tibia", and according to a report rendered by applicant's personal physician the original ulcer was "about four inches above her ankle". The applicant indicated the site of the original injury, designated by the referee as "Right in the region of the malleolus, in back of it a little", by pointing to the 1941 ulcer. On this issue, the "site" of the original injury, the Commission disregarded the testimony of the examining physicians and accepted that of the applicant. "It is of course conceded that reviewing courts may not invade the field of the fact-finding body, and that under well-settled rules where a conflict of evidence exists the findings of the triers of the facts are conclusive." Thoreau v. Industrial Acc. Com., 120 Cal.App. 67, 73, 7 P.2d 767, 769. In the Thoreau case the rule "is limited to cases where the conflict is substantial and real, and not fanciful or fictitious". In Southern Pac. Co. v. Railroad Comm., 13 Cal.2d 125, at page 129, 87 P.2d 1052, at page 1054, wherein it was held that there was no evidence to support a finding, the court quoted with approval the following language from Pacific Gas & Electric Co. v. Industrial Acc. Comm. (Stacey Bros. Co. v. Industrial Acc. Comm.), 197 Cal. 164, 239 P. 1072: "'* * * the findings of the * * * Commission are subject to review only in so far as they have been made without any evidence whatever in support thereof. [Citing cases.] In short, if the facts show substantially without conflict that there is no evidence to support the finding, the Commission was without jurisdiction to make the same. There must be *some* evidence, upon which the finding of special employment is predicated * * *.' (Italics added.) See, also, Nielsen v. Industrial Acc. Comm., 125 Cal.App. 210, 13 P.2d 517. In Children's Hospital Soc. v. Industrial Acc. Comm., 22 Cal.App.2d 365, 71 P.2d 83, 85, where there was a total lack of evidence to support the finding, it was said that 'an award of compensation may not be based upon surmise, conjecture, or speculation.'" In the present proceeding on review respondent Commission is content to argue that "the second ulcer * * * made its appearance in the region of the original injury, if not in the exact site of the first ulcer". For the purpose of continuing consideration of this appeal it may be assumed that the "site" of the present ulcer is at least in the region of the original injury.

[5, 6] Evidence that the recent ulcer is in the exact site or in the region of the original ulcer, standing alone, is not sufficient upon which to base an award upon the ground that the original "injury proximately caused a new and further disability". The location of the latest ulcer in the region of the former may be proved by testimony of a layman who observed its external appearance, but it would seem that the cause of such ulcer could be best proved by one having expert scientific knowledge. As stated in a report of one of the examining physicians, there is preponderating evidence "that the repeated development of varicose ulcers is due entirely to her poor circulation resulting from her pre-existing varicose vein condition and should in no way be considered related to her previously alleged injury of 1938 and should not be considered industrial in origin". As stated, in 1939, more than a year before the ulcer here complained of was reported, applicant suffered another ulcer on the "posterior surface of her left leg, about the ankle and heel area". The physician at that time, Dr. Cox, on January 20, 1939, reported as follows: "This patient originally gave a history of two blows to the crest of the left tibia, many months before she reported here. As noted in our reports, this patient has varicosities which should be treated and at any time she is likely to have broken down areas, these conditions being unrelated to her work. The ulceration was entirely healed at the time she last reported to our office on January 4th, and upon examination to-day it was still healed. There is no relation between the original condition and the one found to-day. * * *" The correctness of this evidence is not attacked. There is no expert evidence to the contrary, although respondents claim that applicant denied Dr. Cox had examined her on January 20th. In this respect the transcript of evidence indicates that applicant referred to a visit to the office of Dr. Cox in March of 1941 and not January 20, 1939.

Respondents contend that "the Commission had in its possession sufficient and sub-

stantial evidence on which to reach a conclusion that the second ulcer was a recurrence of disability proximately and naturally related to the original injury, and hence 'a new and further disability'." This contention is based upon a statement by applicant to the effect that the original ulcer site was still raw and painful after her release by petitioner's doctor on January 4, 1939. Mrs. Collins, the applicant, referring to the second and third injuries testified: "I don't think really the other two knocks done any damage at all. * * * It healed up, it has healed up and then it opened up again"; that at the time the medical treatments ceased in 1939 the sore had "healed over"; that she had suffered from varicose conditions since she was a child, and that all of the ulcers disappeared during her stay in the hospital for the treatment of her toe. At the time of the hearing before the Commission applicant had both legs bandaged. She admitted that she had the same ulcer condition on her right leg that she had on her left, but that her right leg did not bother her.

[7] We cannot approve an award based upon a claim that the foregoing evidence was of sufficient and substantial character to justify a conclusion that the recent ulcer was a recurrence of disability proximately related to the original injury. The record does not disclose any evidence that the applicant was qualified to testify in regard to this matter.

[8-11] The finding of respondent Commission is based upon hearsay testimony. Respondents argue that the applicant testified that other people, including her own doctor, told her the original injury was responsible for her present condition. The only statement from applicant's personal physician appearing in the record is as follows: "Mrs. Collins consulted me on October 25, 1938. She had a large ulcer on her left leg, about four inches above her ankle. She stated that a couple of weeks previous she was moving furniture while at work and bumped her leg against a chair. The ulcer had appeared since that time." This statement does not uphold respondents' contention. Assuming that applicant's personal physician or others made statements as she claims, such testimony is hearsay.

Hearsay evidence is admissible before respondent Commission (Continental Casualty Co. v. Industrial Acc. Comm., 195 Cal. 533, 234 P. 317) when it is best calculated to ascertain the substantial rights of the parties. Labor Code, § 5708, St. 1937, p. 300. A material finding based entirely upon hearsay testimony of an incompetent witness is insufficient. It has no probative force and is not calculated to ascertain the substantial rights of the parties. Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507, Ann.Cas.1918B, 540; Rockefeller v. Industrial Comm., of Utah, 58 Utah 124, 197 P. 1038. In Continental Casualty Co. v. Industrial Acc. Comm., supra, referred to the above Labor Code sec. 5708, the court said (195 Cal. at pages 540, 541, 234 P. at page 320): "While the terms of this section are broad and comprehensive, covering as they do the *admission into the record and use as proof* of any fact in dispute of any evidence objectionable under the common law and statutory rules, yet it was not intended thereby that it would be any the less the duty of the commission to follow the prescribed procedure and rules of evidence. In other words, it still remains the duty of the commission to conduct the proceedings so that there will be as little occasion as possible for the courts to resort to the said rule of decision."

[12-16] "* * * Any award made must have for its basis a firm foundation of fact." Berzin v. Industrial Acc. Comm., 125 Cal. App. 522, 526, 14 P.2d 97, 98; London G. & A. Co., Ltd., v. Industrial Acc. Comm., 202 Cal. 239, 259 P. 1096, 54 A.L.R. 1392. The weight to be given hearsay evidence is to be determined by the Commission. If it carries conviction with the Commission, it may be sufficient to uphold an award (27 Cal.Jur., § 152, p. 483), but it must be evidence of a substantial character from which the Commission may deduce a reasonable inference. The legislature, with the purpose of permitting laymen who often serve as commissioners to ascertain the substantial rights of the parties appearing before it has broadened the rules of evidence to the extent of permitting the reception of "excerpts from expert testimony received by the commission upon similar issues of scientific fact in other cases" (Labor Code, § 5703), but no provision has been made that a layman may testify to a scientific fact the competency and credibility of which is derived only upon the scientific knowledge of some other person. The record does not disclose the reception of excerpts from expert evidence in other

cases, nor do the findings indicate such fact. Witnesses of common experience from ordinary observation and obvious facts may testify as to the existence of a physical or mental condition, but the pathological cause of an ailment is a scientific question upon which it is necessary to obtain scientific knowledge. 20 Am.Jur., pp. 719–736. Hearsay evidence of statements of an injured party as to the manner in which the injury occurred, though meager, may be sufficient upon which to base an award (Sada v. Industrial Acc. Comm., 11 Cal.2d 263, 78 P.2d 1127; Employers', etc., Corp. v. Industrial Acc. Comm., 42 Cal.App.2d 669, 109 P.2d 716), but where the subject matter is within the exclusive knowledge of experts trained in such scientific subject, then expert evidence is essential. William Simpson C. Co. v. Industrial Acc. Comm., 74 Cal.App. 239, 240 P. 58; Newton v. Industrial Acc. Comm., 204 Cal. 185, 267 P. 542, 60 A.L.R. 1279; State Comp. Ins. Fund. v. Industrial Acc. Comm., 195 Cal. 174, 231 P. 996.

[17] The Commission evidently disregarded the testimony of experts introduced by the petitioner herein to the effect that the present ulcer was in no way related to the original injury. This was within the province of the Commission, but it leaves the record devoid of evidence upon an ultimate fact on a scientific subject. However, the applicant testified before the Commission that she had been afflicted with ulcers since she was a child. Certainly this raised a question as to whether the present ulcer was a recurrence due to the original injury or was the result of a preexisting condition. It presented a question of pathology.

The Commission does not contend that the statement of the applicant, assuming it to be true, that "a lot" of other unidentified persons told her the present ulcer was caused by the original injury, is substantial evidence. At least no mention of it is made in the answer or in the "argument and authorities" submitted by respondents, nor do respondents mention the fact that applicant testified: "My own doctor told me that was the cause." Assuming the truthfulness of applicant's statement that her personal physician told her in substance that the present ulcer was caused by the injury of 1938, there is no evidence that the personal physician could give any assistance in solving the question—there was no evidence, indirect or otherwise, that he was qualified to testify upon the subject.

[18] The record has been examined for some substantial evidence to uphold the Commission. When facts peculiarly within the knowledge of experts are required, even though contradicted by non-expert evidence (Hines v. Industrial Acc. Com., 215 Cal. 177, 8 P.2d 1021), and assuming the power of the Commission to reject the expert testimony as not conclusive (Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163), still when evidence, as in this proceeding, was necessary to show that the second ulcer was a recurrence of disability proximately related to an original injury, competent evidence should have been produced in support of the claim.

[19] It appears that applicant's personal physician was probably available as a witness; applicant visited him several days before the Commission hearing. That the 1941 ulcer was an aggravation of that of 1938 and constituted a further industrial disability, was a jurisdictional fact essential to the support of the award. If the statement of the applicant be eliminated, as it should be, there is an entire lack of proof of this jurisdictional fact. Barton v. McDermott, 108 Cal.App. 372, 291 P. 591; Baker v. Industrial Acc. Comm., 135 Cal.App. 616, 27 P.2d 769; County of Los Angeles v. Industrial Acc. Comm., 123 Cal. App. 12, 11 P.2d 434; Southern Pac. Co. v. Railroad Commission, supra.

The award is annulled and the proceeding remanded for such disposition as the Commission may deem proper.

PETERS, P. J., and KNIGHT, J., concurred.

47 Cal.App.2d 531

OROVILLE-WYANDOTTE IRR. DIST. v. FORD et al.

Civ. 6651.

District Court of Appeal, Third District, California.

Oct. 29, 1941.

1. Waters and water courses ⇐231

Where irrigation district assessed mining claims before mining machinery and equipment were placed thereon, and proceedings foreclosing assessment liens did not purport to convey to district title to machinery and equipment, district was not the owner and entitled to possession of machinery and equipment, as distinguished from the realty, by virtue of its purchase at foreclosure proceedings. Gen.Laws 1937, Act 3854, §§ 35, 43–48; St.1939, p. 1108, § 2601.

2. Taxation ⇐509

A lien created in favor of an irrigation district by virtue of its assessment levied in 1929 against mining claims was on a parity with lien created in favor of county for general taxes assessed in that year against the same claims. Gen.Laws 1937, Act 3854, §§ 43–48.

3. Taxation ⇐784

A deed executed pursuant to foreclosure proceedings to any of the state agencies does not extinguish existing liens in favor of the state.

4. Counties ⇐194
Municipal corporations ⇐580, 980(7)

Tax liens in favor of counties and municipalities and special assessments made under authority of state agencies for public purposes are all on an equality, and in case of delinquency, a deed to any one of the agencies on foreclosure proceedings will not obliterate the existing liens on the property in favor of any or all of the others.

5. Waters and water courses ⇐231

Where irrigation district purchased mining claims at sale following foreclosure of assessment liens, deeds executed to district did not abrogate county's lien for taxes, but title obtained by district was subject to satisfaction of county's lien. Gen.Laws 1937, Act 3854, §§ 43–48; St.1939, p. 1108, § 2601.

6. Quieting title ⇐10(1)

In an action to quiet title against adverse claims, plaintiff must recover on the strength of his own title and not on the weakness of the defendants' title.

7. Fixtures ⇐27(1, 3)

Parties to a conveyance of realty or to an interest therein, represented by a contract to purchase, may determine between themselves that machinery or chattels to be annexed to the realty should retain their character as personalty with the privilege of removal, and such agreements are binding between the parties and against third persons having actual or constructive notice thereof, regardless of statutory provisions with respect to fixtures. Civ.Code, § 660; St.1939, p. 1108, § 2601.

8. Fixtures ⇐27(3)

Where conditional sales contract for purchase of mining claims contained agreement that contracting purchaser should retain title to machinery and equipment subsequently installed as his own personalty with privilege of removal, instrument was duly acknowledged and recorded, and machinery and equipment were not on property when irrigation district's lien for assessments vested, district was charged with constructive notice of terms of reservation of title to machinery and equipment and was bound by the agreement. Civ.Code, §§ 660, 1158; Gen.Laws 1937, Act 3854, §§ 35, 43–48; St.1939, p. 1108, § 2601.

9. Fixtures ⇐4

Where a person annexing chattels to realty intends them to become a permanent accession to the realty, they are "fixtures" and part of the realty, but that is not true if the annexor's intention is that annexation should be only temporary.

See Words and Phrases, Permanent Edition, for all other definitions of "Fixture".

10. Municipal corporations ⇐519(1)
Taxation ⇐514

Liens created to secure levies of assessments or taxes may become void for failure of the assessors to take proper notice of recorded evidence of the title and character of assessed property.

11. Municipal corporations ⇐519(1)
Taxation ⇐504

Statutes must be strictly complied with to create valid liens for taxes or assessments.

Appeal from Superior Court, Butte County, H. S. Gans, Judge.

Suit by the Oroville-Wyandotte Irrigation District against F. F. Ford, Frank Stahl, the Honcut Gold Mines Company, Limited, and others to quiet title to seven mining claims, together with mining machinery and apparatus used on the premises. From a judgment for plaintiff, defendants Frank Stahl and the Honcut Gold Mines Company, Limited, appeal.

Judgment modified and, as modified, affirmed.

J. J. Doyle and Theodore Tamba, both of San Francisco, for appellants.

Hankins & Hankins, of San Francisco, for respondent.

THOMPSON, Acting Presiding Justice.

The defendants, Frank Stahl and Honcut Gold Mines Company, Ltd., have appealed from a judgment quieting title against them to seven mining claims in Butte County, together with mining machinery and apparatus used on the premises. In support of its title the plaintiff relies upon certain deeds of conveyance executed in February, 1934, by the collector of the irrigation district upon sales of the lands to the plaintiff for delinquent assessments which were levied in 1929, as provided by sections 43–48 of the California Irrigation Act. Stats.1897, p. 254, and amendments thereto, 1 Deering's Gen.Laws of 1937, Act 3854, page 1792, at page 1830. While the mining machinery and apparatus were not separately assessed or specifically sold for delinquent taxes, the theory upon which the trial court quieted title thereto is that they are deemed to be affixed to the land and an inseparable part of the mining property for taxation purpose under the provisions of section 2601 of the Public Resources Code, St.1939, p. 1108, formerly section 661 of the Civil Code.

The appellants contend that the provisions of section 2601 of the Public Resources Code were rendered inapplicable and that the machinery and apparatus were acknowledged by written agreement executed January 27, 1930, between a former owner of the mining claims and W. F. Anderson, the purchaser thereof, through whom the appellants derived title, to be separate personal property belonging to the operators of the mines and removable at will, as distinguished from fixtures which are ordinarily deemed to be a part of the real property, that Anderson conveyed all his interest in the mining property and machinery May 18, 1931, to Honcut Gold Mines Company, Ltd., and that both instruments were duly recorded, charging the plaintiff with notice of the reservation of title to the personal property separate and apart from the mining claims. It is asserted the findings and judgment quieting title in plaintiff to the mining machinery and appliances are not supported by the evidence for the reason that plaintiff never did acquire title thereto by sale and conveyance of the mining claims for delinquent assessments or otherwise.

The record shows that prior to July 13, 1908, I. M. M. Allen owned 480 acres of land in Butte County, including the mining claims which are involved in this suit, and that, on the last-mentioned date, he conveyed all of his mining claims and rights in the said property to the Big Blue Lead Mining Company. February 7, 1917, the Big Blue Lead Mining Company conveyed to F. F. Ford and Charles G. Fowler, by deed dated February 7, 1917, and duly recorded, "all those certain pieces and parcels of land [describing the mining claims in question] and all those certain mining rights" therein, reserving unto the grantor, Big Blue Lead Mining Company, the right to conduct mining enterprises on the land for a period of twenty-five years thereafter. January 27, 1930, the Big Blue Lead Mining Company transferred by deed all of its interest and mining rights in the property to W. F. Anderson. In the last-mentioned instrument the following agreement was made with respect to the ownership, character and title to the mining machinery and equipment used in operating the mining enterprises thereon:

"It is mutually agreed that all mining appliances, machinery and equipment placed on or in said described premises or used in mining, working on developing the said property by the party of the second part shall at all times be the property of the party of the second part and, in the event of the termination of this agreement without completion of purchase, all said and above mentioned mining appliances and machinery may be removed by the party of the second part."

May 18, 1931, Mr. Anderson conveyed all of his right and title in the property to the Honcut Gold Mines Company, which thereupon took possession thereof and proceeded to operate the mines. Mr. D. E. Young testified that all of the mining ma-

chinery and equipment which are involved in this suit were installed on the property after the conveyance thereof to Anderson, in which instrument the above-quoted provision of agreement with relation to the character and ownership of the machinery and equipment appeared. There is no evidence to the contrary. The conveyance to Anderson of all mining right in the property contained an agreement to sell to him the fee in the claims for the sum of $50,000, to be paid in annual specified installments on or before January 5, 1938, together with specified royalties to be paid from the minerals extracted from the mines. That contract for sale of the property and conveyance of the mining rights remained in full force. The Honcut Gold Mines Company thereby became the owner of all machinery and equipment which were installed on the property with the absolute right to remove it at any time even though the purchase of the mines was not completed and the agreement became terminated. The conveyance to Anderson and thence to the Honcut Gold Mines Company was for an interest in the real property and a reservation of title to the machinery and appliances. It was duly acknowledged and recorded in the public records of Butte County.

The mines are located in Butte County and in the Oroville-Wyandotte Irrigation District. Irrigation districts are authorized to assess only the land within their districts. § 35, Irrigation Act. They may not levy assessments against separate personal property. These particular mining claims were assessed by the Irrigation District in 1929, before the machinery was placed on the properties. Liens were thereby created against the real properties to secure the payments of those assessments. There was no lien against the separate personal property unless, by virtue of section 2601 of the Public Resources Code, the machinery which was subsequently placed thereon automatically became an inseparable part of the realty regardless of the agreement to the contrary between the parties. For default of payments of the assessments against the interests in the real property for the year 1929, the liens were foreclosed pursuant to the provisions of the Irrigation Act, and on February 26, 1934, deeds of conveyance to the lands were executed by the Tax Collector of the district to Oroville-Wyandotte Irrigation District. Neither the foreclosure proceedings nor the deeds last mentioned contain any reference to the personal property or machinery.

The evidence shows that the mining rights in the claims which are here involved were also assessed by the County of Butte and sold to the State of California for delinquent taxes on July 2, 1935. The mining machinery and equipment were sold by the sheriff of Butte County to the appelland, Frank Stahl, on March 9, 1937, for the sum of $3,324.67, to satisfy a judgment against Honcut Gold Mines Company, Ltd.

This suit to quiet title to the mining claims and to the machinery was commenced in May, 1937, against these appellants and against F. F. Ford, W. F. Anderson, the Big Blue Lead Mining Company, and a large number of other defendants. Ford, Anderson and several of the other defendants filed disclaimers. The defaults of other defendants were entered. The appellants, Frank Stahl and Honcut Gold Mines Company, Ltd., filed separate answers claiming title to the machinery and equipment by virtue of the agreement heretofore quoted. Upon trial, the court found that plaintiff is the owner and entitled to possession of the mining claims and machinery, which are specifically described, by virtue of its foreclosure of liens against the real property, and, upon the contrary, that neither Stahl nor Honcut Gold Mines Company had any right, title or interest in or to either the real property or the machinery. Judgment was rendered accordingly. From that judgment this appeal was perfected.

[1] We are of the opinion the findings and judgment to the effect that plaintiff is the owner and entitled to the possession of the machinery and mining equipment, as distinguished from the real property, are not supported by the evidence, for the reason that the irrigation district did not possess a lien for unpaid assessments against the personal property, and the proceedings foreclosing the liens against the real property did not purport to convey to the district title to the machinery and equipment.

The fact that the property may have been subsequently sold and conveyed to the State of California for non-payment of other county taxes is immaterial. That issue does not appear to have been involved in this suit. The State was not a party to this action, and the appellants do not affirmatively ask to quiet title to the property in themselves. Their title to the property, as

against the State, may properly be determined in another action.

[2-4] It is true that a lien created in favor of the Irrigation District by virtue of its assessment levied in 1929 against the land is on a parity with the lien created in favor of Butte County for general taxes assessed in that year against the same land, But it has been held that a deed, executed pursuant to foreclosure proceedings, to any of the state agencies does not extinguish existing liens in favor of the State. La Mesa Lemon Grove, etc., v. Hornbeck, 216 Cal. 730, 737, 17 P.2d 143, 146. In the case last cited it is said in that regard:

"We may now safely conclude that under our system of taxation liens in favor of county and municipal corporations and special assessments, under the authority of state agencies for public purposes are all on an equality. By this is meant that in case of delinquency a deed to any one of these agencies for such taxes will not obliterate the existing liens on the property in favor of any or all of the others."

[5, 6] It follows that the deeds which were executed to the Irrigation District in the present case do not abrogate the lien for taxes in favor of Butte County, but, on the contrary, the title secured by the Irrigation District is subject to satisfaction of the lien of the county. Since the State was not a party to this action, it had no opportunity to assert its title to the property. It is a cardinal rule of law that a plaintiff in an action to quiet title against adverse claims must recover judgment on the strength of his own title and not on the weakness of the defendants' title. 22 Cal.Jur. 167, § 42.

It is true that section 2601 of the Public Resources Code, formerly section 661 of the Civil Code, provides that:

"Sluice-boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine."

[7] By means of a fiction of law the preceding section declares that machinery and tools used in working or developing a mine shall be deemed to be affixed to the mine whether they are actually attached to the land or not. Fixtures are ordinarily considered a part of the land to which they are attached and pass with a conveyance to the real property. § 660, Civ. Code; § 2601, Pub.Res.Code. There is a uniformly-recognized exception to the preceding rule, to the effect that parties to a conveyance of real property or to an interest therein represented by a contract to purchase realty, may determine between themselves that machinery or chattels to be annexed to the land shall retain their character as personal property with the privilege of removing it, and that such agreements are binding between the parties and against third persons having actual or constructive notice thereof, regardless of statutory provisions with respect to fixtures.

In a suit to quiet title to mining property and machinery used in operating mines, founded upon facts similar to those of the present action, it was said in Teater v. Good Hope Development Corporation, 14 Cal.2d 196, at page 207, 93 P.2d 112, 118:

"There is an exception to the rule specified in sections 660 and 661 of the Civil Code which may be thus stated: that the parties themselves may, in their dealings with chattels annexed to or used in connection with real estate, fix upon them whatever character, as realty or as personalty, they desire and the courts will give to the property the character which the parties themselves have fixed upon. Miller v. Struven, 63 Cal.App. 128, 218 P. 287; Fratt v. Whittier, 58 Cal. 126, 41 Am.Rep. 251."

In accordance with that recognized exception to the general rule, section 660 of the Civil Code was amended in 1931, with the evident purpose of enacting into statute the wholesome principle above referred to. After defining the term "fixtures" that section provides:

"Except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods."

There can be no doubt the foregoing exception to the general rule, with relation to fixtures, applies to parties to the agreement themselves, reserving machinery and equipment as the personal property of a purchaser of real estate, or an interest therein, by a conditional sales contract, or otherwise. But it is contended the exception does not apply to strangers to the agreement, and that the plaintiff in this case was not bound by that agreement. We think it

also applies to third parties having actual or constructive notice of the reservation of title.

[8] We are of the opinion the plaintiff is bound by that agreement contained in the conditional sales contract for purchase of the mining claims to the effect that the contracting purchaser of the land should retain title to the machinery and equipment subsequently installed thereon, as his own personal property with the privilege of removing it at will, or in the event of the termination of the contract. That was clearly the intention of the parties to the conveyance. The machinery was not on the property when the plaintiff's lien for assessments vested. In reliance upon the written agreement, it was subsequently placed on the land by Anderson or his successor in title, Honcut Gold Mines Company. The instrument was duly acknowledged and recorded in Butte County. It charged plaintiff with constructive notice of the terms of that reservation of title to the machinery contained in the contract to sell the land to Anderson. § 1158, Civ.Code; Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871.

In an excellent article upon the effect of agreements reserving title to personal property by statutory provisions, which may otherwise become fixtures on land, the author says in 29 California Law Review, page 21:

[9] "After many vicissitudes the law now is settled that in private transactions the legal character of annexed property depends upon the intention of the annexor. If the person annexing chattels to real estate intends them to become a permanent accession to the realty, they are fixtures and part of the realty in the eyes of the law. To the contrary, if the annexor's intention is that annexation be temporary. * * *

"Intention of permanence, then, may be express or implied. When the intention is expressed in private agreements, it is binding as between the parties; but such agreements do not defeat the rights of third parties not privy thereto who are without notice. * * *

"In the present state of law, however, statutory fiat plays a minor role in classifying property for purposes of taxation. * * *

"The assessor is not generally privy to the business transactions of property owners. He has but two means of obtaining reliable information regarding the legal status of annexed property. First, in his work of keeping abreast of market values of assessable property and in keeping current his record of property ownership, he scans recorded real estate transactions. To the extent, therefore, that private agreements are recorded, the assessor may be deemed to have notice of them."

In support of the underscored portion of the preceding statement, the author of that article cites Southworth v. Edmands, 152 Mass. 203, 25 N.E. 106, 9 L.R.A. 118, in which it is said, regarding notice to the assessor of private agreements with respect to the title to chattels annexed to real property that, since his work necessarily involves close watch of recorded property transactions, no good reason appears why the assessor should not take notice of the terms of recorded written agreements affecting the legal character of property. In that cited case it is further said that in a number of cases it is held that the terms of leases respecting the right of the lessee to remove improvements from the premises are material to the inquiry of assessors in determining whether such improvements should be classified as personal property or as fixtures attached to and made a part of the realty, for the purpose of taxation.

[10, 11] Liens created to secure levies of assessments or taxes may become void for failure of the assessors to take proper notice of recorded evidence of the title and character of assessed property. Statutes must be strictly complied with to create valid liens for taxes or assessments. Dougery v. Bettencourt, 214 Cal. 455, 6 P.2d 499; 24 Cal.Jur. 22, § 6.

In construing a statute identical with section 2601 of our Public Resources Code, the Supreme Court of Montana held, in a similar case involving title to mining machinery, that the statute which ordinarily deems such machinery and equipment as "affixed to the mine" and an inseparable part thereof, is not applicable when the parties agree that it shall be retained by the owner thereof or the operator of the mine as separate personal property removable by him. Cheadle v. Bardwell, 95 Mont. 299, 26 P.2d 336, 339; Story Gold Dredging Company v. Wilson, 106 Mont. 166, 76 P.2d 73, 77. In the Cheadle case, supra [95 Mont. 299, 26 P.2d 339], it is said in that regard:

"It is contended by plaintiff that the casing must be deemed to have been affixed to

the realty, by virtue of the provisions of section 6670, Revised Codes of 1921, which reads: 'Sluice-boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine.' With this contention we do not agree. Our Code section was taken from California. It has been construed by the courts of that state, and the construction is not in accord with such construction. The California court recognized the rule that chattels may be annexed to real estate and still retain their character of person property. Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am.Rep. 107; Best Mfg. Co. v. Cohn, 3 Cal.App. 657, 86 P. 829. This court has recognized that rule in numerous instances."

Many authorities are cited in the preceding case to support that principle.

The cases of McNally v. Connolly, 70 Cal. 3, 11 P. 320, and San Francisco Breweries v. Schurtz, 104 Cal. 420, 38 P. 92, upon which the respondent relies, are not in conflict with what we have previously said regarding the binding effect upon the parties to an agreement and upon third persons with notice thereof, that title to personal property subsequently placed on the land is reserved to a proposed purchaser of the realty. Both cases were decided before the amendment to section 660 of the Civil Code. In the McNally case machinery installed in a flour mill "with the understanding between the lessor and the lessee that the latter should be at liberty to remove it" was subsequently sold to satisfy a judgment recovered by a creditor against the lessee. The court merely said that the agreement was unimportant. But there was no evidence that the creditor ever had notice of that contract, which evidently was a mere oral agreement between the parties to the lease. It does not appear that the lease contained a declaration of that reservation of title to the machinery. There is no evidence that the lease was recorded. Evidently the creditor had no notice of the agreement. That case is not in point.

The San Francisco Breweries case, supra, was a suit to foreclose a mortgage executed to secure a promissory note given in payment of a lease on real property and "all fixtures, improvements, and appliances, which had been attached to or made a part thereof". The court properly held that "the mortgage covered real and personal property. Such a mortgage is valid, and may be foreclosed, and the real and personal property may be sold under the same decree." The fact that the mortgage specifically covers fixtures, improvements, appliances and other personal property refutes the claim that the mortgagor agreed that any of the property mentioned was exempt from the mortgage. That case is not in point.

We therefore conclude the findings and judgment are not supported by the evidence in so far as they purport to determine that the respondent is the owner and entitled to possession of the enumerated mining machinery and appliances which are subsequently placed on the land in reliance upon the written agreement contained in a duly-acknowledged and recorded contract for sale of the mining claims.

The judgment is modified by striking therefrom the determination that plaintiff is the owner and entitled to possession of the mining machinery and appliances. As so modified, the judgment is affirmed. The appellants may recover their costs on appeal.

TUTTLE, J., and ROSS, J. pro tem., concurred.



DILLARD v. CITY OF LOS ANGELES et al.

Civ. 13181.

District Court of Appeal, Second District, Division 2, California.

Oct. 28, 1941.

Hearing Granted Dec. 22, 1941.

1. Municipal corporations ⇐187

Where police officer, after having arrested a person suspected of theft and while taking him to police station, was attacked and knocked to floor of car before prisoner was subdued by fellow officer, and thereafter, officer, while in police station, was seen to be unwell and was directed to go home about two hours before his period of duty expired, and while driving his car home collided with a parked car and sustained injuries from which he died, he was not "on duty" as police officer at time of his death, so as to entitle his widow to a pension, notwithstanding general order of department providing that a police officer is considered as being on duty

24 hours a day in absence of proof to contrary.

See Words and Phrases, Permanent Edition, for all other definitions of "On Duty".

2. Municipal corporations ⇐189(1)

The purpose of a general order of city police department providing that for all purposes a police officer is considered as being on duty 24 hours each day in absence of proof to contrary, is to require police officers when not on regular duty to hold themselves in readiness for emergency duty, and it does not require 24 hours of actual police duty.

3. Municipal corporations ⇐187

Pension statutes, including city charter provisions, for pension of widows and dependents of deceased police officers, are to be liberally construed with view to conferring the intended benefits.

4. Municipal corporations ⇐187, 200

City charter provision granting pension where member of fire or police department dies as result of injury received during performance of his duty or from sickness caused by discharge of such duty is not intended to provide for payment of a pension in all cases where officer dies while a member of the department, the provision not creating a system of insurance, but being designed to protect against hazards involved in service as policeman or fireman.

5. Municipal corporations ⇐187

City charter provision granting pension to widow or dependents of fireman or policeman killed while performing duty, liberally and reasonably interpreted, must be construed as providing for payment of pension when police officer dies as result of any injury received while actually discharging his duty as such officer or from sickness caused by actual discharge of his duties, and it requires causal connection between injury or sickness resulting in death and performance of duty.

6. Municipal corporations ⇐187

City charter provision granting pension for death of fireman or policeman killed while performing duty applies not only when police officer is on regular duty but also when on emergency duty.

7. Municipal corporations ⇐187, 200

Police and firemen's pension laws are intended to protect against hazards encountered by a policeman or fireman in performance of his duty.

8. Municipal corporations ⇐187

Where police officer who had been attacked by prisoner whom he was conveying to police station in automobile appeared to be unwell when he arrived at police station and was directed to go home about two hours before his period of duty expired, and while driving his own automobile home was fatally injured in collision with parked automobile, his widow was not entitled to a pension on theory that at time of his injury he was traveling in "zone of his employment" and, therefore, was injured in performance of his duty.

See Words and Phrases, Permanent Edition, for all other definitions of "Zone of his Employment".

9. Mandamus ⇐168(2)

A policeman's widow seeking to require city board of pension commissioners to pay her pension because of husband's death, in order to sustain burden of proof, was required to prove that husband's death was result of an injury received during performance of his duty as police officer.

10. Mandamus ⇐168(4)

Evidence was insufficient to sustain burden on police officer's widow seeking a pension of proving that officer's death in collision with parked automobile while returning home two hours before his period of duty expired because of apparent illness in station after he had been attacked by prisoner whom he was taking to station was received during performance of his duty as police officer, where only evidence was that of medical officer that it was impossible to determine whether accident could have been caused by liquor which officer had been drinking or his heart condition.

11. Evidence ⇐597

Evidence of a speculative or conjectural nature is not sufficient on which to base a finding of facts.

12. Mandamus ⇐187(9)

Where evidence in mandamus proceeding by deceased police officer's widow to require city board of pension commissioners to pay her a pension was susceptible of conflicting inferences as to whether death was caused by officer's heart condition, aggravated by an attack on officer by a prisoner and therefore received in the performance of his duty, or was caused by intoxication, trial court's find-

ing that death was not caused by injury received during performance of his duty could not be disturbed on appeal.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Ruben Schmidt, Judge.

Mandamus proceeding by Eletha R. Dillard against the City of Los Angeles and others to compel the Board of Pension Commissioners of City of Los Angeles to pay petitioner a pension on account of the death of her husband while employed as a police officer. From a judgment for defendants, petitioner appeals.

Affirmed.

Cryer & Jones, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Robert J. Stahl, Deputy City Atty., and Edward J. Olstyn, Deputy City Atty., all of Los Angeles, for respondents.

PER CURIAM.

In this mandamus proceeding petitioner sought to compel the Board of Pension Commissioners of the City of Los Angeles to pay her a pension because of the death of her husband while employed as a police officer by defendant city. From a judgment in favor of defendants, petitioner has appealed.

Appellant's husband, Harold C. Dillard, had been employed for nearly fifteen years prior to the date of his death as a police officer of the City of Los Angeles. On the night of January 22, 1940, he was on duty as a radio patrolman, cruising the streets of the city in a radio car in the company of officer Olewine. His hours of duty for that night were from 6:00 p. m. until 2:30 a. m. the following morning. At about 10:15 p. m. the officers arrested a suspect accused of theft and placed him in the rear seat of the radio car in the custody of Dillard. While Olewine was driving toward the police station the prisoner, who turned out to be a "fighting drunk", attacked Dillard, knocking him to the floor of the car and striking Dillard in the chest and side with his fists. Olewine stopped the car and assisted Dillard in subduing the prisoner by knocking him out with a blow on the head. Olewine then proceeded to drive to the receiving hospital and the prisoner, who soon regained consciousness, fought with Dillard during the remainder of the trip to the hospital. After both Dillard and the prisoner were treated for their injuries at the receiving hospital the officers took the prisoner to the police station for booking, arriving at 11:20 p. m. Dillard remained in the station for about 45 minutes and during this time was noticeably pale, perspiring and breathing hard, and found it necessary to lean against the booking desk for support. His distress was so obvious that other officers in the booking room noticed it and the officer in charge, noting Dillard's apparent illness, directed him to go home. A brother officer, seeing that Dillard appeared to be exhausted and out of breath, offered to take him home but Dillard refused, stating that he could make it in his own car. At about 12:10 or 12:15 a. m. Dillard was taken to the parking lot where he obtained his car and started for his home. At approximately 12:40 a. m. Dillard's car collided with a parked car at a point which was on the direct route to his home. No one actually witnessed the accident. As a result of injuries received in the collision Dillard died almost immediately. A post mortem examination revealed that Dillard's chest had been caved in, the sternum and most of his ribs fractured, his lungs contused and collapsed and the heart ruptured. The autopsy also disclosed that Dillard had been suffering from a chronic heart condition, the left descending coronary being sclerotic and its opening reduced 95 per cent by such condition. The medical testimony shows that this condition was so serious that the deceased would have been subject to a heart attack at any time and that Dillard's distress following the fight with the prisoner was undoubtedly due to his heart condition. The autopsy surgeon also found that deceased's blood contained .25 per cent alcohol, indicating that he was intoxicated at the time of his death. The persons who were in the presence of Dillard prior to the time when he left the police station to go home testified that they did not see him take a drink at any time while he was on duty, nor did they smell alcohol on his breath. It was established that the direct cause of death was the crushing in of Dillard's chest and rupture of his heart. Based upon such facts petitioner, on behalf of herself and her infant daughter, submitted an application for a pension under the provisions of section 183 of the

Charter of the defendant city. The application was denied upon the ground that Dillard's death was not the result of any injury received by him during the performance of his duty as a police officer.

Section 183 of the Charter of the City of Los Angeles provides: "Whenever any member of the Fire or Police Department shall die as a result of any injury received during the performance of his duty, or from sickness caused by the discharge of such duty . . . then an annual pension shall be paid . . ." The trial court found upon stipulated facts that Dillard's death was not a result of any injury received during the performance of his duty, nor from sickness caused by the discharge of such duty.

[1, 2] Appellant's argument that the deceased was on duty as a police officer at the time of his death cannot be sustained. Relying upon a general order of the Los Angeles Police Department, appellant contends that a police officer is on duty 24 hours a day. The order provides: "For all purposes a police officer is considered as being on duty 24 hours each day, in the absence of proof to the contrary. All officers are required to perform police service whenever and wherever same comes to their notice or attention." The evident purpose of this order is to require all police officers, when not on regular duty, to hold themselves in readiness for emergency duty at any time and at all times to perform such police service as comes to their notice. It does not require 24 hours of actual police duty, but requires merely that police services be performed whenever necessary. If a police officer is to be considered as being on duty 24 hours each day, it follows that section 183 of the City Charter would have to be construed as providing in effect for absolute life insurance upon the lives of all officers so long as they were members of the police department, for all injuries resulting in death would of necessity be received during the performance of police duty.

[3, 4] Although it is true that pension statutes are to be liberally construed with the view of conferring the intended benefits (Casserly v. City of Oakland, 215 Cal. 600, 12 P.2d 425), the construction of the section in question which is urged by appellant is patently absurd. To hold that section 183 of the Charter was intended to provide for the payment of a pension in all cases where an officer dies while a member of the police department would render the phrases "injury received during the performance of his duty" and "sickness caused by the discharge of such duty" entirely meaningless. Such statutes ordinarily do not create a system of insurance but are designed to protect against hazards involved in service as a policeman or fireman. Renz v. Hibbing Firemen's Relief Ass'n, 186 Minn. 370, 243 N.W. 713; State v. Board of Trustees, 170 Wis. 154, 174 N.W. 465. In Tripp v. Board of Fire, etc., Commissioners, 94 Cal.App. 720, 271 P. 795, 796, a pension was denied to a fireman who was permanently disabled by causes having no relation to his duties as a fireman. Recovery was sought under a city ordinance which provided a pension for any fireman who "shall become physically disabled by reason of bodily injuries received in, or by reason of sickness caused by, the discharge of the duties of such person". The ordinance was enacted under the provisions of the city charter authorizing the city commission by ordinance to provide a fund for the pensioning of members of the Police and Fire Departments "who have been disabled or become superannuated in the service of the city". Plaintiff contended that the ordinance conflicted with the charter provision and was therefore illegal and that under the charter provision he was entitled to a pension because his disability occurred during a period of time he was employed as a fireman. In disposing of such contention the court held that "disabled in the service of the city" is properly understood to mean "disabled by reason of bodily injuries received in, or by reason of sickness caused by the discharge of the duties of such person", and denied plaintiff any recovery because the evidence showed that his disability was caused by sickness or injury having no relation whatever to his employment as a fireman.

[5, 6] When liberally and reasonably interpreted in the light of the foregoing principles, the Charter section in question must be construed as providing for the payment of a pension when a police officer dies as a result of any injury received while he is actually discharging his duty as such officer, or from sickness caused by the actual discharge of his duties. In other words, there must appear to be some causal connection between the injury or sickness

which results in death and the performance of police duty. So construed, the pension provisions would apply not only when a police officer was on regular duty, but when he was on emergency duty as well.

[7, 8] There is no merit in appellant's contention that at the time of his injury deceased was traveling in the "zone of his employment" and should therefore be held to have been injured in the performance of his duty. It is argued that since it was the duty of deceased as a police officer to be upon the streets of the city of Los Angeles and he was injured while on a street in that city, his injury was received while he was in the "zone of his employment". It is sufficient answer to this contention to point out that police and firemen's pension laws are intended to protect against the hazards encountered by a policeman or fireman in the performance of his duty. Renz v. Hibbing Firemen's Relief Ass'n, supra; Carrick v. Sherman, 105 Cal.App. 546, 288 P. 143. Obviously a police officer who is traveling the streets of a city while off duty is subject to no greater hazards than is any other pedestrian or motorist.

[9-12] In order to sustain the burden of proof it was essential that appellant prove that Dillard's death was the result of an injury received during "the performance of his duties". Cummings v. Policemen's Pension Commission of Borough of Belmar, 121 N.J.L. 129, 1 A.2d 399, 400. Although it is contended that the automobile accident which caused Dillard's death was the result of an injury received during the performance of his duty, i. e., the result of the fight with the prisoner and the consequent illness of Dillard, the evidence does not support such contention. It was established that the direct cause of Dillard's death was the crushing of his chest and rupture of the heart. The only evidence in the record shows that it was impossible to determine whether there was any causal connection between the illness of deceased resulting from the fight and the subsequent collision in which he lost his life. In answer to the question, "Do you have any way to determine whether or not the accident could have been caused by the liquor or the heart condition", the autopsy surgeon stated: "No, Sir, you could not separate the two factors." In an affidavit filed in connection with the motion for new trial, the autopsy surgeon stated: ". . . but whether the accident and the impact resulted from a loss of consciousness on account of a heart attack or from the intoxicated condition of the man at that time, is, in the opinion of your affiant, impossible of determination by medical authority." With the evidence in such a state, any conclusion as to whether the injury resulting from the fight was the cause of Dillard's death would be based upon conjecture or surmise. Evidence of a speculative or conjectural nature is not sufficient upon which to base a finding of fact. Wm. Simpson Construction Co. v. I. A. C., 74 Cal.App. 239, 240 P. 58; Singlaub v. I. A. C., 87 Cal.App. 324, 262 P. 411. There being no other evidence on the point, it follows that appellant has failed to sustain the burden of proof. Even if it be assumed that the medical testimony was sufficient to sustain a finding in appellant's favor, it is evident that such evidence is susceptible of two inferences, i. e., either Dillard's death was caused by his heart condition which was aggravated by the fight and therefore received in the performance of his duty, or it was caused by his intoxication which was not in the performance of his duty. Under such circumstances the finding to the effect that Dillard's death was not caused by any injury received during the performance of his duty could not be disturbed on appeal, since the trial court was at liberty to accept whichever of the two inferences it deemed to be justified under all of the circumstances.

Judgment affirmed.

WOOD, Justice (dissenting).

I dissent. It is established without contradiction that it was the duty of Officer Dillard to work in the radio car from 6 p. m. on January 22 to 2:30 a. m. of the following morning that in the discharge of his duty he made an arrest and that the prisoner while in the radio car attacked Dillard and injured him; that shortly thereafter Dillard took the prisoner to the police station where the officer remained for about 45 minutes; that during this period he was noticeably pale and leaned for support on the booking desk and was so obviously distressed that the officer in charge directed him to go home, although his regular tour in the radio car would not end for two hours; that in accordance with instructions Dillard started for home and was injured while traveling in a direct line to his home by a collision of his car with

an automobile parked on the curb; that Dillard's chest was caved in by the impact of the cars and his heart was ruptured; that the cause of Dillard's death was "a crushing in of the chest and rupture of the heart"; that at the time of making the arrest Dillard was suffering from a chronic heart ailment, the coronary artery being closed 95 per cent subjecting the officer to a heart attack at any time.

In my opinion Officer Dillard, having received injuries arresting the prisoner which incapacitated him from further duty and made him ill and having been directed by the officer in charge of the station to return to his home two hours before the termination of his scheduled period of work, was in the performance of his duty at the time his automobile collided with the parked car and that he died as a result of an injury received during the performance of his duty. The facts above outlined establish the right of plaintiff to receive the pension provided by the city charter. The only contention which respondent can make in an attempt to defeat plaintiff's claim must be founded on the fact that the autopsy surgeon testified that the officer's body contained sufficient alcohol to indicate intoxication and his further testimony that from a medical standpoint it could not be determined whether the accident was caused by the liquor or by the heart condition. In my opinion plaintiff should receive the pension in either event. It is a matter of common knowledge that a great many men in weakened condition drink intoxicating liquor as a stimulant and as an aid to regaining their strength. Apparently Officer Dillard while on his way home drank the liquor with this end in view. In his affidavit presented on motion for a new trial Dr. Anthony stated: "The presence of alcohol in the blood of said deceased taken in connection with the testimony of numerous witnesses to the effect that up to the time he left the parking lot at Temple and Hill Street at about 12:10 or 12:15 A. M. on January 23, 1940, said deceased had not taken liquor, is easily explained from a medical standpoint; that in the opinion of affiant the taking of liquor under the circumstances was the not unnatural act of a man in the exhausted and weakened condition of said deceased at the time, in an effort to stimulate himself for the drive to his home; it was the act of a stricken and dying man to bolster his waning strength for further effort." Dr. Webb, the autopsy surgeon, stated in his affidavit that Officer Dillard was suffering from a heart attack at the time he was sent home, that "said attack was the direct and natural result of the fight he had had with the prisoner in the radio car, in view of the heart condition revealed by the autopsy; that the deceased was so seriously ill at the time and in such precarious condition that he should never have been allowed to attempt to go home alone or to drive an automobile; that he was liable to lose consciousness at any moment and the collision which resulted in his death was what might well have been expected from a driver in his condition at the time."

Pension provisions in a city charter should be given a liberal construction in order to carry out their beneficial purposes. O'Dea v. Cook, 176 Cal. 659, 169 P. 366. In rejecting plaintiff's petition for a pension the court has refused to place a liberal construction upon the charter provisions in question. The conclusion is inescapable that if Officer Dillard had not received injuries while making the arrest he would not have been sent home and consequently would not have met his death in the manner and at the time shown in evidence.



47 Cal.App.2d 520

NELSON et al. v. ROBINSON et al.

Civ. 6363.

District Court of Appeal, Third District, California.

Oct. 29, 1941.

Hearing Denied Dec. 22, 1941.

1. Nuisance ⇐19

Waters and water courses ⇐233

One who permits water to percolate from his artificial canal to the property of his adjoining neighbor commits an invasion of such neighbor's rights for which redress is obtainable in damages, by injunction, or through the abatement of a nuisance.

2. Easements ⇐1

Waters and water courses ⇐164

The right, claimed to have been acquired by prescription, to continue to permit wa-

ter to seep from irrigation ditch, thereby flooding adjoining land, was an "easement", which is a privilege without profit, which the owner of one tenement has a right to enjoy in respect to that tenement in or over the tenement of another person, by reason whereof owner of servient tenement is obliged to suffer or refrain from doing something on his own tenement for the advantage of owner of dominant tenement.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement".

3. Easements ⇐1

An "easement" always implies an interest in the land in and over which it is to be enjoyed.

4. Easements ⇐5, 7(4)

An easement may be acquired by prescription, the adverse use, required by statute, being for a period of five years. Code Civ.Proc. § 325.

5. Waters and water courses ⇐164

In order to establish acquisition by prescription of right of easement to permit seepage of water from irrigation ditch, thereby flooding adjoining land, it was necessary to establish not only the actual infringement of rights of owners of adjoining land for a period of time each year for the statutory period, but also that owners of adjoining land had knowledge of such infringement by seepage of water or at least the existence of facts and circumstances from which such knowledge could be reasonably inferred. Code Civ.Proc. § 325.

6. Evidence ⇐7, 67(1)

In determining whether facts were such that owners of land adjoining irrigation ditch were chargeable with notice of infringement of their rights by seepage of water from ditch onto their land so as to establish easement by prescription, it could not be assumed that because water seeped from ditch one year it would continue to do so every year, since it is common knowledge that porous ground is often sealed and rendered impervious to further percolation by particles of soil carried in the water. Code Civ.Proc. § 325.

7. Easements ⇐5

The foundation of the establishment of a right by prescription is the acquiescence of the owner of the servient tenement in the acts which are relied upon to establish the easement by prescription, and such acquiescence can be established only if owner of servient tenement knew of such acts or was chargeable with knowledge thereof.

8. Easements ⇐8(1)

The adverse use, relied upon to establish an easement by prescription, must be "hostile", that is, a claim asserted against the whole world.

See Words and Phrases, Permanent Edition, for all other definitions of "Hostile".

9. Easements ⇐36(3)

Evidence that each time owners of land adjoining irrigation ditch complained of injury to land resulting from seepage from ditch the owners of ditch by leveling adjoining land and constructing drainage ditches attempted to prevent such injury was insufficient to establish such "claim of right" upon the part of owners of irrigation ditch to thus injure adjoining land as is essential to establishment of easement. Code Civ.Proc. § 325.

See Words and Phrases, Permanent Edition, for all other definitions of "Claim of Right".

10. Adverse possession ⇐112

The burden of proving all the essential elements of an adverse possession or prescriptive title rests upon the party relying upon such title, since the doctrine of adverse possession is to be construed strictly and such possession cannot be made out by inference, but only by clear and positive proof.

11. Waters and water courses ⇐164

Evidence which failed to establish that owners of lands adjoining irrigation ditch knew of seepage of water from ditch each year during statutory period or were chargeable with notice thereof, and which also failed to establish a claim of right by owners of ditch to thus injure adjoining lands, was insufficient to establish a right of "easement" to continue to permit seepage of water from irrigation ditch to the injury of adjoining lands. Code Civ.Proc. § 325.

12. Easements ⇐5

In the absence of statutory requirement, party claiming an easement need not make an express declaration of his claim, but such claim of right must not only exist in claimant's mind but must also be in some way asserted in such manner that owner of

land over which easement is claimed may know of it.

13. Easements ⇐6

In the absence of express notice of claim of easement or actual knowledge of owner of servient tenement, the user by claimant must be so visible, open and notorious that notice or knowledge will be presumed.

14. Limitation of actions ⇐55(7)

Whether action for injury to real property, resulting from seepage of water from irrigation ditch onto adjoining land, was barred by three-year statute of limitations if not commenced within three years after such injury was first inflicted, depended upon whether a single cause of action was created, or whether successive actions could be maintained for repeated or recurring injuries, which turned upon the further question whether trespass was to be regarded as a permanent one or a continuing trespass. Code Civ.Proc. § 338, subd. 2.

15. Waters and water courses ⇐262

Where ground traversed by irrigation ditch was porous in character, it was the duty of owners of such ditch to adopt the common method of sealing it with concrete or some similar material which would prevent the seepage of water, and upon failure to do so owners assumed risk of damage to neighboring landowner.

16. Limitation of actions ⇐55(6)

One should not be permitted to acquire a prescriptive right to continue a negligent act.

17. Limitation of actions ⇐55(7)

Where lands adjoining irrigation ditch were first flooded in 1926 as result of seepage of water from ditch and 10 years later another parcel of land some distance away was likewise flooded, such injuries to lands gave rise to successive causes of action so that landowners were entitled to recover for any injury to their lands which was inflicted within three years prior to commencement of action. Code Civ.Proc. § 338, subd. 2.

18. Equity ⇐67

One of the principal factors in determining "laches" is acquiescence, which must be with the knowledge of the wrongful acts themselves and of their injurious consequences and must be voluntary, not the result of accident, nor of causes rendering it a physical, legal or moral necessity, and must last such an unreasonable length of time that it is inequitable even to the wrongdoer to enforce the peculiar remedies of equity against him.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

19. Waters and water courses ⇐263

Evidence that owners of lands adjoining irrigation ditch had repeatedly complained of injury to lands resulting from seepage of water from ditch and that owners of ditch had thereupon attempted to prevent such seepage and consequent injury was insufficient to establish acquiescence of landowners in acts of ditch owners resulting in injury so as to constitute "laches" barring action for injury to lands.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Mary A. Nelson and others against I. N. Robinson and others to quiet title to realty, to recover damages for injury done to such realty, and to abate a nuisance. From a judgment in favor of defendants, plaintiffs appeal.

Judgment reversed.

Jos. H. Huberty, of San Andreas, for appellants.

Jones & Quinn, Levinsky & Jones, and William H. Woodward, all of Stockton, for respondents.

PER CURIAM.

This action was brought to quiet title to the lands of appellants; to recover damages for injury done to said property; and to abate a nuisance. The trial court found for respondents upon all issues, and the following judgment was entered:

"That the ownership and possession of the plaintiffs to the above described property is subject to the prescriptive right of defendants to permit waters to percolate, flow and seep from the ditch of defendants described in said second amended complaint under, in and upon the hereinbefore described lands of plaintiffs to the same extent and in the same manner as they have heretofore.

"That plaintiffs are barred and forever enjoined from asserting, or claiming, any injury to the lands hereinbefore described, or to crops growing thereon, by reason of water seeping or percolating from said canal as a result of the continued opera-

tion and use of said canal, as same has been operated and used heretofore."

This appeal is taken from said judgment.

Plaintiffs are the owners of three hundred sixty-nine acres of land on Roberts island, in the Delta Region of San Joaquin county. In 1925, defendants, who are landowners in said district, constructed an irrigation ditch to convey water to their respective parcels of land from Middle river, a branch of San Joaquin river. The ditch or canal is about 20 feet wide and four feet in depth, and it borders on the northeast property line of plaintiffs. The area which was affected by the percolating waters is some 50 acres in extent. The court found that said land was fertile and capable of raising valuable crops. It also found that "said lands and crops thereon have been visibly affected, and the injury thereto apparent commencing in the year 1926, and each year thereafter." The court found:

"That heretofore and on or about the year 1925, defendants, and/or their predecessors in interest, constructed along higher ground, lying easterly of, and above described lands of plaintiffs, an irrigation canal and/or ditch which takes water by means of a pumping plant from the junction of Middle River and High Ridge Levee in the County of San Joaquin, State of California, and leads thence along the easterly base of said High Ridge Levee in a general northerly direction through the lands of defendants, Robinson, Jones, Vasquez, Woods and to the property of Armond Woods, commonly known as and called 'Honker Lake', which, said canal and/or ditch, during the times hereinafter mentioned, has been used for the purpose of conducting water therein for the irrigation of the several parcels of land of said respective defendants; that from said time, annually during each irrigation season thereafter, the defendants have operated and used said ditch for the transportation and distribution of irrigation water; that by reason of the nature of the lands through which said ditch runs, a certain amount of seepage and percolation necessarily escapes from said ditch to the lands adjoining on both sides of said ditch; that said seepage and percolation became visible and apparent as early as the year 1926, and has annually, and during each and every irrigation season thereafter been visible and apparent; that said lands and the crops thereon have been visibly affected and the injury thereto apparent commencing in the year 1926, and each and every year thereafter; that said seepage has not increased, become worse, or involved larger areas, but has remained constant during the irrigation season; that defendants claim the right to operate said ditch in the future as it has been in the past.

* * * * * *

"That within the three years last past and immediately preceding the commencement of this action, and for many years theretofore, defendants have allowed water to percolate, seep and flow from the aforesaid canal or ditch on, in and upon lands of plaintiffs, but that said seepage did not gradually, or at all, become worse, and is not constantly, or at all, involving large areas of the lands of plaintiffs, but that on the contrary the extent and amount of seepage was not, during the last said three years, any more, if not less, than it had been theretofore; that the use and enjoyment of said lands of plaintiffs is interfered with by a high water table, which in turn is largely caused, and has been largely caused, by periodical high water in Middle River which seeps in and under said lands of plaintiffs, and also by the irrigation of said lands of plaintiffs by the plaintiffs themselves, without providing any proper or adequate drainage therefor; that the seepage and percolation from said ditch or canal does contribute to said high water table, but the extent of such contribution has not been disclosed or established, other than that such seepage and percolation is no greater than it had been for many years prior to 1935."

The court also found that the use and enjoyment of plaintiffs' lands is interfered with by a high water table, which in turn is largely caused by periodical high water in Middle river, which seeps under said lands, and also by the irrigation of said lands by plaintiffs themselves, without providing proper drainage therefor;

"That the said lands of plaintiffs were, and are, in a high state of cultivation, and are fertile, and are capable of raising large and valuable crops; that the fertility of said lands has not deteriorated, and alkali and/or other destructive substances have not been caused to be deposited upon said lands; that the fluctuat-

ing, and at times high water table, is largely caused by the said seepage from Middle River and drainage resulting from plaintiffs' own irrigation, and that before plaintiffs can develop and enjoy the full productivity of their lands it will be necessary for them to properly provide for the removal of said waters that seep from Middle River and to remove the drainage waters resultant from their own irrigation; that the seepage and percolation out of and from defendants' ditch was during the irrigation season of each year practically uniform, and in and of itself caused no damage to the fertility or productivity of said lands; that it is not true that plaintiffs have been damaged in the sum of $1,000.00, or any other sum, by reason, or as a result of the seepage or percolation of and from defendants' ditch; that seepage and percolation from the canal of the defendants and damage therefrom became visible and apparent to plaintiffs as early as the year 1926, and was known to them, and was visible and apparent to them at all times since 1926, during the irrigation seasons, and that the seepage and percolation out of and from defendants' canal was not, during the three years preceding the commencement of this action, any greater than it had been theretofore if it was not less; that there has been no increased use of said canal since 1935; that the causes of action attempted to be alleged by the plaintiffs are barred by the statute of limitations of the State of California, and particularly by the provisions of subdivision 2, section 338 of the Code of Civil Procedure of the State of California."

* * * * * *

"That for more than five years last past and next immediately preceding the commencement of this action the defendants have used said ditch for irrigation purposes, and during all of said time water has to some extent seeped and percolated from said canal and through the banks and bottom thereof, and during all of said time the plaintiffs had actual notice thereof; that during all of said time defendants claimed the right to permit said seepage as a necessary incident to the use and operation of said ditch; that during all of said time the invasion of plaintiffs' lands, and injury to the crops by said seepage and percolation from defendants' canal to and under the lands of plaintiffs was open, visible, notorious and adverse to the plaintiffs' rights and under claim of right by the defendants, and was known to be adverse by said plaintiffs."

[1] It might be well to state the general rule governing actions of this character. The courts of this state have repeatedly held that one who permits water to percolate from his artificial canal to the property of his adjoining neighbor commits an invasion of the latter's rights for which redress is obtainable in damages, by injunction or through the abatement of a nuisance. Parker v. Larsen, 86 Cal. 236, 24 P. 989, 21 Am.St.Rep. 30; Stoops v. Pistachio, 70 Cal.App. 772, 234 P. 423; Kall v. Carruthers, 59 Cal.App. 555, 211 P. 43; Massetti v. Madera Canal & Irr. Co., 20 Cal.App.2d 708, 68 P.2d 260.

[2-5] It is contended by appellants that the evidence is insufficient to sustain the finding to the effect that defendants have acquired a right by prescription to permit them to flood plaintiffs' property by seepage and percolation. We think the position of appellants is correct. The right which is granted by the judgment is in reality an easement—* * * "a privilege without profit, which the owner of one tenement has a right to enjoy in respect to that tenement, in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former". 9 Cal.Jur., p. 944, § 2. An easement always implies an interest in the land in and over which it is to be enjoyed. Id. It may be acquired by prescription (9 Cal.Jur., p. 948, § 5), and the adverse use must be for a period of five years. Code Civ.Proc., § 325. One of the essentials of adverse user in this case is the actual infringement of the rights of appellants for a period of time each year, for the statutory period, that is, the saturation and percolation of plaintiffs' land by seepage from defendants' canal must have been known to the former, or at least facts and circumstances must be proven from which it might be reasonably inferred that plaintiffs had such knowledge. The trial court did find that such knowledge was a fact, but the record fails to sustain such finding. The testimony shows that there were three occasions when the seepage water was visible on the surface of appellants' land. One was in the year 1925, one in 1928, and the other in 1935. The finding that the seepage and percolation was visibly appar-

ent each year since 1926, is wholly without support in the record. In his opinion, which is part of the record, the trial judge states:

"I am satisfied that defendants were guilty of negligence in bringing water onto their property through the ditch in question, with knowledge on their part of the porous character of the soil without making adequate provision to prevent seepage into plaintiffs' land. Tormey v. Anderson-Cottonwood Irrigation District, 53 Cal. App. 559, 200 P. 814. But I am equally well satisfied that plaintiffs knew at all times since 1926, that the seepage was going on and contributed to the water plane that rose to such height in their land as to flood it in the lower portions every time they irrigated after they planted alfalfa in 1930."

[6, 7] Can we assume that because water seeped in one year, that it will continue to do so every year, and that appellants must have known this? On the contrary, it is a matter of common knowledge that porous ground is often sealed and rendered impervious to further percolation by particles of soil carried in the water. We do not believe that rights in real property can be acquired under such a showing. In 17 Am.Jur., pages 976, 977, paragraph 65, it is said:

"The foundation of the establishment of a right by prescription is the acquiescence on the part of the owner of the servient tenement in the acts which are relied upon to establish the easement by prescription. This makes it necessary that he know of those acts, or be charged with knowledge of them if he did not in fact know of them. A person cannot establish a prescriptive right to an easement to maintain drains under the ground where continued use of the drains is not open and visible and in the absence of proof that the owner of the servient tenement had actual or constructive knowledge of the user."

[8, 9] The second element of adverse user which was not proven was hostility of the user—a claim asserted against the whole world. 1 Cal.Jur., p. 537, § 30. Following the seepage which became visible in 1926, and in response to plaintiffs' demands said defendants engaged men and equipment and spent time and money on plaintiffs' land, leveling the same, and eliminated a slough which said defendants maintained full of water immediately east of defendants' lands during 1926. Thereafter, plaintiffs continuously farmed their lands without any visible or apparent injury from water seepage until 1935. In 1935, plaintiffs' lands became saturated and flooded by seepage water from defendants' canal at or near the so-called "mailbox", about 1,000 feet southerly of the 1926 invasion, whereupon plaintiffs complained to defendants about said water trespass, and as a result of which defendants employed men and dug a drainage ditch about 18 inches deep on plaintiffs' land in an effort to intercept the water percolating from defendants' canal. In 1936, there was a recurrence of seepage water against which plaintiffs again complained, whereupon defendants rented ditch digging equipment and dug a drainage ditch 3 to 4 feet deep along plaintiffs' eastern boundary, in an effort to intercept the percolating water, and installed a pump to elevate the water therefrom back into defendants' canal. Defendant Robinson testified: "I ordered the work done" in the summer of 1936. If respondents always took the position that they had a right to thus injure the property of appellants, they would not have taken those steps to remedy the wrong each time that complaint was made. The evidence is insufficient to establish a claim of right upon the part of respondents.

[10] The rule as to burden of proof in this action is thus stated in 1 Cal.Jur., page 636, section 95:

"Inasmuch as the doctrine of adverse possession is to be construed strictly, and such possession cannot be made out by inference, but only by clear and positive proof, the burden of proving all the essential elements of an adverse possession or prescriptive title is upon the party relying upon it."

[11] We are satisfied that a perpetual right to injure the land of another by means of seepage from an irrigation canal cannot be established by evidence of the character stated, as it lacks proof of essential elements necessary to the acquisition of a prescriptive right. In 19 C.J. page 880, section 34, it is stated:

[12, 13] "While it is not necessary for the party claiming an easement to make an express declaration of his claim, unless it is so provided by statute, it is not sufficient that the claim of right exists only in the mind of the person claiming; it must in some way be asserted in such a manner

that the owner may know of it. In the absence of express notice or actual knowledge on the part of the owner of the land, the user by the claimant must be so visible, open and notorious that notice or knowledge will be presumed."

The next question is whether or not the right of action is barred by section 338, subdivision 2 of the Code of Civil Procedure, which provides that an action for trespass upon, or injury to real property, must be commenced within three years. It is the contention of appellant that he may recover damages for the three year period immediately prior to the filing of the complaint. All parties agree that the cause of action for damage is founded upon a trespass upon real property. It would thus seem as though the action were barred. However, the question is not so simple of solution. It turns upon the question of fact, whether or not the trespass or nuisance is a permanent or continuing one. It is the position of respondents "that in 1926 plaintiffs' cause of action arose once and for all; that at that time, and for three years thereafter, they could have sued defendants for legal and equitable relief had they so desired; but that they did not do so, and that, therefore, section 338(2) Code of Civil Procedure, fixing a three-year period of limitation on actions for trespass or injury to real property, is a bar to the present action." Appellants answer, "that the wrong of which they complain is a 'continuing trespass', giving rise to successive causes of action; that although the statute of limitations may run on all damages sustained three years or more before commencement of their action, it is no bar as to damages occurring the three years next preceding the commencement of their action."

[14] The rule applicable here is thus stated in 75 A.L.R. 529:

"The question whether, in respect to a particular nuisance, a single cause of action is created, or whether successive actions may be maintained for repeated or recurring injuries, which turns upon the further question whether the nuisance is to be regarded as a permanent one or a continuing one," (has arisen in many cases).

[15-17] The undisputed evidence shows that the land injured by seepage in 1926 was some 1,000 feet away from the parcel damaged in 1935. It is true the court found that the seepage had not increased during that time, but this is not a finding to the effect that the water continued to percolate and rise upon the same parcel of property. We think that the occurrence of the damage at such a widely separated place gave rise to a new cause of action. The damage to the first parcel flooded may have been permanent in respect to that, but it was not a permanent damage to other portions of the real property not yet affected. The case of Middelkamp v. Bessemer Irrigating Co., 1909, 46 Colo. 102, 103 P. 280, 23 L.R.A.,N.S., 795, is chiefly relied upon by respondents to sustain their contention that there was but one cause of action which accrued in 1926. That decision does uphold their view, but the facts do not show damage by seepage to one parcel, and then damage to another widely separated portion of the land some ten years later. The case is predicated upon the fact that the irrigation ditch was "properly constructed". The obvious answer to that statement is that no ditch can be considered properly constructed which will seep and leak to the extent that it destroys adjoining land so far as agricultural purposes are concerned. If, as the court here finds, the ground traversed by the ditch was porous in character, it was the duty of the owners of such ditch to adopt the common method of sealing it with concrete or some similar material which would prevent the escape of water. Otherwise, one who uses such a ditch must assume the risk of damage to his neighbor. No one should be permitted to acquire a prescriptive right to continue a negligent act. We therefore hold that appellants are entitled to recover for any injury to their lands which was inflicted within three years prior to the commencement of the action. We might further add that the evidence as to the extent of damages was undisputed. The finding of the court that there was no damage is contrary to the evidence. It might be pointed out that there is an apparent contradiction in respect to such finding. In Paragraph III, the court found that "said lands and the crops thereon have been visibly affected, and the injury thereto apparent, commencing in the year 1926". In paragraph VI, the court found: "That it is not true that the plaintiffs have been damaged by percolation or seepage * *."

[18] As to the finding that plaintiffs were guilty of laches, respondents state that "the same facts which create the

bar of the statute will also present the defense of laches." What we have said upon the defense of the statute of limitations is applicable here. In 10 Cal.Jur., pages 528, 529, section 66, it is stated:

"One of the principal factors in determining laches is acquiescence. * * * Acquiescence, to constitute laches, 'must be with the knowledge of the wrongful acts themselves and of their injurious consequences, it must be voluntary, not the result of accident, nor of causes rendering it a physical, legal or moral necessity, and it must last an unreasonable length of time, so that it will be inequitable even to the wrong-doer to enforce the peculiar remedies of equity against him after he has been suffered to go on unmolested and his conduct apparently acquiesced in.'"

[19] The evidence is insufficient to sustain such finding.

In conclusion, while we are reluctant to set aside findings upon the ground of insufficiency of the evidence, we feel that the state of the record here leaves no other course open to us.

The judgment is reversed.



MORENO v. CAIRNS et al.

Civ. 12816.

District Court of Appeal, Second District, Division 1, California.

Oct. 24, 1941.

Rehearing Denied Nov. 12, 1941.

Hearing Granted Dec. 22, 1941.

1. Municipal corporations ⇐197

The section of Los Angeles city charter, providing that no officer or employee of city fire department shall be suspended, removed, deprived of office or position, or otherwise separated from service of such department, other than by resignation, except for good and sufficient cause, does not apply to resignations. Los Angeles City Charter, § 135.

2. Municipal corporations ⇐197

The resignation of assistant fire chief of city fire department, if voluntary, worked final severance of his relation to such department.

3. Mandamus ⇐154(5)

In mandamus proceeding to compel city fire commissioners to reinstate petitioner as assistant fire chief after his resignation, acceptance of such resignation, if necessary to make it effective, appeared by clear implication from allegations of petition that petitioner was deprived of his position and that respondents refused to reinstate him.

4. Mandamus ⇐154(5)

In mandamus proceeding to compel city board of fire commissioners to reinstate petitioner as assistant fire chief after his resignation, allegations of petition that board members told petitioner that, if he did not resign, he would be summarily discharged and lose all pension rights and that four such positions were to be eliminated, were insufficient to show that resignation was induced by duress, fraud and undue influence.

5. Mandamus ⇐154(5)

In mandamus proceeding to compel city board of fire commissioners to reinstate petitioner as assistant fire chief after his resignation, allegations of petition that board members threatened to discharge petitioner summarily if he did not resign, that no just or reasonable cause for his resignation existed, that no charges were preferred against him, and that he had not been guilty of misconduct justifying his removal, were insufficient to show that resignation was involuntary.

6. Municipal corporations ⇐194

Abolition of position of assistant fire chief of Los Angeles city fire department by board of fire commissioners in good faith would necessarily be followed by holder's discharge or separation therefrom, without any misconduct on his part and unhindered by section of city charter, prohibiting removal of fire department officers or employees without good cause, or other provisions regarding removal for misconduct. Los Angeles City Charter, § 135.

7. Mandamus ⇐154(5)

In absence of allegation that threat by members of city board of fire commissioners to discharge assistant fire chief because of elimination of his position was unlawful, his resignation after such threat was not induced by duress or coercion in legal sense, but must be regarded as voluntary, so as to require affirmance of judgment denying his petition for writ of mandate to compel board to reinstate him.

8. Mandamus ⇐154(5)

In mandamus proceeding to compel city board of fire commissioners to reinstate assistant fire chief after his resignation, allegations of petition that petitioner was forced to resign against his will under duress, misrepresentation, fraud, and undue influence, in that he would be deprived of all pension rights, and that he resigned under protest because of such duress, misrepresentation, etc., were mere conclusions of law insufficient to state cause of action without statement of facts from which fraud, compulsion, or undue influence arose.

WHITE, J., dissenting.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Manuel A. Moreno for a writ of mandate to compel James Cairns and others, constituting the Board of Fire Commissioners of the City of Los Angeles, to reinstate petitioner as assistant fire chief of such city, restore his seniority rights, and pay him back pay. From a judgment against petitioner following an order sustaining a demurrer to his second amended petition without leave to amend, he appeals.

Affirmed.

Hearing granted; HOUSER, J., not participating.

Arthur J. Mullen and Joseph K. Coady, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and George William Adams and Marvin Chesebro, Deputy City Attys., all of Los Angeles, for respondents.

SHAW, Justice pro tem.

This appeal is taken by petitioner from a judgment against him following an order sustaining a demurrer to his second amended petition for writ of mandate, without leave to amend. The writ is sought to compel respondents, who are the Board of Fire Commissioners of the City of Los Angeles, and the individual members thereof, to reinstate petitioner to the position of assistant fire chief of the fire department of that city, which he formerly held, and to his seniority rights, and to pay him back pay claimed to be due him. The petition alleges that after petitioner had served in the fire department for forty-two years with an unblemished record, and while he held the position of assistant fire chief and was in good health, he resigned his position. The circumstances attending this resignation are alleged as follows:

"VI. That your petitioner has not been unlawfully suspended, laid off, or discharged from his position as assistant chief of said Fire Department, but on the contrary, your petitioner under duress, misrepresentation, fraud and undue influence, in that he would be deprived of all pension rights, was forced against his will and desire, to resign from his position with said department; that on July 1, 1939, your petitioner, without any notice other than two hours, was summoned before the Board of Fire Commissioners; that at such time your petitioner was told that if he did not then and there, within two hours, resign from his position with the Fire Department, he would be summarily discharged, and that if he was so discharged he would suffer a complete loss of all pension rights; that because of the pressure of duress, misrepresentation, fraud, and undue influence of complete loss of all pension rights, your petitioner did resign under protest; that no just or reasonable cause existed that your petitioner should have been resigned, other than fear of loss of pension rights with which he was threatened; that no charges of any kind were ever preferred against him.

"VII. That at the time your petitioner was forced to retire, he was informed that four positions as assistant fire chief were to be eliminated, but the rules of seniority then in force and applicable to petitioner were not applied in the case of your petitioner.

"VIII. * * * That your petitioner was deprived of his position arbitrarily and summarily, in that the procedure required by section 135 of the City Charter was not followed, but by intimidations, duress and threat of loss of all pension rights, your petitioner, against his will and without advice of counsel, or allowance of time to secure such advice and counsel, was forced under protest to resign."

"XIII. * * * That your petitioner herein has never been guilty of any misconduct upon which an order for removal could be made."

Respondents contend, and petitioner denies, that this proceeding is barred by section 112½ of the Los Angeles City Charter. That section provides that, "Whenever it is claimed by any person that he has been unlawfully suspended, laid off or discharged, and that such lay-off, suspension

or discharge is ineffective for any reason, any claim for compensation must be made and a demand for reinstatement must be presented in writing within ninety days following the date on which it is claimed that such person was first illegally, wrongfully or invalidly laid off, suspended or discharged"; and said section further provides that failure to comply with these requirements shall bar any action for reinstatement or for recovery of compensation claimed.

The questions in dispute here are, whether the action taken against petitioner, as alleged in the petition, constituted a "layoff, suspension or discharge", and, whether section 112½ is applicable at all to members of the fire department, for whose discipline, removal and reinstatement section 135 of the charter provides an elaborate scheme. We do not find it necessary to decide these questions, for we are satisfied that, whether section 112½ applies to the case or not, the petition must fail for other reasons.

[1-3] Section 135 of the charter, which deals specially with the fire department, provides that, "No officer or employee of the Fire Department shall be suspended, removed, deprived of his office or position, or otherwise separated from the service of the Fire Department (other than by resignation), except for good and sufficient cause", and provides an elaborate procedure for determining whether such cause exists, which, the petition alleges, was not followed in this case. The words, "other than by resignation", in the above quotation, clearly show that the section does not apply to resignations. The petition alleges that petitioner resigned. This resignation, if voluntary, worked a final severance of petitioner's relation to the fire department. Kramer v. Board of Police Commissioners, 1919, 39 Cal.App. 396, 400, 179 P. 216. The case just cited assumes that an acceptance is necessary to make a resignation effective. The contrary was declared, though possibly by way of dicta, in People v. Porter, 1856, 6 Cal. 26, 27, 28; Meeker v. Reed, 1924, 70 Cal.App. 119, 123, 232 P. 760; and In re Estate of Grafmiller, 1938, 27 Cal.App.2d 253, 256, 81 P.2d 181. We need not decide the point, for while an acceptance is not directly alleged here, if one is necessary it appears by clear implication from the allegations that petitioner was deprived of his position and respondents refused to reinstate him.

[4] Petitioner's claim is that his resignation was induced by duress, fraud and undue influence and therefore was not voluntary or effective. We have above quoted all the allegations of the petition in that respect. We regard them as insufficient. It is apparent from a reading of the petition that petitioner's whole claim in this matter is based on the allegations of statements made to him when he was summoned before the Board of Fire Commissioners, at the time he resigned, that "if he did not then and there, within two hours, resign from his position with the fire department, he would be summarily discharged, and that if he was so discharged he would suffer a complete loss of all pension rights", and that "four positions as assistant fire chief were to be eliminated". It is not alleged and is not now claimed that either the statement of the effect of a discharge on pension rights, or that regarding the prospective elimination of positions, was not true, and the other statement, that he would be discharged if he did not resign, was not a statement of fact. Hence the charge of fraud cannot be supported on any of the statements above quoted. No others are set forth in the petition.

[5-7] Neither are the allegations as to duress and threats sufficient to show that the resignation was involuntary. The only threat alleged is that if petitioner did not resign he would be summarily discharged. This is coupled with the allegations, (1) that no just or reasonable cause existed why he should have resigned, (2) that no charges were ever preferred against him, and, (3) that he had been guilty of no misconduct justifying his removal. The second allegation has no significance here, for after he resigned no charges could be preferred. The first and third are not equivalent to a statement that no sufficient cause for his removal existed. If the position occupied by petitioner were in good faith abolished his discharge or separation from it would necessarily follow without any misconduct on his part, unhindered by section 135 of the charter or other provisions regarding removals for misconduct. Kabisius v. Board of Playground, etc., 1935, 4 Cal.2d 488, 493, 50 P.2d 1040. The petition suggests, by recital of information given petitioner, that four positions of assistant fire chief were to be eliminated, without allegation that this was not to be done in good faith, and for all that appears in the petition,

this may have furnished proper ground for petitioner's discharge. It does not, therefore, appear from the petition that there was anything unlawful about the threat made to petitioner. In the absence of such unlawfulness, the resignation following upon it was not induced by duress or coercion, in the legal sense, but must be regarded as voluntary. Kramer v. Board of Police Commissioners, supra, 39 Cal.App. at page 399, 179 P. 216.

[8] Besides the matters already considered, the petition contains, as above noted, allegations that "your petitioner under duress, misrepresentation, fraud and undue influence, in that he would be deprived of all pension rights, was forced against his will and desire, to resign"; that "because of the pressure of duress, misrepresentation, fraud, and undue influence of loss of all pension rights, your petitioner did resign under protest"; and that "by intimidations, duress and threat of loss of all pension rights, your petitioner * * * was forced under protest to resign". All of these are but conclusions of law, which are insufficient to state a cause of action without a statement of the facts from which the fraud, compulsion or undue influence arises, and add no strength to such a statement. Hanford Gas, etc., Co. v. Hanford, 1912, 163 Cal. 108, 113, 124 P. 727; Metropolis, etc., Sav. Bank v. Monnier, 1915, 169 Cal. 592, 596, 147 P. 265; Hannon v. Madden, 1931, 214 Cal. 251, 267, 5 P.2d 4; In re Estate of Sheppard, 1906, 149 Cal. 219, 85 P. 312; see, also, Smith v. Bentson, 1932, 127 Cal.App., Supp., 789, 15 P.2d 910.

The judgment is affirmed.

YORK, P. J., concurred.

WHITE, Justice (dissenting).

I dissent. Respondents' contention that the proceeding herein is barred by section 112½ of the Los Angeles City Charter is without merit. It is clear from a reading of the petition that petitioner was neither laid off, suspended nor discharged. The manner and method adopted by respondent board to effectuate petitioner's retirement or separation from his employment is foreign to any procedure for suspension or removal contemplated by the cited charter provision, and the issue raised in connection therewith should be definitely decided in favor of appellant.

The majority opinion holds that the averments contained in the petition are legally insufficient to effectively charge fraud. In my opinion, the allegations of the petition clearly set forth a factual situation which, if true, amounts to duress, coercion and fraud, and further establishes the fact that appellant's resignation was involuntary and forced. The element of unlawfulness, which the majority opinion asserts is lacking in the allegations of the petition in the instant case, is to my mind clearly present under the allegations contained in the pleading before us. Such unlawfulness consisted of the alleged threats to take from petitioner his position in the fire department unless he resigned therefrom; a position definitely characterized and denominated by the city charter itself, in subdivision 1 of section 135, as "a substantial property right of which he shall not be deprived arbitrarily or summarily, nor otherwise than as in this section provided". Surely the treatment allegedly accorded petitioner, as appears from his petition herein, was both arbitrary and summary, as well as violative of the spirit and letter of the charter, and therefore unlawful.

In my judgment, the allegations contained in the petition on file herein are sufficient to state a cause of action requiring that the demurrer be overruled and that a trial be had thereon. Should the truth of such allegations be established, then certainly the interests of justice and the law as well require judicial intervention, because if administrative boards, working as they do in a field peculiarly exposed to political demands, some of which boards may be competent and fair, yet others subservient to the appointive power, can ruthlessly, by threats, intimidation and coercion such as is alleged in the instant proceeding, deprive a civil service employee of his position, when such position is declared by the charter to constitute a property right, then the vaunted protection against injustice claimed for civil service descends to a mere mockery and we may as well return to the spoils system, where such injustices against a faithful public servant are at least administered without the alloy of hypocrisy.

The petition avers that appellant was a member of the fire department for some 42 years, with a perfect record of fidelity to duty and without a blemish by way of reprimand or discipline for any dereliction upon petitioner's part. The allegations contained

in the petition, if true, set forth an unwarranted, unlawful and illegal circumvention of the plain protective provisions of section 135 of the city charter.

In the recent case of Rhodehamel v. Civil Service Board, 18 Cal.2d 709, 117 P.2d 349, it was directly and positively held that courts are empowered to prevent such excess or abuse of powers and claimed jurisdiction of civil service and kindred boards upon the petition of one adversely affected by the action of such boards.

Instances of what constitutes unreasonable and arbitrary action on the part of administrative boards, as well as the illegality thereof, and the right of courts to correct such abuses, are pointed out in the recent case of Kaesur v. Board of Trustees, 18 Cal.2d 586, 116 P.2d 593.

The judgment should be reversed, with directions to the court below to overrule the demurrer and permit respondents to file answers to the petition, should they be so advised.



47 Cal.App.2d 487

COLONIAL MUT. COMPENSATION INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11767.

District Court of Appeal, First District, Division 1, California.

Oct. 25, 1941.

Rehearing Denied Nov. 24, 1941.

Hearing Denied Dec. 22, 1941.

1. Workmen's compensation ⇐1937

Where order of second referee increasing compensation to injured employee was based on the same evidence and the same facts as original award made by first referee, the employer's insurance carrier was not prejudiced by the fact that the second referee did not read the transcript of the evidence taken before the first referee. Civ. Code, § 3532.

2. Workmen's compensation ⇐1778, 1782

The Industrial Accident Commission has power to rescind or amend its orders, decisions and awards within period of 245 weeks upon good cause appearing, without necessity of any showing that the applicant's disability has recurred, increased, diminished or terminated. St.1937, p. 301, § 5803.

3. Workmen's compensation ⇐1778

The power of the Industrial Accident Commission to change its former award may not be predicated upon a mere change of opinion by the commission, but such power may be properly exercised where there exists some fact or circumstance not within the knowledge of the commission at the time of the making of the former award which warrants the conclusion that the challenged award is inequitable. St.1937, p. 301 § 5803.

4. Workmen's compensation ⇐1782

Where original award in October 1940, for injuries sustained in May, 1940, was improperly based on the amount of wages actually received by the injured employee during the preceding year rather than the average weekly earning capacity of the injured employee at the time of his injury, it was within the power of the Industrial Accident Commission to reopen the proceeding on petition of employee filed in November 1940. St.1937, pp. 279, 301, §§ 4453(d), 5803.

5. Workmen's compensation ⇐816

The average weekly earning capacity at time of injury constitutes the basis for determining average weekly earnings which provides the measure for computing disability payments to injured employee. St.1937, p. 279, § 4453(d).

6. Workmen's compensation ⇐816

In determining the average weekly earning capacity of employee at time of injury, for purpose of computing disability payments, due consideration is to be given to the earnings in the past, but such earnings are not the controlling factor in determining earning capacity. St.1937, p. 279, § 4453(d).

7. Workmen's compensation ⇐816

In determining average weekly earning capacity of injured employee at time of his injury, the wages of employee which were actually earned during the year together with all surrounding circumstances affecting his earning ability should be considered. St. 1937, p. 279, § 4453(d).

8. Workmen's compensation ⇐1895

In proceeding by employer's insurance carrier to review an order of the Industrial

Accident Commission increasing an award to injured employee, record did not support allegation that stipulation was entered in records of Industrial Accident Commission that average earning of employee at time of injury was $60 a month.

9. Workmen's compensation ⇐1785

Where original compensation award was based on theory that injured employee's average earnings were $60 a month, evidence showing that when injured employee was receiving a daily wage of $6.50 working five days a week when work was available, sustained amended award granting compensation at rate of $20 a week. St.1937, p. 279, § 4453(d).

10. Workmen's compensation ⇐816

In determining the average weekly earning capacity of an injured employee, the entire risk of inability to secure employment should not be cast upon the employee, and actual earnings received by him during the year preceding his injury should not furnish the sole test for determining his earning capacity. St.1937, p. 279, § 4453(d).

Proceeding by the Colonial Mutual Compensation Insurance Company, insurance carrier for John Trollan, to annul an order of the Industrial Accident Commission amending its original findings and award in favor of Frank Miller, injured employee.

Order affirmed.

Keith & Creede and Percy J. Creede, all of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

Mathew O. Tobriner and Rinaldo Sciaroni, Jr., both of San Francisco, for respondent Miller.

KNIGHT, Justice.

The petitioner, as insurance carrier for John Trollan, seeks to have annulled an order made by the Industrial Accident Commission amending its original findings and award in favor of Frank Miller, who sustained injuries on May 14, 1940, while employed as laborer by Trollan.

The injuries arose out of and in the course of Miller's employment, and in July, 1940, he filed an application with the commission for the recovery of compensation. The hearing took place before the referee the following month, and on October 23, 1940, the commission, adopting the findings of the referee, awarded disability indemnity from May 22, 1940, to July 16, 1940, at the rate of $8.55 a week, based on wages of $60 a month. On November 18, 1940, Miller petitioned to reopen the proceeding alleging that the amount of the award was based upon an erroneous computation, and that his disability continued after July 16, 1940. The petition to reopen came on for hearing on January 6, 1941, before a second referee; and on March 3, 1941, the commission, confirming the report of the second referee, made an order amending its original findings and award, whereunder Miller was granted compensation at the rate of $20 a week, based on wages of $6.50 a day, working five days a week, from May 22, 1940, to February 5, 1941, and continuing thereafter until termination of disability or further order of the commission, less ten weeks during which Miller worked.

[1] The grounds urged for the annullment of the order relate to the matter of increased compensation; and the first point made in this behalf is that prior to the making of the order the second referee did not read a transcript of the evidence taken before the first referee. Petitioner concedes, however, that all evidence adduced before the first referee as to Miller's earning capacity was introduced and received at the hearing before the second referee. In other words, as stated in petitioner's points and authorities (p. 16) the amended award was based upon the "same evidence" and the "same facts" as the original award. It is apparent, therefore, that petitioner was in no way prejudiced by the fact that the second referee did not read a transcript of the evidence taken before the first referee, and that to have done so would have been an idle act, which the law does not require (Civ.Code, § 3532), because the evidence being the same, no different factual situation would have been brought before him. In this regard the state of the record is essentially different from the one presented in Bethlehem Steel Co. v. Industrial Acc. Comm., 42 Cal.App.2d 192, 108 P.2d 698, upon which petitioner strongly relies; also the one involved in Deter v. Industrial Acc. Comm., 45 Cal.App.2d 664, 116 P.2d 112. Furthermore, it may be observed that during the lapse of two months the present proceeding remained open before the second referee, petitioner at no time suggested the reading of a transcript of the evidence

taken at the first hearing or that the evidence there taken was any different from that produced at the second hearing.

[2, 3] Petitioner's second point is that "good cause" to reopen was not shown. § 5803, Labor Code, St. 1937, p. 301. The law is well settled, however, that the commission has power to rescind or amend its orders, decisions and awards within the period of 245 weeks upon good cause appearing, without the necessity of any showing that the applicant's disability has recurred, increased, diminished or terminated (Bartlett Hayward Co. v. Industrial Acc. Comm., 203 Cal. 522, 265 P. 195; Globe Indemnity Co. v. Industrial Acc. Comm., 91 Cal.App. 347, 266 P. 992); and that while the power of the commission to change its former award may not be predicated upon a mere change of opinion by the commission, such power may be properly exercised where there exists some fact or circumstance not within the knowledge of the commission at the time of the making of the former award which warrants the conclusion that the challenged award is inequitable. Merritt-Chapman & Scott Corp. v. Industrial Acc. Comm., 6 Cal.2d 314, 57 P.2d 501.

[4-6] Here the record shows that in making the original award the commission improperly used as the sole basis therefor the amount of wages *actually received* by Miller during the preceding year, rather than "the average weekly earning capacity of the injured employee at the time of his injury", as required by subdivision d of section 4453 of the Labor Code. That subdivision is as follows: "Where the employment is for less than thirty hours per week, or where for any reason the foregoing methods of arriving at the average weekly earnings can not reasonably and fairly be applied, the average weekly earnings shall be taken at ninety-five per cent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments." As will be noted, under the above provisions it is the average weekly earning capacity at the time of the injury which is the basis for determining average weekly earnings, which, in turn, provides the measure for computing the disability payment; and while it is doubtless the law that in determining the average weekly earning capacity at the time of the injury, due consideration is to be given to earnings in the past, such earnings are not the controlling factor in determining earning capacity. California C. I. Exchange v. Industrial Acc. Comm. 135 Cal.App. 746, 27 P. 2d 782; Aetna Life Ins. Co. v. Industrial Acc. Comm., 130 Cal.App. 488, 20 P.2d 372.

[7] In so construing the law the court in the former case went on to say [135 Cal. App. 746, 27 P.2d 783]: "It is petitioner's [the insurance carrier's] view that the employee is entitled to an award based solely on such earnings and that to determine 'average weekly earning capacity' necessitates a calculation whereby the total amount actually earned during the entire year is divided by 52. It is immediately apparent that this method of computation places upon an injured employee the entire risk of inability to secure employment without regard to his health, training, experience, or willingness to work." And later on, in commenting upon and adhering to the doctrine laid down in the Aetna case, the court said: "It was contended by the petitioner [in the Aetna case] that the average weekly earning capacity of the injured employee should be determined by ascertaining the average weekly wages which he actually received during the entire year previous to the time of his injury. It will be observed that this is precisely the same contention advanced by petitioner in the present proceeding. The contention did not prevail. The District Court of Appeal for the Third Appellate District affirmed the award. The following language which appears in the opinion of the court written by Justice Thompson is apropos to the problem here presented: 'The rule contended for by the petitioner would be unreasonable under some circumstances. It might result in grave injustice to a claimant. A workman may possess excellent earning ability and yet on account of temporary illness or other cause he may be prevented from working throughout a great portion of the year previous to his injury. Under such circumstances, an amount based only upon the average sum which he actually received during that year, regardless of the unusual conditions affecting his employment, would not fairly represent his earning capacity. We are of the opinion the language employed in paragraph (4) of subdivision (a) of section 12 of the Workmen's Compensation Act, which authorizes the acceptance of "such sum as shall reasonably represent the *average weekly earning capacity* of the in-

jured employee at the time of his injury" should be construed to mean that the wages of the employee which were actually earned during the year, together with all the surrounding circumstances affecting his earning ability, should be considered in ascertaining a figure which will reasonably represent his weekly earning capacity. Capacity to earn money necessarily contemplates all the surrounding circumstances and conditions disclosed by the evidence which may indicate one's usual and ordinary ability to earn wages, including his physical ability, his natural talents, his training, his opportunity to secure employment and the condition of his health.'" It follows, therefore, that since the original award herein was based on an illegal rule of computation, it was within the power of the commission to reopen the proceeding on that ground.

[8] In the petition for the writ of review it is alleged that at the hearing before the first referee it was stipulated by Larry Roche on behalf of Miller that Miller's "average earnings at the time of injury were $60.00 a month", and that "This stipulation was entered in the records of Respondent Industrial Accident Commission". However, those allegations are not supported by the record. It appears therefrom that throughout the first hearing, and up to the time the hearing began before the second referee, Miller was not represented by an attorney. Roche, a layman and the business agent of the union of which Miller was a member, was present with Miller at the first hearing, and the only witness who testified thereat was Miller. The entire direct examination was conducted by the referee and in response to one of the questions Miller stated that during the preceding year he earned between $650 and $700; whereupon the referee stated: "Wages stipulated $60 per month"; and the amount of the original award was computed on that basis. At the hearing before the second referee Miller was represented by an attorney, and Roche, testifying thereat as the first witness, positively denied having entered into any stipulation whatever on behalf of Miller.

[9] The third point urged for annullment of the order is that the evidence is insufficient to sustain the award as amended. The point is not sustainable. The evidence shows that when injured Miller was receiving a daily wage of $6.50, working five days a week as work was available, and the amended award was computed on that basis. He was hired through a hiring hall operated by the union to which he belonged, and such was the prevailing wage paid to men so hired to do the kind of work he was performing when injured. At the time Trollan hired Miller he contemplated the job would last three days, and it was on the third day that Miller was injured.

[10] The argument made by petitioner in support of its position is based principally upon the evidence showing that during the year preceding the date of injury Miller was not steadily employed, and earned approximately only $700. But as stated by the court in California C. I. Exchange v. Industrial Acc. Comm., supra, the Aetna case may be considered as "direct authority for the proposition that, in determining the average weekly *earning capacity* of an injured employee, the entire risk of inability to secure employment shall not be cast upon the employee and that the *actual earnings* received by him during the year preceding his injury shall not furnish the sole test for determining his *earning capacity*"; and continuing, the court said: "It must be conceded that neither the Ætna Case nor any other decision to which our attention has been directed holds that inability to secure employment shall not be considered as one of the factors in determining earning capacity." (All italics ours.) The case of Mahaffey v. Industrial Acc. Comm., 176 Cal. 711, 171 P. 298, stressed by petitioner, is analyzed and differentiated in both of the cases above mentioned, and for the reasons stated therein we do not deem the Mahaffey case here controlling.

The order amending the original findings and award is affirmed.

PETERS, P. J., and WARD, J., concurred.

47 Cal.App.2d 512

THOMAS et al. v. SPECK et al.

Civ. 13299.

District Court of Appeal, Second District, Division 2, California.

Oct. 29, 1941.

Hearing Denied Dec. 22, 1941.

1. Homestead ⇐45

That notary's certificate on declaration of homestead must conform with statutory form of a notary's acknowledgment on grant deed of realty may be presumed from statutes requiring that declaration be acknowledged in the same manner as a grant of realty and be recorded. Civ.Code, § 1262.

2. Homestead ⇐45

Where notary's certificate of acknowledgment by homestead claimant, in addition to stating that claimant was known to notary, contained parenthetical statement, "or proved to me on the oath of himself", the inclusion of parenthetical statement did not render declaration of homestead defective for failure to show acknowledgment by claimant in the same manner as a grant of realty is acknowledged. Civ.Code, §§ 1189, 1262.

3. Acknowledgment ⇐22

Before notary may take the acknowledgment of a person not personally known to notary, the identity of such person must be proved by the oath of a third person and cannot be proved by the oath of the person to be identified.

4. Acknowledgment ⇐59

Notaries have specific duties, including that of certifying to instruments acknowledged by parties who appear before them, and such certificates of acknowledgment must be deemed in every respect to be certificates of the notary; no duty being imposed on the subscriber of an instrument who has properly acknowledged it to see to it that notary's certificate is correct.

5. Acknowledgment ⇐36(1), 49

Where notary's certificate stated that person whose acknowledgment was thereby certified was personally known to notary, the additional parenthetical statement "or proved to me on the oath of himself" should be ignored as "surplusage" or made so by construing the word "or" in the conjunctive sense, since it is court's duty to construe in behalf of legality rather than illegality. Civ. Code, § 1189.

See Words and Phrases, Permanent Edition, for all other definitions of "Or" and "Surplusage".

6. Homestead ⇐45

Where notary's certificate, in addition to stating that homestead claimant was personally known to notary, contained parenthetical statement "or proved to me on the oath of himself", notwithstanding such defect, declaration, having been of record for one year, imported "notice" under the Curative Act, since a declaration of homestead clearly is an instrument "affecting title to real property" within meaning of the Curative Act. Civ.Code, §§ 1189, 1207, 1262.

See Words and Phrases, Permanent Edition, for all other definitions of "Affecting Title to Real Property" and "Notice".

7. Acknowledgment ⇐36(1)

Where a notary's certificate contains everything required by the statute, it will not be vitiated by the insertion of unnecessary words.

8. Homestead ⇐45

Where homestead declarant appeared before notary and formally acknowledged that declaration of homestead was his act, the statute, requiring homestead declarant to acknowledge in the same manner as a grant of real property is acknowledged was complied with, and validity of declaration was not affected by ambiguity, if any, in notary's certificate of acknowledgment. Civ. Code, §§ 1189, 1262.

9. Bankruptcy ⇐400(2)

Bankruptcy court's adjudication that bankrupt had a valid homestead in realty was not binding upon creditors who by state law had a lien on the realty claimed as homestead, at the time claimant was adjudicated a bankrupt.

10. Bankruptcy ⇐400(2)

A bankruptcy court order setting apart exemption is "res judicata" only as to the exemption of the property against creditors without liens.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

11. Homestead ⇐107

Where land, in which a homestead was claimed by declaration of homestead duly

recorded prior to entry of judgment, was sold at execution sale without proceedings pursuant to statute with a view to ascertaining any possible surplus value in the property over the value allotted by statute to one with a valid right of homestead, judgment creditors, who procured issuance of execution and sale thereunder, thereby forfeited all rights they had under their judgment to pursue the property. Civ.Code, §§ 1245–1259.

12. Homestead ⇐66, 103

A judgment is not a "lien" upon a validly declared homestead or upon any surplus value therein over and above the statutory exemption.

See Words and Phrases, Permanent Edition, for all other definitions of "Lien".

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by L. C. Thomas and others against Nannie P. Speck and others to quiet title to realty. From a judgment in favor of plaintiffs, defendants appeal.

Judgment affirmed.

John A. Jorgenson, of Los Angeles, for appellants.

M. J. Rankin and Milo V. Olson, both of Los Angeles, for respondents.

HANSON, Justice pro tem.

This is an appeal from a judgment quieting title in real property in favor of the grantee of a homestead declarant against appellants, judgment creditors of the declarant. The judgment was of record prior to the conveyance to respondents.

The facts as stipulated, so far as they are material, are these: In 1930 one De Le Fond recorded a declaration of homestead endorsed upon which the notary's certificate here in question read as follows: "* * * personally appeared *Charles De Le Fond*, known to me (or proved to me on the oath of *himself*) to be the person * * *." This is the statutory form prescribed for the notarial certificate. Civ.Code, sec. 1189. In the blank space of the form the words above italicized were inserted before the acknowledgment. On September 21, 1934, there was filed for record a mortgage executed by De Le Fond in favor of the Home Owners Loan Corporation which secured a promissory note in the principal sum of $2,160, and this it is conceded has ever since been a valid first mortgage lien. On February 25, 1935, a judgment in the principal sum of $1,973.67, now owned by appellants, was recovered against De Le Fond in the municipal court of Los Angeles, and on February 27, 1935, a properly certified abstract of the judgment was filed and recorded in the office of the county recorder of Los Angeles County, wherein the property involved in the action is located. On September 26, 1935, De Le Fond filed a second declaration of homestead, which it is admitted complied in form and in substance with the statute, both as to its contents and the certificate of the notary. This declaration made no reference to the earlier declaration. No abandonment of homestead was ever recorded by De Le Fond subsequent to the filing of his first declaration.

On October 1, 1935, De Le Fond filed a petition in the Federal Court of this district to be adjudged a voluntary bankrupt, duly scheduling therein appellants as creditors and claiming the property herein involved as his homestead. On the same day the court adjudged him a bankrupt. On November 18, 1935, the bankruptcy court, upon its trustee's report of exempt property, entered its order confirming the report and set aside the property here involved as the homestead of De Le Fond and as being exempt. Thereafter on January 6, 1936, the bankruptcy court entered its usual order discharging De Le Fond from all debts and claims against him, provable in bankruptcy, excepting therefrom, however, such as were by operation of law not dischargeable in bankruptcy. While appellants were notified of the bankruptcy proceedings, they never filed a claim therein nor did they at any time appear or participate therein.

On May 8, 1936, De Le Fond conveyed his equity in the property in question to respondents for the sum of $953.44 and the assumption by them of the unpaid balance of the mortgage in the sum of $1,797.56, or a total consideration of $2,750. Pursuant to an execution which had been levied on January 15, 1940, the marshal of the municipal court on February 16, 1940, sold all the right, title and interest of De Le Fond to the judgment creditors, appellants here, for the sum of $1,500. No proceedings were had under Civil Code sections 1245–1259 with a view to ascertaining what, if any, surplus value there might be in the property over the value allotted by statute to one with a valid right of homestead. Thereafter the instant action was instituted and the court,

as heretofore stated, quieted the title in respondents.

The grounds of appeal are: (1) That the declaration was rendered worthless by virtue of the defective notarial certificate; (2) that such defect was not remedied by the Curative Act (Civ.Code, sec. 1207); that an order of a bankruptcy court which had adjudicated that the property was the homestead of the declarant and exempt did not bind appellants even though the bankrupt had scheduled his claim in bankruptcy.

[1-3] The main contention of appellants is that the statute requires for an effective declaration of homestead not merely certain statements in the body of the declaration and that the declaration be executed, acknowledged and recorded, but that it must be acknowledged *in the same manner* as a grant of real property is acknowledged. In short, appellants contend that this provision is for a special type of acknowledgment and is just as much a part of an effective declaration as are the provisions of the statute in respect to the data which the declaration must set forth in what may be termed the body thereof. The rule in this jurisdiction is otherwise. Reid v. Englehart-Davidson, etc., Co., 126 Cal. 527, 58 P. 1063, 77 Am.St.Rep. 206. The statute providing for the selection of a homestead reads in part as follows: "In order to select a homestead, the husband or other head of a family * * * must * * * acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record." Civ.Code, sec. 1262. While it says nothing to the effect that the notary's certificate shall accord with the statutory form of a notary's acknowledgment in a grant deed of real property, such may be presumed from the next section, which requires the declaration to be recorded. But in the instant case there was no evidence that the declarant did not acknowledge in the manner of a grantor of real property. On the contrary, the only variation in the notary's certificate of De Le Fond's acknowledgment from that customarily used by the grantor of realty is in the inclusion of the parenthetical clause which forms no part of the certificate when the declarant is known to the notary. If the notary had not personally known the declarant the latter would then have had to prove his identity by the oath of a third person. He could not have proved his identity by his own oath. Joost v. Craig, 131 Cal. 504, 63 P. 840, 82 Am. St.Rep. 374. Accordingly, if the notary's certificate had not contained, as it does, the language that the declarant *was known to him,* the acknowledgment would indeed have been defective. But such is not here the case.

[4, 5] The certificate of acknowledgment must be deemed in every respect to be that of the notary. Reid v. Englehart-Davidson, etc., Co., supra. Notary publics have specific duties, including that of certifying to instruments acknowledged by parties who appear before them. There is no duty on the part of the subscriber of an instrument who has properly acknowledged it before a notary to see to it that the certificate is correct. The statute pertaining to homesteads above set forth does not impose that duty on the declarant. Obviously the notary did not enjoy the knowledge a notary should have as to the meaning, purpose and requirements of a certificate of acknowledgment. Had he possessed such knowledge he would have known that before he was entitled to certify to declarant's acknowledgment of the instrument it was requisite either that he know the declarant or that, if unknown, his identity should be proved under oath by one who knew both declarant and notary. Joost v. Craig, supra. Not having such requisite knowledge of his duties as a notary he chose to fill in all blanks in the certificate and to take the oath of the declarant as to his own identity although known. While the fact may actually have been the very reverse, it is our duty to construe in behalf of legality rather than illegality. If the phrase ("or proved to me on the oath of himself") had been stricken, the certificate would be unassailable. Such phrase should be ignored as surplusage, or made so by construing the word "or" in the phrase in the conjunctive sense. 46 C.J. 1124. In a certificate which read "proved or acknowledged," a phrase quite as ambiguous as the one before us, the Michigan supreme court in Nelson v. Graff, 44 Mich. 433, 6 N.W. 872, held it proper to regard the words "proved or" as surplusage.

[6-8] But however meaningless might be the language of the certificate, we are convinced that our Curative Act (Civ.Code, sec. 1207) cured the defect prior to the date of appellants' judgment against De Le Fond. A declaration of homestead clearly is an instrument affecting title to real property within the meaning of the Curative Act, which provides that any instrument duly recorded for one year "imparts notice of its

contents to subsequent purchasers and encumbrancers, *notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof,* or the absence of any such certificate". This applies likewise whether the person acknowledging was or was not known to the notary. Haney v. Gartin, 51 Tex.Civ.App. 577, 113 S.W. 166; Baker v. Woodward, 12 Or. 3, 6 P. 173. Where a notary's certificate contains everything required by the statute *it will not be vitiated by the insertion of unnecessary words.* Reed v. Bank of Ukiah, 148 Cal. 96, 82 P. 845. Conceding that the certificate is ambiguous on its face, yet such ambiguity is not fatal to the validity of the declaration. The statutory requirement that a homestead declarant *"must * * * acknowledge, in the same manner as a grant of real property is acknowledged"* was clearly complied with by De Le Fond. He did appear before the notary and formally declare that the act was his. 1 C.J.S., Acknowledgments, § 1. Such act would have been just as efficient if the notary had affixed the written verification of declarant that the declaration was his own. Favello v. Bank of America Nat. Trust & Savings Ass'n, 24 Cal.App.2d 342, 74 P.2d 1057.

The authorities cited by appellant, Kennedy v. Gloster, 98 Cal. 143, 32 P. 941, Reid v. Englehart-Davidson, etc., Co., supra, and Carey v. Douthitt, 140 Cal.App. 409, 35 P.2d 632, are readily distinguishable. In the Carey case it was held that there is no authority for the courts to decree a homestead in the absence of a compliance with the statute. In the Reid case the declaration was held invalid because it could not be ascertained whether plaintiff was the husband or the wife; but it was there decided that the certificate is not a part of the declaration. The Kennedy case, whose dictum is in line with appellants' contention, was overruled by the Reid case.

[9-11] The order of the bankruptcy court is of no importance. It merely adjudicated that De Le Fond had a valid homestead in the property here involved and therefore that it was exempt. However, the adjudication did not bind creditors who by state law had a lien on the property on the date De Le Fond was adjudicated a bankrupt. Blood v. Munn, 155 Cal. 228, 100 P. 694; McCrae v. Felder, 4 Cir., 12 F.2d 554. "An order of a bankruptcy court setting apart exemptions * * * is res judicata only as to the exemption of the property against creditors without liens." 8 C.J.S., Bankruptcy, § 503, p. 1382, note 99. So the controlling question here is not as to the effect of the bankruptcy order on the appellants but whether or not by state law they had a lien on the property on the date De Le Fond was adjudicated bankrupt. If the appellants had a lien it was because De Le Fond's first declaration was so defective that under the state law he could not be said to have a homestead in the property. Furthermore, it may here be observed that if under the state law he had no homestead it was not then necessary, prior to an execution sale of the property, that the appellants should have pursued the procedure laid down in sections 1245–1259 of the Civil Code. If, however, the homestead declaration was valid, then by virtue of Civil Code section 674, as construed by our Supreme Court, the appellants' judgment, even though of record, was *not a lien on the property,* because the Supreme Court says a judgment cannot be a lien on a property that *is* a homestead even though it is a lien on other real property of the judgment debtor. Barrett v. Simms, 62 Cal. 440. Accordingly, if appellants were not lien creditors they were bound by the adjudication in bankruptcy, because in that situation they had a mere contract claim reduced to judgment, unsecured by a lien, and such a creditor is bound by the adjudication. But that is because of his character as a creditor and not simply because the bankruptcy court had made an adjudication that the property was homestead and exempt. If by state law the declaration of homestead was valid, then entirely aside from the order made by the bankruptcy court appellants forfeited all rights they had under their judgment to pursue the property, by their failure to comply prior to execution sale with sections 1245–1259 of the Civil Code.

[12] Moreover, a judgment is not a lien upon a validly declared homestead or upon any surplus value therein over and above the statutory exemption. Barrett v. Simms, supra, followed by Lubbock v. McMann, 82 Cal. 226, 22 P. 1145, 16 Am.St.Rep. 108, Sanders v. Russell, 86 Cal. 119, 24 P. 852, 21 Am.St.Rep. 26, and Boggs v. Dunn, 160 Cal. 283, 116 P. 743.

As bankruptcy does not abrogate secured liens and as an order setting aside a homestead is an adjudication binding only on unsecured creditors, appellants were not affected or bound thereby if they had a lien under state law. At the time De Le Fond was adjudicated a bankrupt appellants had not

caused execution to issue. Neither had there been any sale, at their instance, which would have shifted them from the secured class, if they were in that class, to the unsecured class had such sale occurred before bankruptcy. Appellants owed no duty to go into the bankruptcy court to contest the trustee's report listing the property as a homestead. Nor were respondents entitled to rely upon the orders made by the bankruptcy court.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.



47 Cal.App.2d 467

PEOPLE v. WILLIAMS.

Cr. 3483.

District Court of Appeal, Second District, Division 1, California.

Oct. 24, 1941.

1. Criminal law ⇐260(11)

On appeal from a judgment of conviction, reviewing court would consider the facts in the light most favorable to the people.

2. Criminal law ⇐552(3)

Where judgment of conviction was predicated upon direct and positive testimony of prosecuting witness that accused robbed him, rule that where circumstantial evidence is relied upon for conviction, prosecution must show a set of circumstances consistent with guilt and that such circumstances are inconsistent with any theory or hypothesis of innocence was inapplicable.

3. Criminal law ⇐254

In robbery prosecution wherein jury was waived, credibility of the witnesses and weight of conflicting evidence was for the trial court.

4. Robbery ⇐24(1)

Evidence sustained conviction of robbery in the second degree.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Otis G. Williams was convicted of robbery in the second degree, and he appeals and thereafter the trial court by nunc pro tunc order corrected a clerical error in the judgment of conviction.

Judgment of conviction as corrected, affirmed.

Otis G. Williams, in pro. per.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles county, appellant was charged with the crime of robbery, and it was also alleged that he had suffered a prior conviction of a like offense. To the substantive offense of robbery as charged in the information defendant entered his plea of not guilty, and at the commencement of the trial admitted the charged prior conviction. Following waiver of jury, and a trial by the court, defendant was found guilty of the offense of robbery in the second degree. The sentence was imposed accordingly, but by inadvertence the clerk entered a judgment of robbery in the first degree. From the judgment so entered by the clerk defendant prosecutes this appeal.

With reference to the error appearing in the judgment as entered by the clerk so far as the degree of the crime was concerned, when such matter was brought to the attention of the trial court on August 15, 1941, an order nunc pro tunc was made as of May 23, 1941, correcting the error. Upon proper notice, this court granted respondent's motion for diminution of the record and ordered the clerk of this court to file the supplemental clerk's transcript containing the nunc pro tunc order and corrected judgment.

[1] Stating the facts in the light most favorable to the People, as we are required to do following a guilty verdict or decision, it appears that the victim of the robbery, one Norman Stambler, placed an advertisement in one of the daily newspapers offering his automobile for sale. When he returned to his home on the afternoon of March 1, 1941, defendant was there awaiting him. At that time defendant was introduced to Mr. Stambler and was known to the latter by a name other than that of Williams. The defendant stated to Mr.

Stambler that he was employed as a chef on the Union Pacific dining car service and was starting on his run east in a few days and wanted to buy an automobile before he departed. Mr. Stambler and the defendant discussed the price, and the latter expressed a desire to try the car out. Thereupon Mr. Stambler and the defendant drove around the block, when the defendant advised Mr. Stambler that he wanted to show the car to his wife before closing the deal. They got in the car again and defendant drove to the vicinity of Twenty-fifth and Central avenue, where he left the car for a few moments. On his return he drove the car in company with Mr. Stambler to the vicinity of Forty-fifth and Central avenue, where he parked the same in the rear of an automobile accessory store. At that time defendant asked Mr. Stambler how much money he had on him, and at this time defendant had his right hand in his coat pocket "with the hand and coat pulled forward in a protruding manner". When Mr. Stambler stated that he had nine dollars, the defendant ordered him to "hand it over". Believing the defendant to be armed, and being in fear, Mr. Stambler delivered the nine dollars to defendant, who thereupon got out of the car and disappeared down the alley. He was arrested a few days later after Mr. Stambler had recognized his picture at police headquarters and had identified him at a police show-up.

At the time of his arrest defendant denied that he knew a Mr. Stambler or that he had ever been at Stambler's home. He further denied that he ever knew of or saw a newspaper advertisement concerning the sale of Mr. Stambler's automobile; but nevertheless the officers took such a newspaper clipping out of defendant's pocket. At the trial, however, appellant admitted that he went to Mr. Stambler's home after reading the advertisement and was talking with Mrs. Stambler when her husband arrived. Defendant further testified that he and Mr. Stambler got in the car and drove around; that during the ride defendant got out of the car and went into a store where he owed a bill; that when he was advised as to the balance due on his bill he discovered he did not have sufficient money to pay it; that he returned to the car and said to Mr. Stambler, "Can you lend me some money until we get to the house and I will repay you?" to which, according to defendant, Mr. Stambler replied, "How much do you need?", whereupon defendant said, "I need $22.00". According to the defendant Mr. Stambler replied that he had only eight dollars, whereupon the defendant asked Mr. Stambler to lend him that amount until he got over to the defendant's home. According to defendant's testimony, Mr. Stambler handed him the money, and he went back and paid the bill; that they then drove to the rear of the accessory store, and defendant went into his house; but that when he returned Mr. Stambler had departed in the automobile.

[2, 3] The sole ground urged by appellant for reversal of the judgment is that the evidence as to whether he robbed Mr. Stambler or merely borrowed some money was in conflict, and the court should therefore have found him not guilty. This contention is grounded upon the claim that where circumstantial evidence is relied upon for conviction not only must the prosecution show a set of circumstances consistent with guilt, but such circumstances must also be inconsistent with any theory or hypothesis of innocence. Appellant's contention is without merit. The rule stated by him is not applicable to the facts of this case, for the reason that the same does not turn upon circumstantial evidence, but the conviction is predicated upon the direct and positive testimony of Mr. Stambler that appellant robbed him. No citation of authority is required for the statement that it was for the trial court to determine the credibility of the witnesses and intrinsic value and weight of the conflicting evidence.

[4] The clerical error made by the clerk in the judgment having been corrected by the trial court in the nunc pro tunc order aforesaid to make the judgment speak the truth, and the evidence being sufficient to establish the defendant's guilt, it is ordered that the judgment, as corrected, be and it is affirmed.

YORK, P. J., and DORAN, J., concurred.

47 Cal.App.2d 557

YOUNG v. TASSOP et al.

Civ. 12738.

District Court of Appeal, Second District, Division 1, California.

Oct. 31, 1941.

1. Appeal and error ⇐930(1)

The District Court of Appeal must on appeal take a view of the evidence most favorable to the judgment.

2. Automobiles ⇐245(6, 44)

In action for injuries sustained by pedestrian when struck by automobile at an intersection, evidence was sufficient to present question for jury as to whether motorist was negligent either in entering intersection when traffic signal was against him in violation of city ordinance, or in traveling across intersection at greater speed than was reasonable or prudent under existing conditions, or in failing to sound his horn when reasonably necessary to insure safe operation. Vehicle Code, §§ 510, 671, St.1935, pp. 176, 223.

3. Evidence ⇐594

Generally, uncontradicted testimony should be accepted as proof of the facts testified to, but the most positive testimony may be contradicted by inherent probabilities or by circumstances in evidence in connection with the matter or by witness' manner.

4. Appeal and error ⇐1003

Since it is trial court's province to determine weight to be given testimony, the District Court of Appeal cannot control a conclusion denying credence, unless it appears that there are no circumstances impairing accuracy of the testimony.

5. Witnesses ⇐317(1)

If jury finds a witness willfully false in one material part of his testimony, on which he is contradicted, jury may disbelieve his testimony in other respects, though not contradicted. Code Civ.Proc. § 2061, subd. 3.

6. Evidence ⇐588

In action for injuries sustained by pedestrian when struck by automobile at an intersection, where testimony of police officer who testified on behalf of defendant and of a witness who corroborated officer was contradicted on material points, jury were at liberty to reject all testimony of these two witnesses for defendant. Code Civ.Proc. § 2061, subd. 3.

7. Evidence ⇐589

In action for injuries sustained by pedestrian when struck by automobile at an intersection, defendant's own testimony in corroboration of a police officer who testified in his behalf could be rejected by jury by reason of his interest in the result of the case. Code Civ.Proc. § 2061, subd. 3.

8. Appeal and error ⇐930(1)

On appeal from judgment in favor of plaintiff, District Court of Appeal would presume in support of the verdict that jury rejected whole incident narrated in testimony of defendant's witness.

9. Automobiles ⇐245(72)

Where a pedestrian injured by an automobile fails to look at all, or looks straight ahead without glancing to either side, or is in a position where she cannot see, whether pedestrian is guilty of contributory negligence is usually a "question of law"; but where she looks but does not see an approaching automobile, or seeing one, erroneously misjudges its speed or distance, or for some other reason assumes she could avoid injury to herself, question of contributory negligence is a "question of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

10. Automobiles ⇐245(72)

Fact that, when pedestrian looked in direction from which danger was to be anticipated before starting to cross street, her view was somewhat obstructed by other pedestrians, did not alone, as a matter of law, convict her of contributory negligence, so as to preclude her from recovering for injuries sustained when struck by an automobile.

11. Automobiles ⇐217(5)

A pedestrian crossing street at intersection is not under a continuing duty to look in direction from which danger of approaching vehicles is to be anticipated, but is only under a continuing duty to use ordinary care.

12. Automobiles ⇐245(72)

In action for injuries sustained by pedestrian when struck by automobile at intersection, where evidence showed that pedestrian looked before leaving curb, saw no automobiles coming and heard no horn

sounded, and saw other pedestrians crossing to her left, who would naturally tend to slow progress of any approaching automobile, and that pedestrian walked only eight feet when she was knocked down by automobile approaching from left, whether pedestrian was contributory negligent in not looking again to her left while she walked the eight feet was for jury.

13. Trial ⊂⊃133(6)

Even though it might have been "misconduct" for plaintiff's counsel to ask, and especially to repeat after an adverse ruling, a question seeking to get before jury evidence that defendant did not visit plaintiff at her home after automobile accident, such misconduct did not entitle defendant to a reversal, where any possible prejudicial effect of such misconduct was averted by admonition given by trial court to jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

14. Appeal and error ⊂⊃237(2), 1053(2)

In personal injury action, three answers by plaintiff giving hearsay regarding her physical condition, made in response to questions not calling for such answers, did not constitute prejudicial error, where in two of the instances the answers were stricken out on defendants' motion, and jury were instructed to disregard them, and in the other instance no such motion was made, especially where it appeared that the matters referred to were not important.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Margaret Young against George Tassop and another for personal injuries sustained by plaintiff when struck by an automobile. From a judgment for plaintiff, and from order denying a motion for new trial, the defendants appeal.

Purported appeal from order dismissed, and judgment affirmed.

C. F. Jorz, of Los Angeles, for appellants.

P. E. Cavaney, of Los Angeles, for respondent.

SHAW, Justice pro tem.

The plaintiff sued to recover damages for personal injuries resulting to her from a collision between herself and an automobile driven by the defendant Tassop, for whose acts in that respect the other defendant, it is conceded, was legally responsible. The case was tried by a jury and judgment in favor of plaintiff was entered on their verdict, from which both defendants appeal.

[1] Some of the facts are not in dispute; regarding others there was much conflict in the evidence. Taking the view of the evidence most favorable to the judgment, as we must on appeal, we find it sufficient to show the following facts. The accident occurred in the latter part of the afternoon of September 3, 1938, at the intersection of Broadway and Seventh street in the city of Los Angeles. These streets cross at right angles and at the four corners of their intersection there were traffic signals which controlled traffic by the alternate display of the words "Stop" and "Go" on semaphore arms, and by bells, referred to as the "first bell", which rang when the arms displaying "Stop" for traffic on either street came up, and the "second bell", which rang as the arms displaying "Go" for traffic on the other street arose. Plaintiff was walking south on the west side of Broadway, and as she came to Seventh street the signal directed her to stop, which she did, waiting on the curb for the signal to change. Many other persons were also waiting there. Plaintiff stood on the curb waiting until after the "second bell" rang, then looked east and west and saw no "cars or anything, only people were crossing north and south", stepped down from the curb and started to cross Seventh street within the lines of a marked crosswalk. Many others started south across Seventh street at about the same time. When she got about eight feet from the curb she was hit and knocked down by the car driven by defendant Tassop, receiving the injuries for which she sues. Defendant Tassop was driving west along Seventh street and entered this intersection from the east at a time when the signal applicable to traffic on that street showed "Stop", and came through the intersection at a speed of 20 to 25 miles per hour, without sounding his horn. People ran to get out of his way. Plaintiff did not see the car and Tassop did not see plaintiff before the accident.

At the time of this occurrence, a Los Angeles city ordinance regulating traffic provided that, when the word "Stop" was displayed by a traffic signal, vehicles fac-

ing the signal should stop before entering the nearest crosswalk and remain standing until "Go" was shown by the signal, and that no pedestrian should enter the roadway until "Go" was shown.

[2] From the facts above stated the jury could properly conclude that the defendant Tassop was negligent in several respects: he violated the ordinance above mentioned by entering the intersection when the signal was against him; he travelled across the intersection at a speed greater than was reasonable or prudent under the existing conditions, in violation of section 510 of the Vehicle Code, St.1935, p. 176; and he failed to sound his horn "when reasonably necessary to insure safe operation", thus violating section 671 of the Vehicle Code.

Defendants point to certain evidence which shows, as they claim, both that the defendant Tassop was not negligent, and that the plaintiff was negligent. There was a police officer on duty at the intersection of Seventh street and Broadway when this accident happened, and he testified: "When the first bell * * * rang the car (Tassop's) * * * was practically in the center of Broadway heading west. I saw this lady (plaintiff) step off of the curb and I held my hand up and blew my whistle for her to stop so the car could clear the intersection, and there were a lot of other people standing on her left, they stopped, but she kept on going. * * * I motioned to the car to come on. * * * his front wheels had just crossed the most westerly line of the safety zone when this lady run into his right front fender, the bumper." Defendant Tassop testified to the same effect as to the officer's directions to him, and another witness for defendant gave similar testimony regarding the officer's directions to plaintiff and the other pedestrians. Defendants refer to this testimony as undisputed. Plaintiff and her only other witness who was present at the time of the accident did not mention the matters covered by this testimony, nor were they questioned in regard to them. But it does not follow that the jury were required to accept this testimony as true.

[3, 4] The rule in this respect was stated in Davis v. Judson, 1910, 159 Cal. 121, 128, 113 P. 147, 150, as follows: "While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions.

The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction, or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact; and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy." This rule has been approved and followed ever since. Caldwell v. Weiner, 1928, 203 Cal. 543, 546, 264 P. 1100; Tretheway v. Tretheway, 1940, 16 Cal.2d 133, 138, 104 P.2d 1033; Burke v. Bank of America, etc., Ass'n, 1939, 34 Cal.App.2d 594, 599, 94 P.2d 58.

[5-7] One matter discrediting the testimony of a witness is that, if the jury find a witness wilfully false in one material part of his testimony, on which he is contradicted, they may disbelieve his testimony in other respects, though not contradicted. Section 2061, Code of Civ.Proc., subd. 3; Rolland v. Porterfield, 1920, 183 Cal. 466, 470, 191 P. 913; Estate of Friedman, 1918, 178 Cal. 27, 32, 172 P. 140; Treat v. Treat, 1915, 170 Cal. 329, 333, 150 P. 53, 57; Robinson v. Thornewill, 1931, 112 Cal.App. 498, 500, 297 P. 28. The police officer referred to was contradicted on material points. He testified positively that plaintiff stepped off the curb and started across the street on the first bell; whereas plaintiff testified with equal positiveness that she did not start until after the second bell. He also testified that defendant's car proceeded at a speed of between six and ten miles per hour, while plaintiff's witness testified that its speed was twenty to twenty-five miles per hour. He further testified that defendant Tassop entered the intersection while the signal applicable to him showed "Go", but plaintiff's witness testified that Tassop entered when the signal said "Stop". The defendants' witness who corroborated the officer regarding his directions to plaintiff testified that plaintiff started on the first bell,

which was in conflict with plaintiff's testimony already referred to. The jury were therefore at liberty to reject all the testimony of these two witnesses for defendants, and apparently they did so. The defendant Tassop's testimony in corroboration of the police officer could be rejected by the jury by reason of his interest in the result of the case as a defendant. Estate of McCarthy, 1932, 127 Cal.App. 80, 83, 84, 15 P.2d 223; Vitelli v. Stanbrough, 1931, 118 Cal.App. 120, 123, 4 P.2d 818.

[8, 9] We must presume, therefore, in support of the verdict, that the jury rejected the whole incident narrated in the testimony of the police officer. Excluding it from consideration, we have a case, as we must view it on appeal, where the plaintiff, before leaving her place of safety on the curb and starting across the street, looked in the direction from which danger was to be anticipated, that is, to the east, and seeing no vehicles approaching, and hearing no automobile horn, started across. The rule applying to such a situation, as stated in White v. Davis, 1930, 103 Cal. App. 531, 542, 284 P. 1086, 1091, is: "There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury." This rule has been approved and followed in many later cases and is conceded by defendants here to be correct. See Varner v. Skov, 1937, 20 Cal.App.2d 232, 237, 67 P.2d 123; Reichle v. Hazie, 1937, 22 Cal.App.2d 543, 545, 71 P.2d 849; Lowell v. Harris, 1937, 24 Cal.App.2d 70, 84, 74 P.2d 551; Welch v. Sink, 1937, 24 Cal.App.2d 231, 235, 236, 74 P.2d 832.

[10] Defendants contend, however, that certain testimony given by plaintiff here shows that plaintiff looked only from a position where she could not see, and thus establishes contributory negligence as a matter of law. Her testimony was that there were people standing on the curb to her left when she looked, but that: "I could see to Broadway from where I was standing. That was as far as I could see". She appears to have been near the west side of the crosswalk at the time, and her reference to Broadway could properly be understood as referring to space somewhere east of the crosswalk. Defendants state in their opening brief that this crosswalk is 36 feet wide, and this statement is not disputed by plaintiff. We have not found any testimony in the record on this point, but the crosswalk must have been of considerable width to accommodate the numerous persons who are said to have been in it, and we accept this statement of its width as correct. Plaintiff also testified that, "Everybody was crossing when I started; they were going both ways, north and south"; that she saw people crossing to her left. Under these circumstances she might have concluded that no automobile which she had not seen or heard would come suddenly upon her, and that an apparently clear space of approximately 35 feet was sufficient to enable her to cross in safety. She did take some precautions for her safety, and the question whether she exercised due care was one for the jury. The fact that when she looked her view was somewhat obstructed by other pedestrians does not, alone, convict her of negligence. Reaugh v. Cudahy Packing Co., 1922, 189 Cal. 335, 342, 208 P. 125.

[11, 12] Plaintiff testified that after she started across she looked straight ahead. Defendants argue that this shows negligence on her part. But a pedestrian crossing under such circumstances is not under a continuing duty to look to the left; he is only under a continuing duty to use ordinary care. Salomon v. Meyer, 1934, 1 Cal. 2d 11, 15, 32 P.2d 631; King v. Unger, 1938, 25 Cal.App.2d 632, 634, 78 P.2d 255. In this connection defendants cite the decision of this court in Flores v. Los Angeles Railway Corp., 1936, 15 Cal.App.2d 576, 59 P. 2d 856, but we do not regard it as controlling here. In that case it was held that "* * * appellant Lupe Flores was negligent in stepping up to the tracks of respondent company directly in front of an oncoming street car which was plainly in view at the time she came up to the track, if she had chosen to glance in its direction". Flores v. Los Angeles Railway Corp., supra, 15 Cal.App.2d at page 579, 59 P.2d

at page 857. The plaintiff there stood on the curb at the same corner where plaintiff in this case stood, waiting for the traffic signal to change so that she could cross Seventh street going south, and when it changed she walked south and into the path of a westbound street car which was just clearing the intersection, having entered it with the signal. This court held that she was guilty of contributory negligence as a matter of law, but the opinion shows that the decision was based upon the following facts, besides those just stated: a police officer who was on duty at that point signaled the car to proceed and likewise held up his hand as a signal to the pedestrians on the northwest corner where appellant Lupe Flores was, to wait and allow the street car to pass; appellant Lupe Flores testified she did not look once in either direction for anticipated danger; and the speed of the street car was only five to ten miles per hour. No corresponding facts are to be considered by us in the instant case. The plaintiff in the Flores case walked from curb to car track and did not look at all for danger; the street car was in plain sight and going very slowly. Here the plaintiff did look before leaving the curb, saw no cars coming and heard no horn sounded, and saw other pedestrians crossing to her left, who would naturally tend to slow the progress of any approaching car. She then started across, walking only eight feet, and, as she said, "the first thing I knew I was knocked down". It does not appear that the automobile was in plain sight when she looked; other people crossing the street may have obscured her view of it. At the speed it was going it must have been beyond her clear field of view when she looked. The question whether, under all the circumstances, she was negligent in not looking again to her left while she walked this eight feet is one on which there is room for an honest difference of opinion between men of average intelligence, and it is therefore one of fact on which the jury's finding is conclusive. Salomon v. Meyer, supra, 1 Cal.2d 15, 32 P.2d 631.

[13] Defendants contend that plaintiff's counsel was guilty of prejudicial misconduct in seeking to get before the jury evidence that defendant Tassop did not visit plaintiff at her home after the accident. Objections to two questions on the point were sustained; the answers showing that he did not visit her, given before the rulings, were stricken out and the jury were instructed to draw no inference from them. While it may have been misconduct to ask, and especially to repeat after an adverse ruling, such a question, any possible prejudicial effect of such misconduct was averted by the admonition given by the court to the jury. McCollum v. Barr, 1918, 38 Cal.App. 411, 429, 176 P. 463; Elliott v. Federated F. & V. Growers, Inc., 1930, 108 Cal.App. 412, 418, 291 P. 681.

[14] Defendants also complain of three answers by plaintiff giving hearsay regarding her physical condition, made in response to questions not calling for such answers. In two of these instances the answers were striken out on defendants' motion and the jury were instructed to disregard them. In the other instance no such motion was made. The matters referred to were not important, and we cannot see how any prejudice accrued to defendants from these incidents.

The appeal from the order denying a new trial is dismissed. The judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.

18 Cal.2d 863

DONNELLY v. SOUTHERN PAC. CO. et al.

S. F. 16603.

Supreme Court of California.

Nov. 1, 1941.

As amended Nov. 13, 1941.

1. Carriers ⇐307(2)

Under a state statute providing that a common carrier cannot exonerate itself by agreement from liability for gross negligence, the improper setting of an open switch may constitute "gross negligence", rendering railroad liable to passenger traveling on a free pass who is injured in resulting accident where interstate commerce is not involved. Civ.Code, § 2175.

See Words and Phrases, Permanent Edition, for all other definitions of "Gross Negligence".

2. Commerce ⇐10

In absence of contrary congressional legislation, a state may, by statute or judicial decision, establish rules affecting interstate commerce so long as such commerce is not unduly burdened.

3. Commerce ⇐8(1)

A congressional statute covering the subject supersedes a state statute or decision regulating interstate commerce.

4. Commerce ⇐8(1)

If Congress enacts a statute embracing the general field, but not covering the matter on which the state has ruled, the state statute or decision, even though affecting interstate commerce, is superseded only if Congress intended to occupy the entire field.

5. Commerce ⇐8(1)
Courts ⇐97(5)

Where Congress enacts a statute covering subject of state regulation, it supersedes the state statute or decision affecting interstate commerce, and state courts are then bound by federal court's decisional law in the field.

6. Commerce ⇐8(1)

Generally, an act of Congress does not supersede a state statute or decision affecting interstate commerce unless the two conflict or the state laws stand in the way of Congressional objectives.

7. Courts ⇐97(5)

A decision of the United States Supreme Court that the Hepburn Act provisions regulating issuance of free passes by interstate carriers was intended to occupy entire field of free passes, that it superseded all state law in that field, and that decisions of federal courts were controlling on liability of a carrier for negligence to holder of a pass containing an exculpatory provision, was binding on state Supreme Court. Hepburn Act, 34 Stat. 584, 49 U.S.C.A. § 1 et seq.

8. Carriers ⇐307(2)

An interstate carrier may validly contract to release itself from liability for negligence to the holder of a free pass. Hepburn Act, 34 Stat. 584, 49 U.S.C.A. § 1 et seq.

9. Carriers ⇐307(2)

A carrier cannot protect itself from liability for willful and wanton negligence to the holder of a free interstate pass. Hepburn Act, 34 Stat. 584, 49 U.S.C.A. § 1 et seq.

10. Negligence ⇐1, 4

"Negligence" is an unintentional tort, a failure to exercise the degree of care in a given situation that a reasonable man under similar circumstances would exercise to protect others from harm.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

11. Negligence ⇐1, 11

A "negligent" person has no desire to cause the harm that results from his carelessness, as distinguished from a person guilty of "willful misconduct" who intends to cause harm; "willfulness" and "negligence" being contradictory terms.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct", and "Willfulness".

12. Negligence ⇐11

A tort having some of the characteristics of both negligence and willfulness occurs when a person, with no intent to cause harm, intentionally performs an act so unreasonable and dangerous that he knows, or should know, that it is highly probable that harm will result, and such a tort is "wanton and reckless misconduct", or, as it is sometimes called, "willful negligence", "wanton and willful negligence", or even "gross negligence".

See Words and Phrases, Permanent Edition, for all other definitions of "Wanton and Reckless Misconduct", "Wanton and Willful Negligence", and "Willful Negligence".

13. Negligence ⇐11

"Wanton and willful misconduct" involves no intention, as does "willful misconduct", to do harm, and differs from "negligence" in that it does involve an intention to perform an act which the actor knows, or should know, will very probably cause harm.

14. Damages ⇐91(1)
Negligence ⇐11, 100

"Wanton and reckless misconduct" is more closely akin to "willful misconduct" than to "negligence", and has most of the legal consequences of willful misconduct in that it justifies an award of punitive damages, and contributory negligence is not a defense.

15. Negligence ⇐13

The federal courts have rejected any distinction between "negligence" and "gross negligence", and recognize no degrees of negligence as do state courts.

16. Negligence ⇐3, 13

Under federal court decisions, if a person fails to exercise the degree of care that the law requires him to exercise under the circumstances, he is "negligent", and, though there may be different standards of care in different circumstances, his failure to exercise such care in each case constitutes no more than "negligence".

17. Negligence ⇐22

Under federal court decisions, persons dealing with dangerous instrumentalities involving great risk of harm must exercise a greater amount of care than persons acting in less responsible capacities, but the former are no more "negligent" than the latter for failing to exercise the required care.

18. Negligence ⇐13

In California, a distinction is made between "ordinary negligence" and "gross negligence", and this distinction amounts to a rule of policy that a failure to exercise due care in those situations where the risk of harm is great will give rise to legal consequences harsher than those arising from negligence in less hazardous situations.

See Words and Phrases, Permanent Edition, for all other definitions of "Ordinary Negligence".

19. Carriers ⇐307(2, 6)

Under provision of the Hepburn Act regulating issuance of free passes by interstate carriers, such a pass may validly release carrier from liability for negligence for injuries to passenger, including what in California would constitute "gross negligence", and the release would be inapplicable only in case of "wanton and reckless misconduct", as distinguished from "negligence". Hepburn Act, 34 Stat. 584, 49 U S.C.A. § 1 et seq.

20. Carriers ⇐307(6)
Commerce ⇐8(12)
Courts ⇐97(5)

The action of a switchman in throwing a switch the wrong way, causing a train to turn into a siding and collide with a train thereon, even if "gross negligence" under California rule, did not constitute "wanton and reckless misconduct", within federal statute and rule of decisions, where switchman did not intend to throw switch the wrong way, and therefore passenger traveling on interstate free pass could not recover for injuries. Hepburn Act, 34 Stat. 584, 49 U.S.C.A. § 1 et seq.

In Bank.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Joelene Donnelly against Southern Pacific Railway Company and others, for injuries sustained by plaintiff in a collision while she was traveling on a free pass. Judgment for plaintiff and defendant appeals.

Reversed.

For prior opinion, see, Cal.App., 111 P. 2d 463.

Elliott Johnson, of Oakland, for appellants.

Hildebrand & Bills and James R. Agee, all of Oakland, for respondent.

TRAYNOR, Justice.

Plaintiff, the wife of an employee of the Southern Pacific Railroad, was traveling on a free pass from El Paso, Texas to Sacramento, California, aboard a Southern Pacific train when it collided with an eastbound train standing upon a siding in California. Plaintiff brought this action against the railroad to recover damages for personal injuries suffered in the collision. The complaint alleges, and the answer admits that before the collision one of defendant's employees, in the course of his employment, set improperly the switch that controlled the siding, causing the westbound train to turn into the siding and collide with the eastbound train. No evidence was intro-

duced on the question of negligence. The court instructed the jury that the plaintiff was entitled to recover from the defendant only if the switchman was grossly negligent in setting the switch. It defined gross negligence as "that entire want of care which would raise a presumption of conscious indifference to consequences; an entire want of care, or such a slight degree of care as to justify the belief that there was an entire disregard for and indifference to the safety and welfare of others". The jury returned a verdict in favor of the plaintiff, and defendant has appealed from the judgment.

The free pass on which plaintiff was traveling contained the following condition: "The person accepting and using this pass, in consideration of using the same, agrees that the Southern Pacific Company shall not be liable under any circumstances for any injury to the person, or for any loss or damage to the property of the individual using the pass; and that as to such person the Company shall not be considered as a common carrier or liable as such." Plaintiff contends that this provision releases the defendant from liability for ordinary negligence, but not gross negligence, and that the jury was justified in finding the switchman guilty of gross negligence. Defendant asserts that the provision is a release from liability for any sort of negligence, ordinary or gross; that the provision is inapplicable only in the case of wilful or wanton misconduct, and that there is no evidence to justify a finding that the switchman was guilty of wilful or wanton misconduct.

[1] California by statute has provided that "a common carrier cannot be exonerated by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants". Cal.Civ.Code, sec. 2175. This court has held that the improper setting of an open switch may constitute gross negligence rendering the railroad liable to a passenger traveling on a free pass who is injured in the resulting accident. Walther v. Southern Pacific Co., 159 Cal. 769, 116 P. 51, 37 L.R.A., N.S., 235.

[2-5] Plaintiff, however, was traveling in interstate commerce. The question presented therefore is whether the California statute and decision can validly apply to railroads engaged in interstate commerce. In the absence of contrary congressional legislation a state may by statute or judicial decision establish rules affecting interstate commerce so long as such commerce is not unduly burdened. Port Richmond, etc., Ferry Co. v. Board of Chosen Freeholders of Hudson County, 234 U.S. 317, 34 S.Ct. 821, 58 L.Ed. 1330; Geer v. State of Connecticut, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793; Plumley v. Commonwealth of Massachusetts, 155 U.S. 461, 15 S.Ct. 154, 39 L.Ed. 223; Cooley v. Board of Port Wardens, 12 How. 299, 13 L.Ed. 996; Chicago, R. I. & P. Co. v. Maucher, 248 U.S. 359, 39 S. Ct. 108, 63 L.Ed. 294; Chicago, M. & St. P. Ry. Co. v. Solan, 169 U.S. 133, 18 S.Ct. 289, 42 L.Ed. 668; Pennsylvania Ry. Co. v. Hughes, 191 U.S. 477, 24 S.Ct. 132, 48 L.Ed. 268. If a statute is enacted by congress covering the subject of the state's regulation, it supersedes the state statute or decision. Southern Ry. Co. v. Railroad Commission of Indiana, 236 U.S. 439, 35 S.Ct. 304, 59 L.Ed. 661; Southern Express Co. v. Byers, 240 U.S. 612, 36 S.Ct. 410, 60 L.Ed. 825, L.R.A. 1917A, 197; Adams Express Co. v. Croninger, 226 U.S. 491, 33 S.Ct. 148, 57 L.Ed. 314, 44 L.R.A.,N.S., 257; Western Union Tel. Co. v. Speight, 254 U.S. 17, 41 S.Ct. 11, 65 L.Ed. 104; see Western Union Tel. Co. v. Commercial Milling Co., 218 U.S. 406, 31 S.Ct. 59, 54 L.Ed. 1088, 36 L.R.A., N. S., 220, 21 Ann.Cas. 815; see 30 Ill.L.Rev. 373; 41 Harv.L.Rev. 200. If, however, congress enacts a statute that embraces the general field but does not cover the matter on which the state has ruled, the state statute or decision is superseded only if congress intended by such legislation to occupy the entire field, thereby excluding all state control. Atchison, T. & S. F. Ry. v. Railroad Commission of California, 283 U.S. 380, 51 S.Ct. 553, 75 L.Ed. 1128; Kelly v. State of Washington, 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3; Welch Co. v. State of New Hampshire, 306 U.S. 79, 59 S.Ct. 438, 83 L.Ed. 500; Kansas City So. Ry. v. Van Zant, 260 U.S. 459, 43 S.Ct. 176, 67 L.Ed. 348; Southern Express Co. v. Byers, 240 U.S. 612, 36 S.Ct. 410, 60 L.Ed. 825, L.R.A.1917A, 197; Adams Express Co. v. Croninger, 226 U. S. 491, 33 S.Ct. 148, 57 L.Ed. 314, 44 L. R.A.,N.S., 257; Western Union Tel. Co. v. Speight, 254 U.S. 17, 41 S.Ct. 11, 65 L. Ed. 104; Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., 251 U.S. 27, 40 S.Ct. 69, 64 L.Ed. 118; see Chicago,

M. & St. P. Ry. Co. v. Solan, supra; Chicago, R. I. & P. Co. v. Maucher, supra; Pennsylvania Ry. Co. v. Hughes, supra. The state courts are then bound by federal decisional law in the field. Kansas City So. Ry. v. Van Zant, supra; Southern Express Co. v. Byers, supra; Adams Express Co. v. Croninger, supra; Western Union Tel. Co. v. Speight, supra.

[6, 7] In 1906 congress passed the Hepburn Act, 34 U.S.Stats. at Large 584, 49 U.S.C.A. § 1 et seq., regulating the issuance of free passes by interstate carriers. The act deals only with the classes of person to whom free passes may be issued and contains nothing about the liability of carriers to such passengers, nor the terms of the passes. Generally an act of congress is not regarded as superseding a state statute or decision unless the two conflict or the state law stands in the way of congressional objectives. Welch Co. v. State of New Hampshire, 306 U.S. 79, 59 S.Ct. 438, 83 L.Ed. 500; Kelly v. State of Washington, 302 U.S. 1, 58 S. Ct. 87, 82 L.Ed. 3; Atchison, T. & S. F. Ry. v. Railroad Comm. of California, 283 U.S. 380, 51 S.Ct. 553, 75 L.Ed. 1128; Maurer v. Hamilton, 309 U.S. 598, 60 S.Ct. 726, 84 L.Ed. 969; Palmer v. Commonwealth of Massachusetts, 308 U.S. 79, 60 S.Ct. 34, 84 L.Ed. 93. Nothing in the Hepburn Act conflicts with state rules on liability for negligence, and it sets forth no objective that would be hindered by the application of state law. Nevertheless the Supreme Court of the United States took the position in Kansas City Southern Ry. Co. v. Van Zant, 260 U.S. 459, 43 S. Ct. 176, 67 L.Ed. 348, that the Hepburn Act was intended to occupy the entire field of free passes, that it superseded all state law in the field, and that the decisions of the federal courts were therefore controlling on the liability of a carrier for negligence to a holder of a pass containing an exculpatory provision. This court is bound by that decision and must therefore disregard the California law and apply the rules established by the decisions of the federal courts.

[8, 9] The United States Supreme Court has made it clear that a carrier may validly contract to release itself from liability for negligence to the holder of a free pass. Northern Pacific Ry. Co. v. Adams, 192 U.S. 440, 24 S.Ct. 408, 48 L. Ed. 513; Boering v. Chesapeake Beach R. Co., 193 U.S. 442, 24 S.Ct. 515, 48 L.Ed. 742; Charleston & Western Carolina Ry. Co. v. Thompson, 234 U.S. 576, 34 S.Ct. 964, 58 L.Ed. 1476; Kansas City Southern Ry. Co. v. Van Zant, supra; see Smith v. Atchison, T. & S. F. Ry. Co., 8 Cir., 194 F. 79; Ellis v. Davis, 5 Cir., 4 F.2d 323. The federal courts have indicated, however, that a carrier may not protect itself from liability for "willful and wanton negligence". New York Central Ry. Co. v. Mohney, 252 U.S. 152, 40 S.Ct. 287, 288, 64 L.Ed. 502, 9 A.L.R. 496; Virginia Beach Bus Line v. Campbell, 4 Cir., 73 F.2d 97, certiorari denied 294 U.S. 727, 55 S.Ct. 637, 79 L.Ed. 1258; see Northern Pac. Ry. Co. v. Adams, supra; Bush v. Bremner, 8 Cir., 36 F.2d 189; Smith v. Atchison, T. & S. F. Ry. Co., supra. It is therefore necessary to determine what is meant by "willful and wanton negligence".

[10-14] Negligence is an unintentional tort, a failure to exercise the degree of care in a given situation that a reasonable man under similar circumstances would exercise to protect others from harm. Rest.Torts, secs. 282, 283, 284; Prosser, Torts, sec. 30, et seq. A negligent person has no desire to cause the harm that results from his carelessness. Rest.Torts, sec. 282(c). And he must be distinguished from a person guilty of willful misconduct, such as assault and battery, who intends to cause harm. Prosser, Torts, p. 261. Willfulness and negligence are contradictory terms. Kelly v. Malott, 7 Cir., 135 F. 74; Neary v. Northern Pac. R. Co., 41 Mont. 480, 110 P. 226; Michels v. Boruta, Tex.Civ.App., 122 S.W. 2d 216. If conduct is negligent, it is not willful; if it is willful, it is not negligent. It is frequently difficult, however, to characterize conduct as willful or negligent. A tort having some of the characteristics of both negligence and willfulness occurs when a person with no intent to cause harm intentionally performs an act so unreasonable and dangerous that he knows, or should know, it is highly probable that harm will result. Rest.Torts, sec. 500, et seq.; Prosser, Torts, pp. 260, 261. Such a tort has been labelled "willful negligence", "wanton and willful negligence", "wanton and willful misconduct", and even "gross negligence". It is most accurately designated as wanton and reckless misconduct. It involves no intention, as does willful misconduct, to do harm, and it differs from negligence in that it does involve an intention to perform an act that the actor knows, or should know,

will very probably cause harm. See Kastel v. Stieber, 215 Cal. 37, 46, 8 P.2d 474; Albers v. Shell Co., 104 Cal.App. 733, 286 P. 752; Tognazzini v. Freeman, 18 Cal.App. 468, 123 P. 540; 45 C.J. 674. Wanton and reckless misconduct is more closely akin to willful misconduct than to negligence, and it has most of the legal consequences of willful misconduct. Thus, it justifies an award of punitive damages, and contributory negligence by the plaintiff is not a defense. See cases cited in Prosser, Torts, p. 261.

This is the type of misconduct that the federal courts characterize as "willful and wanton negligence". In New York Central Ry. Co. v. Mohney, 252 U.S. 152, 40 S.Ct. 287, 64 L.Ed. 502, 9 A.L.R. 496, an engineer ran his train past two separate danger signals and it crashed into a train ahead. The collision resulted in injury to plaintiff, who was traveling on a free pass containing a provision releasing the railroad from liability for negligence. The State Court of Appeals found the engineer guilty of willful and wanton negligence, and the United States Supreme Court held the railroad liable, despite the release in the pass, on the ground that there was sufficient evidence to support the state court's finding of willful and wanton negligence. A railroad engineer who has deliberately run his train past two danger signals has intentionally performed so dangerous an act that he must have known that harm would probably result, and he is guilty of wanton and reckless misconduct rather than negligence. In Virginia Beach Bus Line v. Campbell, 4 Cir., 73 F.2d 97, plaintiff, a holder of a free pass with a release provision, was injured by a collision at a dangerous crossing between the bus in which he was riding and a railroad train. The court permitted him to recover against the defendant bus company on the ground that the negligence of the driver in operating the bus at a rate of from 55 to 60 miles per hour over a dangerous railroad crossing was willful and wanton. Such conduct constitutes more than negligence. It is a dangerous act performed intentionally with the knowledge that it will probably cause harm.

[15-17] Plaintiff contends that while the release is effective as to ordinary negligence, it is not effective as to gross negligence. The federal courts, however, have rejected any distinction between negligence and gross negligence; they recognize no degrees of negligence. New York Central Railroad Co. v. Lockwood, 17 Wall. 357, 21 L.Ed. 627; The New World v. King, 16 How. 469, 14 L.Ed. 1019; Milwaukee & St. Paul Ry. Co. v. Arms, 91 U.S. 489, 494, 23 L.Ed. 374; Westre v. Chicago, M. & St. Paul Ry. Co., 8 Cir., 2 F.2d 227, and cases there cited. If a person fails to exercise the degree of care that the law requires him to exercise under the circumstances, he is negligent. There may be different standards of care in different circumstances but the failure to exercise such care in each case constitutes no more than negligence. See Salmond, Torts, 8th Ed., 461; Pollock, Torts, 13th Ed., 457; Prosser, Torts, 256 et seq.; 1 Bevan, Negligence, 4th Ed., 15; Harper, Law of Torts, 176; 1 Street Foundations of Legal Liability, 99; Elliott, Degrees of Negligence, 6 So.Cal.L.Rev. 91. Persons dealing with dangerous instrumentalities involving great risk of harm must exercise a greater amount of care than persons acting in less responsible capacities, but the former are no more negligent than the latter for failing to exercise the required care. See cases cited in 45 C.J. 665, footnote 78. "There are no 'degrees' of care, as a matter of law; there are only different amounts of care, as a matter of fact; and 'gross' negligence is the same thing as ordinary negligence, 'with the addition', as Baron Rolfe put it, 'of a vituperative epithet'. Wilson v. Brett, (1843) 11 M. & W. 113; 152 Eng.Rep. 737." Prosser, Torts, pp. 258, 259. As stated by the United States Supreme Court in the Lockwood case [17 Wall. 382, 21 L.Ed. 627], supra: "We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. * * * In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply 'negligence.'"

[18, 19] Some jurisdictions, including California, distinguish between ordinary and gross negligence. Kastel v. Stieber, 215 Cal. 37, 8 P.2d 474; Albers v. Shell Co., 104 Cal.App. 733, 286 P. 752; Walther v. Southern Pacific Co., 159 Cal. 769, 116 P. 51, 37 L.R.A.,N.S., 235; see 6 So.Cal.L. Rev. 91, 127. This distinction amounts to a rule of policy that a failure to exercise due care in those situations where the risk of harm is great will give rise to legal consequences harsher than those arising from negligence in less hazardous situations. See Walther v. Southern Pacific Co., supra. The federal rule, however, clearly recog-

nizes the validity of a release from liability for negligence, including what in California would constitute gross negligence, and holds such a release inapplicable only in the case of wanton and reckless misconduct as distinguished from negligence.

[20] In the present case the alleged conduct of the switchman does not constitute wanton and reckless misconduct. There is no allegation that he intended to throw the switch the wrong way. Apparently, he did not know he was throwing the switch the wrong way and that harm would probably result. He was guilty of negligence alone. This negligence may have been "gross" under the California rule but the federal cases are clear that such dereliction constitutes negligence and not wanton and reckless misconduct. "It would be going a great way to say that the failure of the switch tender to throw the switch so that the train would go on the main line was a wanton and malicious neglect. The only thing that can be said is that someone was careless, and that is admitted." Shelton v. Canadian Northern Ry. Co., C.C., 189 F. 153, 160; see Milwaukee & St. Paul Ry. Co. v. Arms, 91 U.S. 489, 23 L.Ed. 374. There is therefore no basis for a finding of reckless and wanton misconduct.

The judgment is reversed.

GIBSON, C. J., and SHENK and EDMONDS, JJ., concurred.



18 Cal.2d 884

KRELING et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

In re KRELING et al.

S. F. 16575.

Cr. 4353.

Supreme Court of California.

Nov. 1, 1941.

Rehearing Denied Nov. 27, 1941.

1. Contempt ⇐21

One cannot be punished in contempt for the disobedience of a void order.

2. Nuisance ⇐65

An action in equity on behalf of the state to enjoin the operation of a gambling house must be based upon the provisions of statutes regarding nuisances rather than upon common law definitions of public nuisance. Civ.Code §§ 3479, 3480.

3. Judgment ⇐18(2)
Nuisance ⇐84, 86

Where restraining order was sought on theory that certain activities contributed to maintenance of bookmaking or gambling houses which were said to constitute public nuisances and the complaint alleged in detail the nature of the organization conducting such activities but did not set forth the facts from which it could be concluded that the activities constituted a public nuisance within statute, the restraining order exceeded authority of trial court and was invalid and judgment of contempt for violation of the restraining order was required to be annulled. Civ.Code, §§ 3479, 3480; Code Civ.Proc. § 527.

4. Judgment ⇐18(2)

Where restraining order was sought on theory that certain activities contributed to maintenance of bookmaking or gambling houses which were said to constitute public nuisances, in absence of allegations of fact from which it could be determined that such activity was within the statutory definition of public nuisance, court had no adequate basis for the issuance of restraining order. Civ.Code, §§ 3479, 3480; Code Civ.Proc. § 527.

5. Habeas corpus ⇐29

Habeas corpus is an appropriate remedy to halt the enforcement of an invalid judgment of contempt.

6. Habeas corpus ⇐29

Where judgment of contempt was invalid, alleged contemnors were entitled to release on writ of habeas corpus.

In Bank.

Certiorari proceeding by Martin Kreling and others against the Superior Court of Los Angeles County and others to annul an order adjudging petitioners guilty of contempt consolidated with proceedings by Martin Kreling and others for writ of habeas corpus.

Judgment of contempt annulled and petitioners discharged.

S. F. 16575:

John J. Taaffe, of San Francisco (Leo R. Friedman, of San Francisco, of counsel), for petitioners.

Earl Warren, Atty. Gen., and Warren Olney, Burdette J. Daniels, and Herbert E. Wenig, Deputy Attys. Gen. for respondents.

Cr. 4353:

John J. Taaffe, of San Francisco, for petitioners.

Earl Warren, Atty. Gen., and Warren Olney and Herbert Wenig, Deputy Attys. Gen., for respondents.

GIBSON, Chief Justice.

In these consolidated cases petitioners seek to challenge the validity of a judgment of contempt issued against them by the Superior Court of Los Angeles County. The judgment of contempt arose out of a proceeding in equity in which the Attorney-General sought to enjoin the widespread activities of the Annenberg racing news service throughout the state. The complaint for an injunction alleged that the Annenberg organization was composed of numerous branches throughout the United States, and that it was engaged in furnishing supplies and facilities used in the illegal operation of bookmaking and pool selling establishments maintained for wagering on horse races. The complaint named 112 specific persons as defendants, 99 unknown persons as John Doe and five unknown corporations. Petitioners herein were sued fictitiously as John Doe Twenty-Eight and John Doe Thirty, respectively, and their proper names were inserted later by amendment to the complaint. In the action of People v. Annenberg, Superior Court of Los Angeles, Number 451935, the Attorney-General obtained a temporary restraining order which enjoined these petitioners and others from engaging in any acts in furtherance of their conspiracy to furnish information, materials and facilities for the illegal operation of bookmaking establishments. Thereafter the superior court found upon the basis of affidavits and testimony introduced by the Attorney-General that petitioners had wilfully and intentionally violated the terms of the restraining order. Petitioners were adjudged guilty of contempt of court upon 148 separate counts, and each petitioner was sentenced to pay an aggregate fine of $29,600 and also to serve 296 days in the county jail.

[1] Petitioners seek, in S. F. No. 16575, to have the order adjudging them guilty of contempt annulled upon a writ of certiorari. It is contended that the temporary restraining order is void because in excess of the court's jurisdiction. If the order is void, it is perfectly clear that the judgment of contempt must be annulled, for no one may be punished in contempt for the disobedience of a void order. Wutchumna Water Co. v. Superior Court, 215 Cal. 734, 736, 12 P.2d 1033; Ex parte Brown, 97 Cal. 83, 85, 31 P. 840. Petitioners argue that the complaint in the main action does not present facts sufficient to justify the intervention of a court of equity. The restraining order as well as the permanent injunction was sought upon the theory that petitioners' activities contributed to the maintenance of bookmaking or gambling houses which were said to constitute public nuisances.

[2-4] In People v. Linn, 118 P.2d 472, this day decided, we held that such an action in equity on behalf of the state to enjoin the operation of a gambling house must be based upon the provisions of our statutes rather than upon the common law definitions of "public nuisance." The argument advanced on behalf of the state in the present case is identical with the one which was rejected in the Lim case, that is, that gambling establishments, which were public nuisances at common law, should be considered inherent public nuisances in this state for the purposes of an equity injunction apart from the provisions of our statute. The complaint upon which the restraining order in the present case is based alleges in detail the nature of the organization of which petitioners formed a part. It sets forth the manner in which services and supplies necessary to the functioning of bookmaking establishments were furnished by the organization, and it alleges a conspiracy among the defendants for the purpose of furnishing these services and supplies. But the complaint does not set forth facts from which it can be concluded that the activities of these petitioners constituted a public nuisance within the terms of our statute. Allegations of fact are required from which it can be determined that the furnishing of such services and supplies is within the statutory definition of "public nuisance" as activity "which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property." Civil Code, § 3479, 3480; People v. Lim, supra. In the absence of such allegations the court had no adequate basis for the issuance of its restraining order which, in broad terms, enjoined petitioners from printing or dis-

tributing racing forms and scratch sheets, from gathering or disseminating horse racing news and from using their printing plants or communication facilities for such purposes. It is clear, therefore, that the restraining order granted in the present case exceeded the authority of the trial court and is invalid. People v. Lim, supra; People v. Seccombe, 103 Cal.App. 306, 284 P. 725; Code of Civil Procedure, § 527. In view of our conclusion upon this point it is unnecessary to consider the numerous other issues of importance raised by this proceeding. The judgment of contempt must be annulled.

[5, 6] Petitioners also sought, in Application of Kreling, Crim. 4353, to obtain their release by a writ of habeas corpus upon the theory that the judgment of contempt under which they were imprisoned exceeded the authority of the trial court. It is settled that habeas corpus is an appropriate remedy to halt the enforcement of an invalid judgment of contempt. Ex parte Brown, 97 Cal. 83, 31 P. 840; Ex Parte Clarke, 126 Cal. 235, 58 P. 546, 46 L.R.A. 835, 77 Am.St.Rep. 176.

The judgment of contempt is annulled and the petitioners are discharged.

CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.



18 Cal.2d 872

PEOPLE v. LIM et al.

S. F. 16414.

Supreme Court of California.

Nov. 1, 1941.

Rehearing Denied Nov. 27, 1941.

1. Nuisance ⇐61

A gambling house constituted a "public nuisance" at common law for the purpose of criminal prosecution.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Nuisance".

2. Nuisance ⇐77

An action on behalf of the state to enjoin activity which violates general concept of public policy finds no basis in the doctrines of the common law.

3. Constitutional law ⇐70(1)
Criminal law ⇐5
Nuisance ⇐60, 84

It is competent for the legislature, within constitutional limits, to declare any act criminal and make repetition or continuance thereof a public nuisance or to vest in courts of equity power to abate them by injunction but it is not the province of courts to ordain such jurisdiction for themselves.

4. Nuisance ⇐60

Compelling reasons of policy require that the responsibility for establishing those standards of public morality, the violation of which are to constitute public nuisance within equity jurisdiction should be left with the legislature, since "nuisance" is a term which does not have a fixed content, either at common law or at the present time.

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance".

5. Nuisance ⇐60

In a field where the meaning of a term is so vague and uncertain as the meaning of the term nuisance, it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity.

6. Injunction ⇐102

The fact that conduct against which injunctions are sought in behalf of the public is criminal in nature will not prevent the intervention of equity where a clear case justifying equitable relief is present.

7. Injunction ⇐102

Equity is loath to interfere where standards of public policy can be enforced by resort to criminal law since equitable remedy has the collateral effect of depriving a defendant of jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy and the defendant also loses the protection of the higher burden of proof required in criminal prosecution and after imprisonment and fine for violation of equity injunction, defendant may be subjected under the criminal law to similar punishment for the same acts.

8. Constitutional law ⇐70(1)

In the absence of a legislative declaration to that effect, courts should not broaden the field in which injunctions against criminal activity will be granted.

9. Nuisance ⇐65

An action in equity on behalf of the state to enjoin the operation of a gambling house must be based upon the provisions of statutes regarding nuisances rather than upon the common law definitions of public nuisance. Code Civ.Proc. § 731; Civ.Code, §§ 5, 3479, 3480; Pol.Code, § 4468.

10. Nuisance ⇐84

Where an attempt is made to enjoin particular activity under the theory that it constitutes a nuisance under general statutory provision, sufficient facts must be alleged so that the court may conclude that nuisance exists within statutory provisions. Code Civ. Proc. § 731; Civ.Code, §§ 3479, 3480.

11. Nuisance ⇐84

In action on behalf of the people to restrain defendants from continuing the operation of a gambling establishment, complaint alleging that the gambling house operated by defendants "draws together great numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits among them, creates traffic and fire hazards and is thereby injurious to health, indecent and offensive to the senses and impairs the free enjoyment of life and property" was sufficient as against general demurrer. Code Civ.Proc. § 731; Civ.Code, §§ 3479, 3480.

12. Pleading ⇐207

A special demurrer should not be sustained where the allegations of the complaint are sufficient clearly to apprise the defendant of the issues which he is to meet.

13. Pleading ⇐209

A special demurrer for uncertainty is not intended to reach the failure to incorporate sufficient facts in the pleading but is directed at the uncertainty existing in the allegations actually made.

14. Pleading ⇐207

In action on behalf of the people to restrain defendants from continuing the operation of a gambling establishment, where facts upon which plaintiff relied were stated with sufficient clarity in complaint and the allegations were neither uncertain, ambiguous nor unintelligible, the sustaining of special demurrer was improper even though the allegations of the complaint did not present a complete picture of the factual situation surrounding the operation of defendants' gambling house. Code Civ.Proc. § 731; Civ. Code, §§ 3479, 3480.

In Bank.

Appeal from Superior Court, Monterey County, Maurice T. Dooling, Jr., Judge.

Action by the People against Eddie Lim and others to restrain defendants from continuing the operation of a gambling establishment. From an adverse judgment, plaintiffs appeal.

Reversed.

For prior opinion of District Court of Appeals, see, 111 P.2d 429.

Rehearing denied; CARTER, J., did not participate.

Anthony Brazil, Dist. Atty., of Salinas, Earl Warren, Atty. Gen., and Warren Olney and Herbert E. Wenig, Deputy Attys. Gen., for appellant.

Harry L. Noland, of Salinas, and James M. Hanley and Herbert Chamberlin, both of San Francisco, for respondent.

GIBSON, Chief Justice.

The district attorney of Monterey county commenced this action on behalf of the People of the state of California to restrain defendants from continuing the operation of a gambling establishment in the city of Monterey. The complaint set forth the manner in which the various games were played and alleged that the operation of this gambling house constituted a public nuisance by encouraging idle and dissolute habits, by disturbing the public peace and by corrupting the public morals. It was further alleged that previous attempts to eradicate this evil by prosecutions under the penal laws had proven ineffective and that the aid of equity was necessary to accomplish its suppression. A preliminary injunction was asked to restrain defendants from conducting and operating gambling games pending a trial of the action. Defendants interposed both general and special demurrers. The trial court sustained the demurrers and denied plaintiff's motion for a temporary injunction. After plaintiff's refusal to amend the complaint, the court entered its judgment in favor of defendants.

Upon this appeal it is contended in behalf of the People that the complaint states a proper cause of action and that it was error on the part of the trial court to sustain the general demurrer. The authority of a district attorney to bring such an action is found in the Code of Civil Pro-

cedure, section 731, which provides: "A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists * * *." Civil Code, section 3480 provides: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." The definition of "nuisance", as the term is used in section 3480, is found in the provisions of the preceding section, Civil Code, section 3479: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, * * * is a nuisance." It is stated in the allegations of the complaint that the action was instituted under statutory provisions. Thus, it is alleged that the gambling house operated by defendants constitutes a public nuisance "for the reason that it tends to and does in fact debauch and corrupt the public morals, encourage idle and dissolute habits, draws together great numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits among them, creates traffic and fire hazards, and is thereby injurious to health, indecent and offensive to the senses and impairs the free enjoyment of life and property".

Although this proceeding purports to have been brought under the code provisions governing such actions, the plaintiff upon this appeal relies rather upon the theory that the statutory definition of "public nuisance" is not intended to be exclusive and that gaming houses, which were recognized as public nuisances at common law, are inherently public nuisances apart from the provisions of our statute. Plaintiff cites those statutes which provide that the common law must be given effect as the rule of decision where not repugnant to or inconsistent with the constitution or laws of the state. Pol. Code, § 4468; Civ.Code, § 5. Thus, it is said, a gambling house constitutes an inherent public nuisance in this state and equity will enjoin such a public nuisance in an action brought on behalf of the People. Defendants argue, however, that the authority conferred upon a district attorney to bring such an action in equity extends only to those nuisances specified by statute and that their activities are not within the terms of our statute.

[1, 2] It must be conceded that the cases cited by plaintiff, as well as many others, demonstrate that a gambling house constituted a public nuisance at common law for the purposes of a criminal prosecution. Rex v. Rogier, 1 B. & C. 272; Rex v. Taylor, 3 B. & C. 502; Scott v. Courtney, 7 Nev. 419; Ehrlick v. Commonwealth, 125 Ky. 742, 102 S.W. 289, 290, 10 L.R.A.,N.S., 995, 128 Am.St.Rep. 269; 1 Wood, Nuisances, 3d Ed. 1893, § 45, p. 63 et seq.; see, also, Bryant v. Mead, 1 Cal. 441, 442; People v. Jackson, 3 Denio, N.Y., 101, 45 Am.Dec. 449; State v. Vaughan, 81 Ark. 117, 98 S.W. 685, 7 L.R.A.,N.S., 899, 118 Am.St.Rep. 29, 11 Ann. Cas. 277; 1 Bishop, Criminal Law, 9th Ed. 1923, § 1135, p. 835; Russell, Crimes, 6th Ed. 1896, p. 741; 46 C.J. 701. While these cases indicate that gambling houses were recognized as public nuisances in criminal prosecutions, they do not hold that an equity action on behalf of the state might be maintained at common law to enjoin the operation of a gambling house. On the contrary, it is clear that the jurisdiction of equity was very sparingly exercised on behalf of the sovereign to enjoin public nuisances. The attitude of the early English cases is expressed by Chancellor Kent in a leading case: "I know that the court is in the practice of restraining private nuisances to property, and of quieting persons in the enjoyment of private right; but it is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a court of equity to interfere at all, and much less, preliminarily, by injunction, to put down a public nuisance which did not violate the rights of property, but only contravened the general policy." Attorney-General v. Utica Insurance Co., 2 Johns.Ch., N.Y., 371, 380. The authorities support the conclusion that this statement accurately represents the attitude of the earlier courts of equity where the sovereign sought injunctions against public nuisances. People v. Davidson, 30 Cal. 379, 387; State v. Vaughan, supra, 98 S.W. page 689; State v. Ehrlick, 65 W. Va. 700, 64 S.E. 935, 937, 23 L.R.A.,N.S., 691; State ex rel. Cir. Atty. v. Uhrig, 14 Mo.App. 413; People v. Condon, 102 Ill. App. 449; In re Debs, 158 U.S. 564, 592,

15 S.Ct. 900, 39 L.Ed. 1092; McClintock, Equity, 1936, sec. 158, p. 284. The common law recognized various types of wrongful activity as indictable public nuisances, including such miscellaneous acts as eavesdropping, being a common scold and maintaining for hire a place of amusement which served no useful purpose. See, 1 Wood, Nuisances, pp. 37, 60, 68, 72. The kinds of public nuisance at common law, however, where injunctions were granted on behalf of the sovereign included only those cases of public nuisance in which the sovereign's rights were given the same protection that would have been given to the rights of a private person. An action on behalf of the state, therefore, to enjoin activity which violates general concepts of public policy finds no basis in the doctrines of the common law.

It has been recognized that the tendency to utilize the equity injunction as a means of enforcing public policy is a relatively recent development in the law. Mack, "Revival of Criminal Equity" [1903], 16 Harv. L. Rev. 389, 392; [1913] 8 Ill.L.Rev. 19; McClintock, supra, p. 286. Courts have held that public and social interests, as well as the rights of property, are entitled to the protection of equity. Cf. People v. Laman, 277 N.Y. 368, 14 N.E.2d 439, 443; State v. Compere, 44 N.M. 414, 103 P.2d 273, 276; [1924] 13 Cal.L.Rev. 63. This development has resulted in a continuous expansion of the field of public nuisances in which equitable relief is available at the request of the state. It has been held, for example, that the legislature may properly define the term "public nuisance" for the purposes of an equity injunction so as to include activity which was not a nuisance at common law or activity which offends concepts of public policy even though no rights of property are involved. Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205; People v. Barbiere, 33 Cal.App. 770, 166 P. 812; see, 28 Am.Jur. 338, 5 A.L.R. 1474; 22 A.L.R. 542; 75 A.L.R. 1298. Where particular activity, such as gambling or horse-racing, has been held to come within the language of a statute defining the term "public nuisance" for the purposes of equity jurisdiction on behalf of the state, courts have granted injunctions, or indicated that they would grant them, even though the acts were also criminal. State v. Robb & Rowley, United, Tex.Civ.App., 118 S.W.2d 917; Pompano Horse Club et al. v. State, 93 Fla. 415, 111 So. 801, 809, 810, 52 A.L.R. 51; Commonwealth v. McGovern, 116 Ky. 212, 75 S.W. 261, 66 L.R.A. 280; Carlton v. Rugg, 149 Mass. 550, 22 N.E. 55, 5 L.R.A. 193, 14 Am.St.Rep. 446; Jones v. State, 38 Okl. 218, 132 P. 319, 44 L.R.A.,N.S., 161, Ann.Cas.1915C, 1031; State v. Ehrlick, 65 W.Va. 700, 64 S.E. 935, 23 L.R.A.,N.S., 691. Upon at least two occasions the legislature of this state has passed statutes authorizing an action in equity to enjoin particular activity contrary to the public policy as a "public nuisance". Thus, houses of prostitution and houses where narcotics are illegally sold may be enjoined in an action brought by the district attorney of the county in which they are located. Stats.1913, p. 20, Deering's General Laws 1937, Act 6161; Stats. 1925, p. 532; Health and Safety Code 1939, § 11781, St.1939, p. 773.

It must be admitted, however, that the authorities are divided as to whether the expansion of the field of public nuisances in which equity will grant injunctions must be accomplished by an act of the legislature. See, New Orleans v. Liberty Shop, 157 La. 26, 101 So. 798, 40 A.L.R. 1145; Olson v. Platteville, 213 Wis. 344, 251 N.W. 245, 91 A.L.R. 315. Some courts have attempted by judicial action alone to define "public nuisance" very broadly in order to grant injunctions on behalf of the state. Thus, it has been said that any place where a public statute is continuously flouted constitutes a public nuisance which may be enjoined by the state. State ex rel. Vance v. Crawford, 28 Kan. 726, 733, 42 Am.Rep. 182; 5 Pomeroy, Equity Jurisprudence [1919], p. 4296. Other courts have flatly stated that a particular form of activity, such as bullfighting, is so objectionable as to constitute a public nuisance for the purposes of an equity injunction without the aid of a statute. State ex rel. Atty. Gen. v. Canty, 207 Mo. 439, 105 S.W. 1078, 15 L.R.A., N.S., 747, 123 Am.St.Rep. 393, 13 Ann. Cas. 787; cf. Stead v. Fortner, 255 Ill. 468, 99 N.E. 680, criticized in 8 Ill.L.Rev. 19. The courts of this state, however, have refused to sanction the granting of injunctions on behalf of the state merely by a judicial extension of the definition of "public nuisance". The case of In re Wood, 194 Cal. 49, 227 P. 908, which has been severely criticized (see, Chaffee, Free Speech in the United States [1941], p. 336 et seq.; [1924] 13 Cal.L.Rev. 63; [1925]

73 U. of Pa.L.Rev. 185), held only that the injunction granted was not void even though conceivably erroneous. This was so because the conspiracy there involved could be considered a public nuisance as a threatened impairment of the free use of property of the citizens of the state. Similarly, in Weis v. Superior Court, 30 Cal.App. 730, 159 P. 464, it was held that the district attorney of San Diego county was authorized, under Code of Civil Procedure, section 731, to enjoin the performance of a public exhibition which was shown to have been indecent, and thus within the statutory definition of public nuisance in Civil Code, section 3479. In People v. Seccombe, 103 Cal.App. 306, 284 P. 725, however, the court refused to permit the maintenance of a suit in equity on behalf of the state to restrain defendant's continued practice of usury. It was held that though reprehensible, the practice of usury could not be brought within any of the sections of the statute defining public nuisances. The courts have thus refused to grant injunctions on behalf of the state except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance. Where the legislature has felt that the summary power of equity was required to control activity contrary to public policy, it has enacted statutes specifying that such activity constitutes a public nuisance which may be enjoined in an action brought on behalf of the state.

[3] We think the proper rule, therefore, and the one to which this state is committed is expressed in the following language from State v. Ehrlick, 65 W.Va. 700, 64 S.E. 935, 940, 23 L.R.A.,N.S., 691: "It is also competent for the Legislature, within the constitutional limits of its powers, to declare any act criminal and make the repetition or continuance thereof a public nuisance * * * or to vest in courts of equity the power to abate them by injunction; but it is not the province of the courts to ordain such jurisdiction for themselves." See, People v. Steele, 4 Cal.App.2d 206, 213, 40 P.2d 959, 41 P.2d 946; 16 Harv.L.Rev. 389, 403.

[4, 5] In addition to the historical precedents which we have considered, compelling reasons of policy require that the responsibility for establishing those standards of public morality, the violations of which are to constitute public nuisances within equity's jurisdiction, should be left with the legislature. "Nuisance" is a term which does not have a fixed content either at common law or at the present time. McClintock, supra, p. 288; 13 Cal.L.Rev. 63; 23 Cal.L.Rev. 428; 16 Harv.L.Rev. 389, 396. Blackstone defined it so broadly as to include almost all types of actionable wrong, that is, "any thing that worketh hurt, inconvenience or damage". 2 Cooley's Blackstone, 4th Ed. 1899, p. 1012. We have already referred to those modern definitions which seek to make of equity an additional remedy for the enforcement of the criminal law by defining "public nuisance" for the purposes of an injunction as any repeated and continuous violation of the law. 5 Pomeroy, supra, p. 4296. In a field where the meaning of terms is so vague and uncertain it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity. Activity which in one period constitutes a public nuisance, such as the sale of liquor or the holding of prize fights, might not be objectionable in another. Such declarations of policy should be left for the legislature. See, Chaffee, supra, p. 336, et seq.; 8 Ill.L.Rev. 19, 36; 73 U. of Pa.L. Rev. 185, 189.

[6-9] Conduct against which injunctions are sought in behalf of the public is frequently criminal in nature. While this alone will not prevent the intervention of equity where a clear case justifying equitable relief is present (Perrin v. Mountain View Mausoleum Ass'n, 206 Cal. 669, 671, 275 P. 787; People v. Steele, supra; People v. Seccombe, supra, 103 Cal.App. page 312, 284 P. 725), it is apparent that the equitable remedy has the collateral effect of depriving a defendant of the jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy. See, State v. Vaughan, supra, 68 S.W. page 690; 5 Pomeroy, supra, p. 4299. The defendant also loses the protection of the higher burden of proof required in criminal prosecutions and, after imprisonment and fine for violation of the equity injunction, may be subjected under the criminal law to similar punishment for the same acts. For these reasons equity is loath to interfere where the standards of public policy can be enforced by resort to the criminal law, and in the absence of a legislative declaration to that effect, the courts should

not broaden the field in which injunctions against criminal activity will be granted. Thus, for the reasons set forth, the basis for an action such as this must be found in our statutes rather than by reference to the common law definitions of public nuisance.

The trial court sustained both general and special demurrers to the complaint in the present case. In support of the court's ruling on the general demurrer, defendants argue that the allegations of the complaint are insufficient because no facts are alleged from which the court could conclude that a nuisance existed under the provisions of Civil Code, sections 3479, 3480, and Code of Civil Procedure, section 731. It is contended that the allegations of the complaint present merely conclusions of the pleader, framed in the language of the statute.

[10] It is undoubtedly true, as suggested by defendants, that where an attempt is made to enjoin particular activity upon the theory that it constitutes a nuisance under general statutory provisions, sufficient facts must be alleged so that the court may conclude that nuisance exists within the provisions of the statute. People v. Seccombe, 103 Cal.App. 306, 310, 284 P. 725; People v. Steele, 4 Cal.App.2d 206, 212, 40 P.2d 959, 41 P.2d 946; State v. Johnson, 26 N.M. 20, 188 P. 1109; 46 C.J. 784. The principle which applies in such cases is clearly illustrated by comparing with State v. Johnson, supra, a recent case from the same jurisdiction, State v. Compere, 44 N.M. 414, 103 P.2d 273. In the earlier case, which was relied upon by the California court in People v. Seccombe, supra, the court held insufficient a bare allegation that the practice of medicine without a license was injurious to the health and thus an enjoinable public nuisance. The allegation that the illegal practice of medicine was injurious to the health was said to be a mere conclusion of the pleader and was held not to present facts from which the court could conclude that a public nuisance existed. In State v. Compere, supra, the complaint alleged that the defendant, in addition to being unlicensed, was unskillful and uninformed and that because of his lack of skill the continued practice of medicine by him constituted a danger to the health and lives of the public. The court held, though adhering to the rule set forth in State v. Johnson, supra, that this complaint was sufficient because particular facts were presented from which the existence of a public nuisance could be deduced. Nor is this rule altered by virtue of the fact that there are certain exceptional situations where, because of the difficulty in pleading the specific facts of the case, the courts have sanctioned general allegations without requiring a statement of the particular facts, as in an equity action under special statute to enjoin as nuisances houses where liquor is sold illegally (People v. Burkett, 75 Cal.App. 349, 242 P. 1073; Hammond v. McDonald, 32 Cal.App.2d 187, 89 P.2d 407) or houses maintained for purposes of prostitution, assignation or lewdness. People v. Laine, 41 Cal.App. 345, 182 P. 986; People v. Arcega, 49 Cal.App. 239, 241, 193 P. 264; People v. Bayside Land Co., 48 Cal.App. 257, 191 P. 994. In such actions to enjoin nuisances under special statutory authority the legislature has specified the particular activity which is sought to be enjoined and a general allegation cannot mislead the defendant as to the nature of the case which he is called upon to answer. See, People v. Arcega, supra, 49 Cal.App. page 242, 193 P. 264.

[11] Although the defendants' contention that particular allegations of fact are required is therefore correct, we think that the allegations of the present complaint are adequate as against a general demurrer. The complaint alleges that the gambling house operated by defendants "draws together great numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits among them, creates traffic and fire hazards, and is thereby injurious to health, indecent and offensive to the senses and impairs the free enjoyment of life and property". Crowds of disorderly people who disturb the peace and obstruct the traffic may well impair the free enjoyment of life and property and give rise to the hazards designated in the statute. In cases of a similar nature pleadings which are not essentially different from the one here involved have been held to state facts sufficient to constitute a cause of action. People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374, 39 L.R.A. 581, 58 Am.St.Rep. 183; People v. Wing, 147 Cal. 379, 81 P. 1103; Weis v. Superior Court, supra. It follows that the trial court was in error in sustaining the general demurrer.

[12-14] The trial court also erred in upholding the special demurrer. Such a demurrer should not be sustained where the allegations of the complaint are sufficiently clear to apprise the defendant of the issues which he is to meet. Jacobson v. Oakland Meat & Packing Co., 161 Cal. 425, 433, 119 P. 653, Ann.Cas.1913B, 1194; Jones v. Iverson, 131 Cal. 101, 104, 63 P. 135; Hurwitz v. Gross, 5 Cal.App. 614, 617, 91 P. 109; 21 Cal.Jur. 102. A special demurrer for uncertainty is not intended to reach the failure to incorporate sufficient facts in the pleading, but is directed at the uncertainty existing in the allegations actually made. Callahan v. Broderick, 124 Cal. 80, 83, 56 P. 782; Brea v. McGlashan, 3 Cal.App.2d 454, 39 P.2d 877; Smith v. Hollander, 85 Cal.App. 535, 542, 259 P. 958; Butler v. Wyman, 128 Cal.App. 736, 740, 18 P.2d 354. While it may be true that the allegations of this complaint do not present a complete picture of the factual situation surrounding the operation of defendants' gambling house, the facts upon which the plaintiff relies are stated with sufficient clarity. The allegations are neither uncertain, ambiguous nor unintelligible. Although the complaint should not be taken as a model of good pleading, it is sufficient as against both the general and special demurrers.

The judgment is reversed.

SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.



18 Cal.2d 889

Ex parte MOORE.

Cr. 4354.

Supreme Court of California.

Nov. 1, 1941.

Rehearing Denied Nov. 27, 1941.

Habeas corpus ⇐28

Where court exceeded its authority in granting preliminary injunction, petitioner seeking by writ of habeas corpus to obtain his release from imprisonment under order adjudging him in contempt of court for violating the preliminary injunction was entitled to be discharged.

In Bank.

Habeas corpus proceeding by Harry E. Moore to obtain his release from imprisonment under a contempt order.

Petitioner discharged.

Calvin H. Conron, Jr., of Bakersfield, and Charles H. Carr, of Los Angeles, for petitioner.

Earl Warren, Atty. Gen., Everett W. Mattoon, Asst. Atty. Gen., and Warren Olney, Burdette J. Daniels, and Herbert E. Wenig, Deputy Attys. Gen., for respondent.

PER CURIAM.

Petitioner seeks by a writ of habeas corpus to obtain his release from imprisonment under an order of the Superior Court of Los Angeles adjudging him in contempt of court. This case arises from the attempt of the Attorney-General to enjoin the activities of the Annenberg racing news service which is described in Kreling and Cohen v. Superior Court, Cal.Sup., 118 P.2d 470, this day decided. The petitioner was one of the defendants in People v. Annenberg, Superior Court of Los Angeles, No. 451,935. He was adjudged in contempt of court for a violation of the preliminary injunction issued in that case. The terms of the preliminary injunction involved here are identical with the terms of the restraining order in the same case which was involved in Kreling and Cohen v. Superior Court, supra. We hold, therefore, upon the authority of that case and People v. Lim, Cal.Sup., 118 P.2d 472, this day decided, that the court exceeded its authority in granting the injunction. The petitioner must be discharged, and it is so ordered.

47 Cal.App.2d 577

In re KELLY'S ADOPTION.

SCHWEITZER et al. v. KELLY.

Civ. 11889.

District Court of Appeal, First District, Division 1, California.

Nov. 4, 1941.

1. Divorce ⇐289, 293, 303(1), 309

During pendency of divorce action, at final hearing, or at any time thereafter during minority of parties' children, court may make such order for children's custody, care, education, maintenance and support as seems necessary or proper and may modify or vacate such order at any time. Civ.Code, § 138.

2. Adoption ⇐7, 12

A legitimate child cannot be adopted without consent of its parents, if living, but if father of child, whose custody has been given to mother by judicial decree, willfully fails to pay for child's care, support and education for one year when able to do so, mother alone may consent to child's adoption, but only after the father has been personally served with copy of citation. Civ. Code, § 224.

3. Adoption ⇐10

Adoption proceedings must be instituted in superior court, which is court of general jurisdiction. Civ.Code, § 226.

4. Adoption ⇐14

A judgment or order of adoption is entitled to all presumptions attaching to any other judgment of superior court.

5. Divorce ⇐303(1)

A child's custody, awarded by divorce decree, may be changed at any time during child's minority. Civ.Code, § 138.

6. Divorce ⇐298(1), 306

The guiding consideration in determining, not only custody, but education and maintenance, of minor child of parties to divorce suit, is child's best interest. Civ. Code, § 138.

7. Parent and child ⇐2(4), 3(3)

Without application for divorce, a court may award exclusive or partial custody or control of spouses' minor child and direct either of them to support, care for or educate child in accordance with parents' natural rights and child's best interests. Civ. Code, §§ 199, 214; Probate Code, §§ 1406, 1408.

8. Divorce ⇐303(1)

A provision in superior court's order that minor child, whose custody was awarded to her mother by divorce decree, stay with father on fourth Saturday night of every month until further order of court, without prejudice to any subsequent motion to modify decree or any order amending it, was subject to modification at any time. Civ.Code, § 138.

9. Divorce ⇐302

The question of custody, limited or absolute, of divorced spouses' minor child depends primarily on terms of divorce decree. Civ.Code, § 138.

10. Divorce ⇐303(3)

A superior court's order, amending its previous order amending final divorce decree by striking out all reference to minor child's custody, which was awarded by decree to mother and given by first amending order to father on fourth Saturday night of every month, and permitting child to "stay" with father on such nights, did not bestow legal custody of child on father, but merely gave right of visitation. Civ.Code, § 138.

11. Adoption ⇐14

Custody, care, control and direction for education of divorced spouses' minor child are incidents of divorce decree, which may be affected by adoption proceedings. Civ. Code, §§ 138, 226.

12. Adoption ⇐7

Where father of minor child, whose custody has been awarded to mother thereof by divorce decree, willfully fails for one year to pay for child's care, support and education when able to do so, adoption of child by mother and her second husband may be ordered, notwithstanding parental interest, including specified privileges under divorce decree. Civ.Code, § 224.

13. Parent and child ⇐2(2)

As between parents adversely claiming custody of their minor child, neither of them is entitled thereto as of right.

14. Divorce ⇐298(1), 306

The temporal, mental and moral welfare of divorced parents' minor child are guiding considerations in determining child's custody, control, care, maintenance and education. Civ.Code, § 138.

15. Adoption ⇐7

Where divorced husband, for about two years, paid nothing for support of his minor child, whose custody was awarded to mother by divorce decree, he made no determined effort in good faith to discover child's whereabouts or support her after mother moved to adjoining county without notifying father of change of address, and there were intervals during which he could have paid something toward child's support during second year, though he was without work part of time, trial court did not abuse its discretion in granting petition of mother and her second husband for adoption of child on ground of father's willful failure to support child for one year. Civ.Code, §§ 138, 224.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Proceeding by Lawrence Schweitzer and wife for adoption of Edward Joseph Kelly, Jr., a minor contested by Edward Joseph Kelly. From an order granting the petition, contestant appeals.

Affirmed.

James D. Lucey, of San Francisco, for appellant.

Chalmer Munday and Edward J. Jose, both of San Francisco, for respondents.

WARD, Justice.

The questions on this appeal from an order of adoption involve: (1) The jurisdiction of the superior court of one county to grant an order for the adoption of a minor child, with the consent of the mother, against the objection of its natural father, while there is in force a prior order made by the superior court of another county in terms as follows: "It Is Ordered and Decreed that the mino. child of the parties, Edward Joseph Kelly, Jr., stay with the defendant father on the fourth Saturday night of every month hereafter commencing with the month of April, 1936, and until further order of Court. This order is made without prejudice to any motion subsequent to modify final decree of divorce or any order amending same heretofore made by this Court." (2) Whether the evidence shows that appellant neglected to pay for the support and education of the child, although able to do so, for a period of one year.

Mrs. Schweitzer, the mother of the minor, was granted a final decree of divorce in May, 1935, in the city and county of San Francisco in an action brought by her against Edward Joseph Kelly, contestant herein, her former husband. She was awarded the custody of the child, and the father was ordered to pay $25 a month for the child's support. Subsequently the mother remarried, and she and the child's stepfather petitioned the superior court in San Mateo county for an order permitting the adoption of the minor, who at the time was eight years of age. The court granted the petition, and from such order the contestant appeals.

[1, 2] "In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same." Civ.Code, § 138. "A legitimate child can not be adopted without the consent of its parents if living; provided, however, that after the custody of any child has by any judicial decree, been given to the mother, and the father for a period of one year shall wilfully fail to pay for the care, support and education of such child when able to do so, then the mother alone may consent to such adoption, but only after the father has been personally served with a copy of a citation * * *." Civ. Code, § 224.

[3-7] Adoption proceedings must be instituted in the superior court, a court of general jurisdiction. Civ.Code, § 226. "The judgment or order of adoption is entitled to all the presumptions which attach to any other judgment of such courts." Estate of Grazzini, 31 Cal.App.2d 168, 171, 87 P.2d 713, 715. Irrespective of the precise wording of a decree, under the provisions of Civil Code, section 138, the custody of a child may be changed at any time during minority. The guiding consideration in determining not only custody, but education and maintenance, is the best interests of the child. Without application for divorce, a court may award exclusive or partial custody or control, and is empowered in accordance with the natural rights of the parents and the best interests of the minor to direct either party to support, care for or educate the child. Civ. Code, §§ 199, 214; Prob.Code §§ 1406, 1408.

[8] The right or privilege set forth in the above quoted order, that the minor stay with the father on the fourth Saturday night of every month, was subject to modification at any time. The mother and the stepfather, who had moved to San Mateo county, desired the minor's adoption. For such purpose it was proper to file a petition in "the superior court of the county in which the petitioner resides". Civ.Code, § 226. In the Matter of the Estate of Lewellyn Williams, 102 Cal. 70, 36 P. 407, 41 Am.St.Rep. 163, it appeared that a child's parents had been divorced in the state of New York on the ground of the adultery of the father. At the time of the child's adoption by her uncle and his wife in California, the mother was dead, and the father was a resident of New York. In that case, 102 Cal. pages 81, 82, 36 P. page 409, the court said: "The remaining question to be considered is whether the validity of the order of adoption is affected by the fact that it was made without the consent of the father of respondent, and without notice to him. As already stated, the father of respondent had been divorced from the mother on the ground of his adultery, and, such being the case, his consent to the order of adoption was rendered unnecessary by the express provisions of section 224 of the Civil Code, then and now in force. The fact that the decree of divorce was made before the enactment of our Civil Code, and for an act of adultery committed in another state, did not make that section inapplicable to the proceeding taken by the deceased for the adoption of respondent; and to so hold is not to give any retroactive or extraterritorial effect to the provisions of that section. The section simply declares under what circumstances the consent of the natural parent shall not be required in a proceeding for the adoption of a child, and it was intended to furnish the rule in regard to that matter in all subsequent applications for adoption under the statute." It should be noted that in the mentioned case, the attack grew out of a claim of the adopted child to an interest in the estate of one of the adopting parents, a collateral matter.

In interpreting section 224 as it formerly read, it was held that the consent of a parent divorced for cruelty or adultery was required where custody of the child was awarded by a divorce decree. Matter of Cozza, 163 Cal. 514, 126 P. 161, Ann.Cas. 1914A, 214. It was also held that where the parent to whom custody had been awarded died, the right of the other parent, although divorced for adultery or cruelty, revived, and the consent of such parent was required by the section. In re DeLeon, 70 Cal.App. 1, 232 P. 738. Section 224 in its present form does not provide that consent need not be obtained from a father or mother adjudged guilty of adultery or cruelty by decree of divorce. In view of the decision as the section formerly read, appellant contends that under the present reading it should be held that before the consent of the father can be dispensed with in the present proceeding, it must appear that the mother has exclusive custody under judicial decree. In support of this contention appellant cites Miller v. Higgins, 14 Cal.App. 156, 111 P. 403. Certain language appears in the opinion in that case which might seem to support appellant's theory, but the case involved a peculiar factual situation so different from the present case as to be of no assistance. There the father had sought modification of a divorce decree in Contra Costa county. After the court had announced its intention of modifying the decree, but before the entry of the order, the mother, without the knowledge of the father and without informing the court in Los Angeles county of the pendency of the motion in Contra Costa county, succeeded in having third parties adopt the child, following which she retained the child in her care. The court in rendering its decision said (14 Cal.App. pages 162, 163, 111 P. page 406): "The record discloses that the fraud practiced upon the court making the order of adoption in this case was the concealment from the court of facts affecting its jurisdiction. It is unnecessary to cite authorities in support of the proposition that when a court competent to adjudicate upon the subject-matter of the litigation obtains jurisdiction over the parties, within the territorial limits of its extent, such court alone has the power to adjudge upon the questions sought to be litigated in the suit, and no other court can deprive it of that power. The court finds, and it is most evident, that but for the concealment of the facts referred to it would not have made this decree of adoption in the first instance. Such concealment of facts affords ground for relief in equity. Bigelow on Fraud, vol. 1, p. 92." In the present case the record does not disclose that a motion for modification of the decree was pending.

[9, 10] In Younger v. Younger, 106 Cal. 377, 39 P. 779, it was held that a court of another county than that which granted the divorce and made an award of custody had jurisdiction of an adoption proceeding, though in the Younger case the decree awarding custody of the child did not contain a provision similar to that in the present case, namely, permission to have the child stay with the father one night a month. The question of custody, limited or absolute, depends primarily upon the terms of the decree. The record shows that on May 1, 1940, the superior court in San Francisco county made an order that the father "shall have the custody" of the minor on the fourth Saturday night of every month. Sixteen days later, in an order amending the previous order amending final decree, all reference to custody was stricken out and the child permitted to "stay" with the father at the designated period. It is evident that the superior court of the city and county of San Francisco did not intend that the "stay" should be construed as "custody", but rather that the child might visit his father for one night a month. The right of visitation does not bestow legal custody. In re Hardesty's Adoption, 150 Kan. 271, 92 P.2d 49.

[11-14] Custody, similar to care, control and direction for education, are incidents of a divorce decree that may be affected by adoption proceedings. Where the conditions specified in section 224 exist, an adoption may be ordered, notwithstanding parental interest, including specified privileges under a divorce decree. "As between parents adversely claiming the custody, neither parent is entitled to it as of right." The child's "temporal and its mental and moral welfare" (Civ.Code, § 138) are the guiding considerations in determining custody, control, care, maintenance and education.

[15] It appearing that the superior court in San Mateo county obtained jurisdiction in the adoption proceedings (Younger v. Younger, supra; In re Darling's Estate, 173 Cal. 221, 159 P. 606), only one further question requires consideration: Did "the father for a period of one year * * * wilfully fail to pay for the care, support and education of such child"? Civ.Code § 224. In re Hickson, 40 Cal.App.2d 89, 104 P.2d 411, is a case where adoption by the stepfather was denied by the trial court and its decree affirmed on appeal. The point of decision rested upon the wilful failure of the father to provide for his child. The court held (40 Cal.App.2d pages 92, 93, 104 P. 2d page 413): "In section 227 it is provided that the court shall make the order of adoption if it is satisfied that the interests of the child will be promoted thereby. The trial court, being solicitous to preserve the family relationship and to protect the rights of the child and of its natural parent, doubtless was of the opinion that the best interests of the child would not be promoted by the adoption. In such cases a wide discretion is reposed in the trial judge, and his decision should not be disturbed by a reviewing court in the absence of a clear showing of an abuse of such discretion."

In the present case, for about two years prior to the date of adoption, the father had failed to pay anything for the child's support. The last payment appears to have been made in May, 1938, in the sum of $12.50. Prior to that time payments were made on certain months in full, but generally in amounts smaller than that fixed by the court. He had worked approximately seven months in 1939 and had just been laid off at the time of the adoption hearing in May, 1940. The record shows that he had the ability to pay something toward the support of the child in the year preceding the adoption order, and he seeks to excuse his failure to obey the order of the court upon the theory that the mother moved to an adjoining county and that he did not know where the child was living; that he visited the former residence of his wife and inquired of a small boy as to where the family had moved but was unable to obtain the information. Appellant did not use the mail as a means of communicating with either the child or the mother. Perhaps the mother was remiss in failing to notify the father of the change of address. Conflicting statements of the mother and father appear in the record. Throughout the history of the case as related, it is clear that the father was lax in endeavoring to locate the child; that he made no determined effort in good faith to discover its whereabouts or to afford it support during the year before the adoption, during which time the child was supported by his stepfather. For a period of three years before the interlocutory decree was entered, the child was supported by his mother; and thereafter only intermittently by his natural

father. During a part of this period the latter was without work, but clearly there were intervals during which his failure to support his child was without lawful or any excuse, and hence the finding that he wilfully failed to support the child has foundation in fact.

Under all the circumstances of the case, we are unable to say that the trial court abused its discretion. In re Fahlman, 84 Cal.App. 248, 257 P. 893; In re Hickson, supra.

The judgment, order and decree is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.



47 Cal.App.2d 584

SMULSON v. BOARD OF DENTAL EXAMINERS et al.

Civ. 12655.

District Court of Appeal, Second District, Division 1, California.

Nov. 4, 1941.

1. Statutes ⇐47

A statute to be valid, is not required to have that degree of exactness which inheres in a mathematical theorem.

2. Statutes ⇐47

The provision of the Business and Professions Code defining unprofessional conduct as concerns dentists as the making use of any advertising statements of a character tending to deceive or mislead the public is not invalid on ground that it is too vague and uncertain to enable one to know what is forbidden. St.1937, p. 1248, § 1680(11).

3. Physicians and surgeons ⇐10

The purpose of provision of Business and Professions Code defining unprofessional conduct as concerns dentists as the making use of any advertising statements of a character tending to deceive or mislead the public is to prevent deception and imposition, but its application may properly be extended to cover the occasional case where the misleading is done without any specific intent to do so, since word "mislead" does not always imply an intent to deceive. St.1937, p. 1248, § 1680(11).

See Words and Phrases, Permanent Edition, for all other definitions of "Mislead".

4. Licenses ⇐38

In proceedings before a licensing board for revocation or suspension of a professional license on account of unprofessional conduct, the accusation or complaint is sufficient if expressed in language of statute.

5. Licenses ⇐38

The rule that an accusation or complaint in proceedings before a licensing board for revocation or suspension of a professional license on account of unprofessional conduct is sufficient if expressed in language of statute, is subject to qualification that the language of statute must be sufficiently explicit to advise a person charged thereunder of the particular kind of unprofessional conduct which it is proposed to prove against him.

6. Physicians and surgeons ⇐11(3)

An accusation before a state board of dental examiners charging licensed dentist with unprofessional conduct, which set forth dentist's advertisement allegedly constituting unprofessional conduct and which characterized it in statutory language, was sufficient to confer jurisdiction on board, where nothing on face of attached advertisement refuted the allegations of its character. St.1937, pp. 1247, 1248, §§ 1670, 1680 (11).

7. Physicians and surgeons ⇐6(2)

The making of impressions of the mouth for dental plates is a part of the "practice of dentistry", and can be done only by a licensed dentist.

See Words and Phrases, Permanent Edition, for all other definitions of "Practice of Dentistry".

8. Physicians and surgeons ⇐11(3)

Evidence that licensed dentist's advertisement stated that he personally took the impressions for dental plates and made a special study of each case, and that impressions were not always taken by the dentist personally but were sometimes left to another dentist in his employ, was sufficient to establish "unprofessional conduct" authorizing suspension of license to practice for two years, as against dentist's contention that the word "take" in the advertisement

did not refer to actual making of the impressions but meant that after they were made the dentist took them in his hands for the purpose of studying them. St.1937, pp. 1247, 1248, §§ 1670, 1680(11).

See Words and Phrases, Permanent Edition, for all other definitions of "Unprofessional Conduct" and "Take".

9. Fraud ⇐13(1)

One who uses a word having a double meaning cannot escape charge of misleading or deceiving by saying that to him, or as he meant the words, they were true.

10. Physicians and surgeons ⇐11(3)

Evidence that licensed dentist's advertisement stated that by his easy payment plan one was not required to pay until after he had worn dental plate for 30 days, and that easy payment plan consisted in taking a note, the date of first payment of which was fixed at 30 days after estimated time for completion, and selling note to a finance company, first submitting the application for credit to such company before doing the work, was sufficient to establish "unprofessional conduct" authorizing suspension of license to practice for two years. St.1937, pp. 1247, 1248, §§ 1670, 1680(11).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceedings by Harry Smulson against the Board of Dental Examiners and others for a writ of mandate to compel the board to vacate its suspension of petitioner's license to practice dentistry. From an adverse judgment, the petitioner appeals.

Affirmed.

Robert F. Shippee, of Los Angeles, for appellant.

Harry E. Lindersmith, of Los Angeles, for respondents.

SHAW, Justice pro tem.

Proceedings were taken against petitioner, a licensed dentist, before the State Board of Dental Examiners, on charges that he had been guilty of unprofessional conduct. After a hearing, the board found the charges to be true and suspended his license to practice dentistry for a period of two years. He then filed in the superior court a petition for a writ of mandate to compel the board to vacate its suspension of his license. The superior court gave judgment against him, from which he appeals.

On appeal he makes three contentions: that the statute under which the proceedings against him were taken is void; that the accusation filed against him with the board was insufficient; and that there was no evidence before the board to support their finding.

Section 1670 of the Business and Professions Code, St.1937, p. 1247, provides that, "Any dentist may have his license revoked or suspended by the board for unprofessional conduct", and section 1680 of the same code sets forth a definition of the term "unprofessional conduct", as it concerns dentists, in seventeen subdivisions. The accusation against petitioner contained two separate charges, based on different parts of this statutory definition. The board found him guilty on both charges, but the separate suspensions ordered run for the same length of time and are concurrent. Hence our conclusion stated below that the action of the board on one charge must be upheld renders it unnecessary to consider the other.

[1] One of the charges against petitioner was based on subdivision (11) of section 1680 of the Business and Professions Code, which includes in the definition of unprofessional conduct "The making use of any advertising statements of a character tending to deceive or mislead the public". It is contended that this provision is too vague and uncertain to enable a dentist to know what is forbidden, citing Hewitt v. State Board of Medical Examiners, 1906, 148 Cal. 590, 84 P. 39, 3 L.R.A., N.S., 896, 113 Am.St.Rep. 315, 7 Ann.Cas. 750, and In re Peppers, 1922, 189 Cal. 682, 209 P. 896, in each of which a statute was held void for uncertainty. But neither of the statutes involved in those cases was at all like that here in question. Here the effective words of description are: "tending to deceive or mislead the public". These words are well known and understood in both popular and legal language. This description of the forbidden practices is no more uncertain than many other statutory provisions which have been held to be valid exercises of legislative power. It is not required that even a penal statute, to be valid, have that degree of exactness which inheres in a mathematical theorem. "* * * the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree". Nash v. United States, 1913, 229 U.S. 373, 377, 33 S.Ct. 780, 781, 57 L.Ed. 1232, 1235. This quoted statement

was approved and followed in People v. Associated Oil Co., 1930, 211 Cal. 93, 108, 294 P. 717, 719, where the phrase "unreasonable waste of natural gas" was held sufficiently certain for use in a prohibitory statute, and in Pacific Coast Dairy v. Police Court, 1932, 214 Cal. 668, 677, 8 P.2d 140, 141, 80 A.L.R. 1217, where the words "diligent effort to find the owner thereof and to restore or return the same" in a penal statute were upheld against the attack that they were too uncertain. For other instances of statutes held valid against the claim of fatal uncertainty, see People v. Beifuss, 1937, 22 Cal.App., Supp.2d, 755, 67 P.2d 411; People v. Smith, 1939, 36 Cal. App., Supp.2d, 748, 92 P.2d 1039; and People v. Banat, 1940, 39 Cal.App., Supp.2d, 765, 100 P.2d 374, and cases therein cited.

A case very much like this is Glass v. Board of Medical Examiners, 1920, 50 Cal. App. 389, 195 P. 73, 74, which upheld a provision of the Medical Practice Act defining unprofessional conduct for which a license could be revoked as including "All advertising of medical business which is intended or has a tendency to deceive the public or impose upon credulous or ignorant persons, and so be harmful or injurious to public morals or safety". The court in that case cited and distinguished Hewitt v. Board of Medical Examiners, supra, and said, "It would not be possible to frame a definition of unprofessional advertising which would anticipate in terms every form of advertisement which unscrupulous practitioners might thereafter devise. This being so, it cannot reasonably be held necessary to the validity of the statute that it go further than to state a reasonably definite rule under which all such specific acts might be included. This we think has been done in the terms of the statute so far as the same are now presented for consideration." Glass v. Board of Medical Examiners, supra, 50 Cal.App. page 392, 195 P. page 74.

[2, 3] The same effective words regarding a tendency to deceive the public appear here as in the Glass case, and they are the essential part of the definition in each case. We find here the additional word "mislead". It does not always imply an intent to deceive (People v. Wahl, 1940, 39 Cal.App., Supp., 2d 771, 773, 100 P.2d 550), but it does not for that reason lack certainty. Neither does it render the statute invalid on other grounds. While the purpose of the provision is to prevent deception and imposition, its application may properly be extended to cover the occasional case, if there be such, where the misleading is done without any specific intent to do so. See Semler v. Oregon State Board of Dental Examiners, 1935, 294 U. S. 608, 613, 55 S.Ct. 570, 79 L.Ed. 1086, 1090.

[4-6] The charge against petitioner alleged that he "knowingly and intentionally caused to be printed, circulated and distributed to the general public * * * a certain hand bill * * * wherein and whereby the said Harry Smulson did advertise as a dentist and did make use of advertising statements of a character tending to deceive or mislead the public, a photostatic copy of which advertisement is hereto attached". It has been held in regard to proceedings before a licensing board for revocation or suspension of a professional license on account of unprofessional conduct that the accusation or complaint is sufficient if expressed in the language of the statute. Winning v. Board of Dental Examiners, 1931, 114 Cal.App. 658, 664, 300 P. 866; Howson v. Board of Medical Examiners, 1932, 128 Cal.App. 35, 37, 16 P.2d 693; Gustafson v. Board of Osteopathic Examiners, 1935, 10 Cal.App. 2d 436, 438, 51 P.2d 1106. This rule is subject to the qualification that the language of the statute must be sufficiently explicit to advise a person charged thereunder of the particular kind of unprofessional conduct which it is proposed to prove against him. Lanterman v. Anderson, 1918, 36 Cal.App. 472, 477, 172 P. 625; Dyment v. Board of Medical Examiners, 57 Cal.App. 260, 265, 207 P. 409; Tapley v. Abbott, 1931, 111 Cal.App. 397, 399, 295 P. 911; Anderson v. Board of Medical Examiners, 1931, 117 Cal.App. 113, 115, 3 P.2d 344; Bley v. Board of Dental Examiners, 1932, 120 Cal.App. 426, 431, 7 P.2d 1053. Here the language of the statute used in the accusation would of itself be sufficient to comply with the rule, as so qualified, but the accusation goes further and sets forth a copy of the advertisement used, and characterizes it in the statutory language. The sufficiency of this charge might be defeated if there were anything on the face of the attached advertisement which refuted the allegations of its character, but we find nothing of the kind.

[7] At the hearing the advertisement attached to the accusation was placed in

evidence, its circulation by petitioner as alleged being admitted. As is usual in such cases it is grossly and fulsomely laudatory of petitioner's mode of operations and of the quality of the work done by him. Referring to dental plates it says: "They are made after Dr. Smulson personally takes the impressions and makes a special study of your case. What I have done for thousands of other folks I am confident I can do for you." The making of impressions of the mouth is a part of the practice of dentistry, and can be done only by a licensed dentist. Jacobs v. Board of Dental Examiners, 1922, 189 Cal. 709, 714, 209 P. 1006. The statement just quoted, read with the other matters commendatory of petitioner's work, conveys the idea that it is too important a part of the practice to be left to the "skilled work of only licensed dentists" in petitioner's office, which is elsewhere mentioned in the handbill, and so it is done by petitioner *personally*. The evidence of a witness who came to petitioner's office for plates in response to this handbill showed that the impressions of her mouth were not taken by petitioner but by some dentist in his employ. This fact was not revealed to her at the time, but was discovered by her later apparently without any help from petitioner or his staff. Petitioner himself testified that "There were times when I didn't take the impression". Obviously the declaration of the handbill did not represent a uniform custom of his business, and tended to mislead the public in a matter which in the handbill he tried to make them think was important.

[8, 9] Petitioner endeavors to escape from this conclusion by urging that the word "take" in the statement above quoted does not refer to the actual making of the impressions but means that after they are made petitioner "takes" them in his hands for the purpose of studying them. To any one who has heard any discussion of such matters this is plainly a forced and unusual construction of the language used. Even if it be accepted as a possible construction, it remains true that the construction we have given the word "take" in this connection, as referring to the actual work of making the impressions, is also possible and much more in consonance with ordinary usage. The use of a word having a double meaning is a common device of those desiring to deceive or mislead others. One who does this cannot escape the charge of misleading or deceiving by saying that to him, or as he meant the words, they were true. Webster v. Board of Dental Examiners, 1941, 17 Cal.2d 534, 110 P.2d 992; People v. Wahl, supra.

[10] The handbill also contains these statements: "You can have your plates and make your first payment 30 days after they are completed by using my no money down easy payment plan"; "Don't Pay Me One Penny Until You Have Worn My Dental Plates for 30 Days". These are also misleading statements. They must be understood as referring to the agreed time for payment, not—as argued—to some time to which a patient might, by processes of evasion, defer payment. According to petitioner's testimony the easy payment plan referred to consisted in taking a note and selling it to a finance company, first submitting the application for credit to that company before doing the work, though in some cases not so approved credit was extended. The date of first payment was put in the note when the patient made a definite appointment for the work and was fixed so as to be 30 days after the then estimated time for completion. In the case of the patient who testified, the time for her first payment arrived and she was sued before she got one of her plates fixed up so she could wear it. In petitioner's actual practice he fixed the date of the first payment before he even began to work on the plates; at that time he could not know when he could complete the plates and place them in wearable condition, for sometimes many fittings with accompanying delay would be necessary for that purpose. But once the date of payment was fixed and the note transferred to a finance company it was out of his power to extend the time to conform to his statements in the handbill.

Other parts of the handbill are claimed to be misleading. It contains many statements undoubtedly intended to appeal to the credulous and attract them to petitioner's office, but further mention of them appears unnecessary, for the two matters above discussed are sufficient to support the decision of the board.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.

47 Cal.App.2d 574

SMITH v. SMITH et al.

Civ. 13324, 13325.

District Court of Appeal, Second District, Division 2, California.

Nov. 3, 1941.

1. Trusts ⇐110

In suit to have realty which had been conveyed by plaintiff and her deceased husband to their son, and which probate court after son's death had set apart to son's widow, declared property of plaintiff and that defendant held it in trust for plaintiff, evidence as to income of plaintiff's husband, as to statements of plaintiff and her husband that property belonged to son, and that son and his wife had paid taxes for many years, supported conclusion adverse to plaintiff.

2. Trusts ⇐371(3)

Where parties and subject-matter of suit to recover realty on ground that defendant held it in trust for plaintiff were within court's jurisdiction, equity court could dispose of all issues, not only by holding that defendant had title and did not hold as trustee for plaintiff, but also by awarding defendant possession, as against claim that trial court in doing so went beyond issues raised by pleadings, even if pleadings might have been more comprehensive and exact.

3. Gifts ⇐82(2)

In suit to recover realty on ground that aged and infirm grantor made gift thereof to son in contemplation of death, finding that property had been deeded by plaintiff to son as gift during serious illess, but not in "contemplation of death", was sustained by the evidence. Civ.Code, §§ 1149–1151.

See Words and Phrases, Permanent Edition, for all other definitions of "Contemplation of Death".

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Suit by Jessie E. Smith, by her guardian ad litem Flossie Gerome, against Blanche Smith, and others, to recover real property. From adverse judgments, plaintiff appeals.

Affirmed.

Henry F. Poyet and Wilbert S. Weatherwax, both of Los Angeles, for appellant.

Frank L. Perry, of Redondo Beach, for respondent.

SCOTT, Justice pro tem.

From adverse judgments in two suits to recover real property plaintiff appeals.

In case No. 13324, plaintiff and her deceased husband in 1922 bought property known as "lot 29, Block D, El Nido Tract", under a contract which provided for a $50 down payment and monthly installments of $25 each, and shortly thereafter assigned their rights under the contract to their son, Herbert Smith. The payments were completed and in 1924 a deed to the property was made to Herbert Smith. Parents and son occupied the property as their home. The son later married and thereafter both father and son passed away. The probate court set apart the property to defendant as widow of the son. This suit was brought by Flossie Gerome, daughter of plaintiff, who had been appointed guardian ad litem for that purpose due to the incapacity of plaintiff, who is aged and infirm. The amended complaint seeks to have the court declare that the property belongs to plaintiff and is merely held in trust for her by defendant, and to compel defendant to return it to her.

[1] The conclusion of the trial court adverse to plaintiff is supported by ample evidence. The latter's husband during his lifetime had an income of about $30 a month and put in his time working in a small garden. Witnesses testified that plaintiff and her husband had stated at various times that the property belonged to their son, and it appears that the latter and defendant had paid taxes on the property for many years prior to the filing of this suit.

[2] Plaintiff contends that the trial court went beyond the issues raised by the pleadings by not only deciding that defendant holds title to the property and does not hold it as trustee for plaintiff, but also by awarding defendant possession of the premises. While it does appear that the pleadings might have been more comprehensive and exact, there is no doubt that the subject matter and the parties were within the court's jurisdiction and that the issues in the case concerned the title to and possession of the specific piece of property. That being the case, we see no valid reason why a court of equity should not dispose of these issues on the basis of the credible and persuasive evidence before it.

[3] In case No. 13325, plaintiff during a serious illness in the year 1936 made a deed to "lot 28" in the same tract, giving it to

her son, and upon his death it was set apart to defendant as his widow. The complaint seeks to set aside the gift as being one made in contemplation of death and asks that the property be returned to plaintiff. Civ.Code, §§ 1149, 1150, 1151. The trial court found that the property had been deeded by plaintiff to her son as a gift during a time of her serious illness, but not in contemplation of death or with intent that it should take effect only in case of her death.

While it is true that Civil Code, section 1151, provides that "a gift in view of death may be revoked by the giver at any time, and is revoked by his recovery from the illness", the evidence herein shows that plaintiff is still seriously afflicted so that she cannot talk or write, and has difficulty in communicating even with her daughter, the guardian ad litem. There is no charge of fraud or coercion at the time the deed was made; nor is there any testimony that plaintiff declared at the time of making it that the deed was a gift made in contemplation of death, or that since then she has so declared or that she has indicated a desire or intention to revoke it. Because of her disability she was not available as a witness at the trial. The sufficiency of the evidence to support the findings of the trial court is the only question requiring consideration on this appeal, and since it is adequate we conclude that plaintiff cannot prevail.

Judgments affirmed.

MOORE, P. J., and WOOD, J., concurred.



47 Cal.App.2d 601

KNERR v. BARUCH CORPORATION.

Civ. 13249.

District Court of Appeal, Second District, Division 2, California.

Nov. 6, 1941.

Hearing Denied Dec. 31, 1941.

1. Fraud ⇐41
Reformation of Instruments ⇐36(3)

The complaint of a subcontractor, who contracted to do brickwork for contractor for $97,500, including estimated profit of $7,000, alleging that he was not familiar with type of building to be erected, that plaintiff relied on defendant's estimate of cost and did not procure any other estimate, and that defendant made false and fraudulent representations with intent that plaintiff should rely on them, and seeking to have contract reformed to increase total amount due or to have judgment against defendant for difference between price agreed upon and cost of construction, plus estimated profit of $7,000, was insufficient to state a cause of action. Civ.Code, § 1577(1, 2).

2. Fraud ⇐22(1)
Reformation of Instruments ⇐25

On the question of liability for fraud or of reformation of contract, one who enters into a contract which proves unprofitable because of his negligence in failing to ascertain essential facts from sources readily available, cannot cast the burden of his negligence on the other party by asserting that the latter was guilty of misrepresentation and fraud in not furnishing him with facts and figures which he made no effort to secure for himself, even though the other party may have expressed an opinion or voiced an estimate concerning elements in question.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by H. E. Knerr against the Baruch Corporation to have a contract reformed on the ground of mutual mistake or to have judgment against defendant for a stated sum because of alleged fraud and misrepresentation. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Henry M. Lee, of Los Angeles, for appellant.

Julius Mackson, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff appeals from a judgment of dismissal following an order sustaining defendant's demurrer to the complaint without leave to amend. The sufficiency of the complaint is the sole question for our consideration.

[1] The complaint alleges in substance that defendant corporation, engaged in the business of a building contractor, and plaintiff, an experienced and well qualified brick-work subcontractor, entered into a contract by which plaintiff was to do

the brick work on a housing contract held by defendant, under which 100 two-story and 2 one-story brick buildings and certain other structures were being erected for a total contract price of $1,187,710. Plaintiff contracted to do the brick work for $97,500, including an estimated profit to himself of $7,000. The work was completed in less than ten months and actually cost $113,003.26. Plaintiff seeks either (1) to have the contract reformed so as to increase the total amount due him to $120,003.26, including a profit of $7,000, or (2) to have judgment against defendant for $22,503.26, which is the difference between the price agreed upon and the cost of construction, plus the estimated profit of $7,000. The first cause of action seeks this relief on the ground of mutual mistake and the second cause of action is based on alleged fraud and misrepresentation.

In support of his theory of mutual mistake plaintiff alleges that he enjoyed friendly relationship with defendant and its officers and had done other work for it, and in this case was asked by defendant's representative to inspect the plans and specifications and take the contract; that he was not familiar with the type of building to be erected; that defendant's representative told him it had estimated the cost and that $97,500 would be sufficient to cover the same with a profit of $7,000 to plaintiff; that plaintiff relied on defendant's estimate and "plaintiff did not further check said cost or otherwise procure any other estimate than that furnished by defendant, at all times relying upon the positive assurance of said defendant as to the correctness thereof, and further upon the representations and assurances then and there made by defendant unto plaintiff that he should not and need not check or compare said figures or estimate in any other manner"; that it was the mutual intent of the parties that a contract be entered into for an amount which would cover the cost plus a $7,000 profit to plaintiff, and that they were mutually mistaken as to the amount that should be inserted in the contract; that this fact was discovered immediately after work was commenced by plaintiff, and defendant's representative stated in effect that it recognized that plaintiff "would suffer a great loss by reason of the inadequacy of the consideration expressed in the contract" and "that it would fully compensate plaintiff in the manner mutually intended as hereinbefore alleged, and in accordance with said mutual understanding, regardless of the admitted error as to the amount erroneously set out in the contract".

The second cause of action is "based upon fraud and misrepresentation", and sets up substantially the same matters as in the first cause of action, with further allegations (1) that defendant represented to plaintiff that another subcontractor had made an estimate and a bid of $97,800 on the job, and (2) that defendant's representations, set out above, were false and fraudulent, and that it either knew or had cause to suspect they were false and kept from plaintiff this knowledge or suspicion of their falsity with intent that plaintiff should act in reliance thereon.

In substance, then, the complaint merely alleges that plaintiff, a brick-work contractor of ability and experience sufficient, in his own mind, to entitle him to $7,000 profit in ten months on this one job alone, unfamiliar with the type of work he was contracting to do and with no estimate or opinion as to its cost, took no steps to find out what it would cost but chose to rely upon the estimate or opinion (see Estimate, 21 C.J. 1049, 1050) of defendant that if he bid $97,500 he could do the work and make a $7,000 profit. The allegation that defendant's representative said some other subcontractor had thought or estimated he could do it for about that amount must be regarded as immaterial. From the complaint itself it would appear that plaintiff, having agreed in writing to do the job for a stipulated amount, was obligated to carry out his contract and is entitled to no more than the agreed price. The complaint does not state facts sufficient, even if true, to entitle him to a reformation of the contract or damages, either on the ground of mutual mistake or fraud. Mistake of fact is defined by Civil Code section 1577 as "a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed".

[2] As to the alleged fraud or misrepresentation, it is apparent from the complaint that the relation between plaintiff

and defendant was not one of especial trust or confidence. It was incumbent upon plaintiff to make his own investigation and calculations and to exercise his own judgment before executing his contract. The means of determining the extent of the labor and the amount of materials required for construction, as well as the cost of each, obviously was as available to plaintiff as it was to defendant. When one enters into a contract which proves unprofitable because of his negligence in failing to ascertain the essential facts concerning it from sources readily available, he cannot thereafter throw the burden of his negligence upon the shoulders of the other contracting party by asserting that the latter had been guilty of misrepresentation and fraud in not furnishing him with facts and figures which he made no effort to secure for himself, even though the latter may have expressed an opinion or voiced an estimate as to elements in question. 12 Cal.Jur., sec. 33, p. 756.

In distinguishing the instant case from that of Gogo v. Los Angeles County, etc., District, 45 Cal.App.2d 334, 114 P.2d 65, we need only observe that if plaintiff in this case had been equally as diligent as the plaintiff there in the conduct of his business this suit would have been unnecessary.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concurred.



PEOPLE v. AMICK.

Cr. 544.

District Court of Appeal, Fourth District, California.

Nov. 4, 1941.

Rehearing Denied Nov. 17, 1941.

Hearing Granted Dec. 2, 1941.

1. Criminal law ⇐878(3)

The statute providing that verdict of acquittal on one or more counts shall not be deemed an acquittal of any other count means that each count in indictment or information charging separate and distinct offense must stand upon its own merit, and that verdict of either conviction or acquittal of one charge has no effect on other separate counts which are contained therein. Pen.Code, § 954.

2. Homicide ⇐16

Manslaughter, like murder, can be committed with any instrumentality or means known to the ingenuity of man. Pen.Code, § 192.

3. Automobiles ⇐344

"Negligent homicide" can only be committed as specified in provision in Vehicle Code relating thereto, and by means of an automobile. Vehicle Code, § 500, St.1935, p. 173.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligent Homicide".

4. Automobiles ⇐316

The provision in Vehicle Code relating to negligent homicide in operation of automobile, defined a crime different from any of the crimes which had been defined in any of the various provisions of the Penal Code. Vehicle Code, § 500, St.1935, p. 173.

5. Criminal law ⇐5

The legislature may make laws defining what breaches of public peace shall be punishable, specify various degrees of same crime, and require different measures of punishment for each.

6. Criminal law ⇐803½

In trial for negligent homicide committed while operating automobile in negligent manner, trial court need not do more than state law to jury in language of applicable statutes specifying lesser degree of punishment for homicide committed in doing unlawful act not amounting to felony while operating vehicle or driving in negligent manner than for homicides otherwise committed in doing such acts or without due caution and circumspection. Vehicle Code, § 500, St.1935, p. 173; Penal Code, § 192.

7. Automobiles ⇐356

What amounts to lack of due caution and circumspection in cases of involuntary manslaughter, committed in doing lawful acts or driving of vehicle in negligent manner within statute declaring person causing another's death by such driving guilty of negligent homicide, are questions for jury to decide according to particular facts. Vehicle

Code, § 500, St.1935, p. 173; Penal Code, § 192.

8. Criminal law ⇐878(3)

Under statute providing that verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count, acquittal of defendant on count charging manslaughter did not require acquittal of defendant on count charging negligent homicide committed while driving truck in negligent manner, since crimes charged were not identical. Penal Code, §§ 192, 954; Vehicle Code, § 500, St.1935, p. 173.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Herbert M. Amick was convicted for negligent homicide. From a judgment and order denying motion for new trial, he appeals.

Judgment and order affirmed.

W. C. Dorris and C. Fleharty, Jr., both of Bakersfield, for appellant.

Earl Warren, Atty. Gen. and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Appellant was charged in an amended information as follows: Count 1, with the crime of manslaughter in that he did, on the 28th day of May, 1941, feloniously and without malice, kill Albert Briggs and Fred McKinney, human beings. In the second count he was charged with violating section 480 of the Vehicle Code, St.1935, p. 170 (so-called "hit and run" section); and in count 3 with violating section 500 of the Vehicle Code, St. 1935, p. 173 (negligent homicide) in that he did on May 28, 1941, feloniously drive an automobile in a negligent manner, and in a manner constituting the commission of an unlawful act not amounting to a felony, thereby injuring Albert Briggs and Fred McKinney, who died as a proximate result of the injuries.

After a plea of not guilty as to each count appellant went to trial which resulted in a verdict of not guilty as to the first and second counts and guilty as to the third count. A new trial was denied, Appellant was sentenced upon the third count. This appeal followed.

A brief resume of the facts shows that on May 28, 1941, appellant was employed by the WPA at a location known as the Blue Mountain Project, a few miles northeast of Woody in Kern county. He was a truck driver and the truck that he drove was a Dodge 1½-ton flat rack truck with a stake bed and stake sides. On the day mentioned appellant took the truck to Bakersfield at about 8:30 a. m. He had at least four bottles of beer while in Bakersfield. He returned to the project at about 3 p. m. There was evidence that he was intoxicated at that time. His driver's license and chauffeur's license had been previously revoked in December, 1940, but this was not known to the WPA officials due to Amick's misstatements to them. About 3:25 p. m. the truck was loaded with 17 workmen seated on seats in the rear of the truck when the appellant drove away from the site towards Woody. The highway is about 17 feet wide with a steep grade and has many curves about a mile and a half east of Woody. While proceeding at a rate of from 35 to 45 miles an hour the appellant came around a curve in the road, driving on the wrong side of the highway and in the path of another truck which was going in the opposite direction up the grade. As the appellant thus proceeded, he collided with the other truck and at the time of the collision the evidence convincingly shows that he was driving at an excessive rate of speed, in violation of section 510 of the Vehicle Code, St.1935, p. 176; that he was also driving under the influence of intoxicating liquor, in violation of section 502 of the Vehicle Code, St.1935, p. 174; that he was driving on the wrong side of the highway on a mountain road, in violation of sections 525 and 597 of the Vehicle Code, St.1939, p. 2197, St.1935, p. 194; and that he was also guilty of reckless driving in violation of section 505 of the same code, St.1939, p. 2107. There was also evidence that the appellant was driving in a negligent manner, which negligence might have been the violation of any of the foregoing sections or may have consisted of independent acts testified to at the trial. As a result of the collision six of the men on the truck were seriously injured and two others, Albert Briggs and Fred McKinney, received injuries from which they soon died.

The sole point raised by appellant is that the verdict acquitting him of manslaughter is inconsistent with the verdict of guilty of negligent homicide, since both charges grow out of the same act which resulted in the death of the same individuals; that an

acquittal upon a count in an information charging manslaughter is inconsistent with a conviction on another count charging homicide in the same information and amounts to a complete acquittal of the accused. In support of the contention appellant cites People v. Andursky, 1925, 75 Cal. App. 16, 241 P. 591, where it was held that where a defendant was charged in one count of an information with the crime of rape alleged to have been committed upon a female of the age of 15 years and in a second count of the same information, charging him with a violation of the Juvenile Court Act, St.1915, p. 1225, where it was alleged, among other things, that the defendant, on the same day charged in the first count, induced her to remain away from her home and usual place of abode and induced her to go with him to a room in a rooming house and there occupied the same bed with her and there accomplished acts of sexual intercourse with her, and the same evidence was relied on to convict on both counts, a verdict finding the defendant guilty on the first count and not guilty on the second count was inconsistent and conflicting, and insufficient to support a conviction.

People v. Day, 1926, 199 Cal. 78, 248 P. 250; People v. Coltrin, 5 Cal.2d 649, 661, 55 P.2d 1161; and People v. Hickman, 31 Cal.App.2d 4, 11, 87 P.2d 80, are also cited. It is argued that in view of the above-cited authorities "that the two essential elements of the crime of negligent homicide, namely, 'in the commission of an unlawful act not amounting to a felony' or 'driving a vehicle in a negligent manner' are contained in the crime of involuntary manslaughter, and that the jury by rendering a verdict of not guilty upon the manslaughter count, and rendering a verdict of guilty upon the negligent homicide count, rendered an inconsistent verdict, and the defendant is entitled to an acquittal upon both counts".

It should be noted that the Andursky and Day cases were decided in 1925 and 1926, respectively. In 1927, the legislature amended several sections of the Penal Code relating to pleading of various crimes (Stats.1927, p. 1042). There was added to the last sentence of section 954 the following: "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." We might well assume that the decisions in the first two above-mentioned cases prompted or had considerable to do with the legislative determination to amend section 954 as above quoted. The remaining cases cited by appellant were, however, decided subsequent to that amendment, each of which quotes from or refers to the case of People v. Day, supra, to the effect that where a person is convicted on one count of an information and acquitted on another he is entitled to an acquittal on both counts if both counts state precisely the same offense. Both of these recent cases do not discuss the 1927 amendment to section 954. The reference to the Day case in each of these later cases might be considered dictum, for in the Coltrin case the court held that abortion and murder were two separate and distinct crimes and that there is no common basis on which they may rest as the same offense. Similarly in the Hickman case the court held that an acquittal of grand theft as charged in count 3 and a conviction of attempt to commit grand theft as charged in count 2 were not inconsistent verdicts, as the two crimes were not identical. The rule contended for by appellant might possibly apply if he had been acquitted of count 1 and thereafter a new and different information was filed charging him with negligent homicide and he was again placed on trial.

In People v. Day, supra, 199 Cal. page 83, 248 P. page 252, it was said: "This is the test used to determine the validity of a plea of once in jeopardy interposed to a subsequent indictment after an acquittal or conviction upon one indictment. Of course, no plea of twice in jeopardy or former acquittal was or could have been made by the defendant in this action, inasmuch as she was tried but once. It should be noted, however, that all of the rules applicable to a plea of once in jeopardy do not have application to a determination of whether the offenses stated in different counts of an indictment are identical."

[1] We believe the effect of the amendment of section 954 of the Penal Code in 1927 was given careful consideration in the case of People v. Ranney, 123 Cal.App. 403, 11 P.2d 405, 406, where a similar argument was presented. It was there said:

"The disposition of one count had no bearing upon the verdict with respect to other counts, regardless of what the evidence may have been. Each count must

stand upon its own merit. The amendment to section 954 of the Penal Code conclusively settles this controversy adversely to the contention of the appellant. That section provides for the charging of 'two or more different offenses of the same class of crimes or offenses, under separate counts.' That section, as amended in 1927, then provides that, 'A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.' This language clearly means that each count in an indictment or information, which charges a separate and distinct offense must stand upon its own merit, and that a verdict of either conviction or acquittal upon one such charge has no effect or bearing upon other separate counts which are contained therein. * * * There are no authorities to the contrary in other jurisdictions where a statute exists similar to the California law above quoted."

The appellate department of the superior court in People v. Horowitz, 131 Cal. App. Supp. 791, 19 P.2d 874, had occasion to consider this same argument. At page 793 of 131 Cal.App. Supp., at page 874 of 19 P.2d, appears the following:

"Appellants' most strongly urged argument is that the dismissal of the second count was an acquittal on that charge and that, as an acquittal, it is so inconsistent with the finding of guilt under count I that the later cannot stand. * * * Authorities could be cited which would seem to support a reversal. People v. Andursky (1925) 75 Cal.App. 16, 241 P. 591; People v. Puppilo (1929) 100 Cal.App. 559, 280 P. 545. But we find more persuasive cases recognizing that such inconsistent verdicts may be caused, not by the confusion, but the mercy of the jury, of which the appellant can neither complain nor gain further advantage. [Citing cases.] Moreover, probably to avoid the result of those cases which interpret inconsistent verdicts as acts of stupidity rather than acts of leniency, section 954, Penal Code, was amended in 1927 so that it now reads", (as above quoted). "We conclude that even if the dismissal be regarded as an acquittal, that is no reason why the judgment of conviction, based on ample evidence, should be reversed."

The effect of the 1927 amendment to section 954 of the Penal Code was recognized and commented upon in the recent case of People v. Derenzo, 46 Cal.App.2d 411, 115 P.2d 858. In that case the court held that since, under section 954 of the Penal Code, the verdict of acquittal of one or more counts of an information is not to be deemed an acquittal of any other count, a dismissal of a count of receiving stolen property, if it be regarded as tantamount to an acquittal, is not a bar to conviction on counts of robbery and burglary, which are wholly separate and distinct offenses.

[2, 3] It might be well to point out in passing that appellant was not charged with involuntary manslaughter, but with manslaughter, which under section 192 of the Penal Code could be either voluntary or involuntary so long as the act was committed without malice. Manslaughter, like murder, can be committed with any instrumentality or means known to the ingenuity of man, whereas, negligent homicide can only be committed as specified in section 500 of the Vehicle Code and by means of an automobile.

[4-7] Our Supreme Court in People v. Beckhard, 1939, 14 Cal.2d 690, 96 P.2d 794 (all justices concurring) has definitely held that by the enactment of section 500 of the Vehicle Code the legislature defined a crime different from any of the crimes which had been defined in any of the various provisions of the Penal Code. The purpose of the enactment of section 500 of the Vehicle Code was reviewed in People v. Pociask, 1939, 14 Cal.2d 679, 686, 687, 96 P.2d 788, 792. It was there said:

"It is within the function of the legislature to make laws defining what breaches of the public peace shall be made punishable. Accordingly it may specify various degrees of the same crime and require a different measure of punishment for each. It is apparent that by the enactment of section 500 of the Vehicle Code the legislature has specified a lesser degree of punishment when the homicide is committed in the doing of an unlawful act not amounting to a felony while operating any vehicle, or while driving in a negligent manner, than is meted out in the cases of homicides otherwise committed in the doing of an unlawful act not amounting to felony or without due caution and circumspection. Sec. 192, Pen.Code. When the legislature has so spoken and the court has stated the law to the jury in the language of the applicable statutes, it is not required to do more. People v. Fowler [178 Cal. 657, 174 P. 892]; People v. Anderson [58

Cal.App. 267, 208 P. 324]. Therefore, what may amount to a lack of 'due caution and circumspection' in cases of involuntary manslaughter committed in the doing of a lawful act, or what may constitute the driving of a vehicle 'in a negligent manner', are questions to be decided by the jury according to the particular facts in each case guided by appropriate instructions from the court. The practical difficulties of obtaining a conviction in automobile homicide cases arising under section 192 of the Penal Code may have been the incentive for the enactment of section 500 of the Vehicle Code. That is, in order to foster greater care in the operation of such dangerous instrumentalities, the legislature may have afforded a means by which appropriate punishment may be imposed upon all who have caused death through a breach of duty of due care in such operation."

[8] Therefore the two crimes of involuntary manslaughter and negligent homicide are not identical. Under section 954 of the Penal Code as amended, the acquittal on count 1 does not necessarily result in an acquittal on count 3. People v. Kirsch, 204 Cal. 599, 269 P. 447.

The judgment and order denying a new trial are affirmed.

BARNARD, P. J., and MARKS, J., concurred.



47 Cal.App.2d 596

SOUTHERN PAC. CO. v. CATUCCI.

Civ. 11878.

District Court of Appeal, First District, Division 2, California.

Nov. 6, 1941.

1. Executors and administrators ⇐224

Railroad properly presented to executrix of deceased contractor contingent claim based on contractor's agreement to indemnify and save railroad harmless from claims. Probate Code, § 707.

2. Executors and administrators ⇐437(7)

Railroad having contingent claim against deceased contractor's estate based on contractor's agreement to indemnify and save railroad harmless against claims resulting from work covered was not entitled to bring action at law on claim until within two months after claim had become due, and action filed before claim matured was premature. Probate Code, § 714.

3. Executors and administrators ⇐421

Action by railroad against deceased contractor's executrix alleging that action had been commenced for damages for deaths of persons injured and that contractor had agreed to indemnify and save railroad harmless and alleging that claim against estate had been rejected did not sound in equity where plaintiff alleged that unless claim had status in probate proceedings of approved claim plaintiff would be without recourse to enforce indemnity provision and plaintiff's rights would be prejudiced but did not allege condition of estate, ability of executrix to pay claims, nor desirability of creating a fund to meet them.

4. Pleading ⇐8(12)

In action by railroad against deceased contractor's executrix, based upon contingent claim, allegations that unless claim filed by railroad and rejected by defendant had status in probate proceedings of approved claim plaintiff would be without recourse to enforce provisions of contractor's indemnity agreement, and that unless plaintiff's claim should have status of approved claim plaintiff's rights under contract would be prejudiced were "conclusions of law" which did not avoid necessity of making allegations as to condition of estate and ability of executrix to provide for payment of claims and desirability of creating fund to meet them necessary to give equity jurisdiction.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

5. Pleading ⇐8(1)

In suit by railroad in equity against deceased contractor's executrix based upon contingent claim, if plaintiff had no remedy at law, facts showing lack of remedy should have been alleged instead of merely alleging lack of remedy.

6. Pleading ⇐8(12)

In suit by railroad against deceased contractor's executrix, based upon contingent claim, allegation that unless plaintiff's claim should have status of approved claim, plaintiff's rights under contract would be prejudiced and enjoyment of such rights would

be hindered was not sufficient where no fact was pleaded showing plaintiff would be prejudiced or hindered.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the Southern Pacific Company against Bella Julia Catucci, executrix under the will of Joseph Catucci, deceased, based upon a claim against the estate of the decedent. From a judgment for defendant after a demurrer was sustained, plaintiff appeals.

Affirmed.

John J. Allen, Jr., of Oakland, and Henley C. Booth and R. S. Myers, both of San Francisco, for appellant.

Donahue, Richards & Hamlin, of Oakland, for respondent.

STURTEVANT, Justice.

In an action involving a claim against the estate of the decedent Joseph Catucci the trial court sustained a demurrer to the plaintiff's complaint. Later the trial court caused a judgment to be entered in favor of the defendant. From that judgment the plaintiff has appealed.

The plaintiff's complaint alleged the corporate capacity of the plaintiff; that the plaintiff and the decedent entered into a construction contract on October 14, 1939; that the decedent employed John Camara; that on the 25th day of October, 1939, Catucci and Camara suffered injuries from which they died; that the last will and testament of Catucci was admitted to probate and Bella Catucci, the wife of the decedent, was appointed executrix and as such she is now acting; that she published notice to creditors on November 9, 1939, and the time to present claims would expire six months thereafter; that on the 25th day of April, 1940, the plaintiff presented its claim which was rejected on the 6th day of May, 1940; that Bella Catucci and others have commenced an action, No. 159,850, claiming $151,572.28 as damages for the death of Joseph Catucci; that Susie Camara has commenced an action, No. 159,831, in which she seeks to recover damages, $50,450.22, for the death of John Camara; that the above-mentioned construction contract, among others, contained the following provisions:

"'(21) Liability: Contractor expressly agrees to indemnify and save Railroad harmless from and against any and all claims, loss, damage, injury and liability howsoever same may be caused, resulting directly or indirectly from work covered by this agreement.

"'(26). Attorneys' Fees: In case Railroad shall bring suit to compel performance of or to recover for breach of any covenant, agreement or condition herein written, Contractor shall and will pay to Railroad reasonable attorney fees in addition to the amount of judgment and costs.'

"That plaintiff has no remedy at law in the premises; that unless plaintiff's said claim have the status of an approved claim in said probate proceedings, plaintiff's rights under said contract will be prejudiced and the enjoyment of such rights will be hindered; that plaintiff does not know at this time the amount of the claim it may have against said estate nor has it any means of ascertaining such amount, and that said claim is a contingent claim within the meaning of Section 707 of the Probate Code of the State of California." Then followed the prayer:

"Wherefore, plaintiff prays for judgment against defendant that said claim heretofore filed in said probate proceedings and rejected as aforesaid be approved, and for such other and further relief as is proper and equitable in the premises." The defendant interposed a demurrer which was both general and special. The order sustaining the demurrer was general.

[1-4] That it was proper practice for this plaintiff to present to the executrix its contingent claim is the settled law of this state. Verdier v. Roach, 96 Cal. 467, 31 P. 554. However, it was not entitled to bring an action at law on the claim until within two months after its claim had become due. Probate Code, § 714. Nevertheless, before said claim matured it filed this action. It can hardly be questioned that as an action at law to enforce the plaintiff's claim the bringing of such action was premature. Miller v. Miller, 171 Cal. 269, 152 P. 728; Brooks v. Lawson, 136 Cal. 10, 68 P. 97; Morse v. Steele, 132 Cal. 456, 458, 64 P. 690. But the plaintiff asserts that its action sounds in equity. The sole question to be determined is, "Does said action sound in equity?" We think it is clear that it does not. The plaintiff alleged that "* * * unless the claim heretofore filed by it and rejected by defendant has a status in said probate proceedings of an approved claim plaintiff will be without re-

course to enforce the provisions of said contract" of indemnity; "that unless plaintiff's said claim have the status of an approved claim in said probate proceedings, plaintiff's rights under said contract will be prejudiced and the enjoyment of such rights will be hindered; * * *". Those allegations did not present an issue in equity. Miller v. Miller, supra. True it is that an examination of the record in that case discloses that the complaint did not include the allegations of conclusions of law which were inserted by this plaintiff in its complaint. But it also discloses that, as stated by the court in 171 Cal. on page 272, 152 P. on page 729, "But these complaints before us are not bills in equity. While each asks for a determination of the status of the claim upon which suit is brought, each is frankly based upon a rejected demand for moneys not yet due, and there is neither pleading nor prayer with reference to the condition of the estate, the ability of the defendants to provide for future payments, nor the desirability of creating a fund to meet the annual demands of the plaintiffs. Nor is any reason set forth why the action was brought before any part of the alleged claim became due." Excepting the conclusions of law quoted above, the same comment applies to the complaint in the instant case. It contains no allegation as to the condition of the estate of the decedent, the ability of the executrix to provide for claims mentioned, nor the desirability of creating a fund to meet them. In short, there is no allegation that any fund exists of which a court of equity may take jurisdiction. As such allegations were material they may not be avoided by pleading conclusions of law. E. H. Renzel Co. v. Warehousemen's Union, 16 Cal.2d 369, 376, 106 P.2d 1; 49 C.J. 47. The plaintiff cites and relies on Joost v. Castel, 33 Cal.App.2d 138, 91 P.2d 172. But an examination of the record in that case shows the plaintiff's complaint did not omit the allegations we have mentioned above. The same comment is applicable to the pleadings before the court in Dabney v. Dabney, 9 Cal.App.2d 665, 673, 51 P.2d 108. In Newman v. Burwell, 216 Cal. 608, 15 P. 2d 511, the record shows the complaint contained full averments on the allegations which we are now discussing. Furthermore, there was no allegation of threatened waste or diversion of funds to the injury or prejudice of the plaintiff. 2 Story Eq.Juris., § 1141 et seq.

[5, 6] Returning to the allegations which we stated were conclusions of law, we will now discuss each one separately. Having alleged that the executrix rejected its claim, the plaintiff alleged that "* * * unless the claim heretofore filed by it and rejected by defendant has a status in said probate proceedings of an approved claim plaintiff will be without recourse to enforce the provisions of said contract" of indemnity. In section 714 of the Probate Code it is provided that the holder of a rejected claim may bring suit "* * * within two months after it becomes due* * *". If, perchance, the estate of the deceased is entirely sufficient and if the funds are not disbursed until said litigation has been disposed of under said section, the remedy of the plaintiff is complete. It pleads no facts to the contrary. If such facts exist they should have been pleaded. 10 R.C.L. 414, "Equity", §§ 169, 170, 173 and 179. The plaintiff also alleged "that plaintiff has no remedy at law in the premises". If such were the fact the plaintiff should have alleged facts showing to the court that it had no remedy at law. 10 R.C.L. 420. The plaintiff also alleged "that unless plaintiff's said claim have the status of an approved claim in said probate proceedings, plaintiff's rights under said contract will be prejudiced and the enjoyment of such rights will be hindered". Examining the allegations set forth in plaintiff's complaint, no fact is pleaded showing that it will be "prejudiced" or that it will be "hindered". Said allegation was not helpful. Johnson v. Wunner, 40 Cal.App. 484, 486, 181 P. 103.

The judgment is affirmed.

NOURSE, P. J., and SPENCE, J. concurred.

47 Cal.App.2d 591

STANDARD OIL CO. OF CALIFORNIA v. PHILBRICK, Director of Motor Vehicles, et al.

Civ. 13382.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1941.

Automobiles ⇐37

A portable draw works weighing 34,000 pounds, which was not self-propelled, was not designed or used primarily for transportation of persons or property, and was only incidentally operated or moved over a highway in going from place of storage to an oil well where it was to be used and back to place of storage was a "special mobile equipment" and not a "trailer" and hence was exempt from tax imposed upon trailers, notwithstanding that if draw works and crossbeams were unbolted and removed frame and wheels might be fitted with a body and used for other purposes. Vehicle Code, §§ 39, 142 (d), 370, St.1935, pp. 96, 108, 147; §§ 36, 372, St.1937, pp. 2450, 615.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Mobile Equipment" and "Trailer".

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Suit by the Standard Oil Company of California against Howard Philbrick, Director of Motor Vehicles, and others to enjoin the taxation of certain property of plaintiff. From an adverse judgment, defendants appeal.

Affirmed.

Earl Warren, Atty. Gen. and Lewis Drucker, Deputy Atty. Gen., for appellants.

Lawler, Felix & Hall, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Defendants appeal from a judgment enjoining taxation of certain property of plaintiff under the provisions of the Vehicle Code, St. 1935, p. 93.

The case was submitted under a stipulation of facts. The sole question before the trial court was whether plaintiff's "portable draw works" was (1) a "trailer", and therefore subject to being taxed under provisions of the Vehicle Code, or (2) "special mobile equipment" and not subject to such tax.

Plaintiff had purchased a trailer chassis consisting of a bare frame and running gear with six wheels equipped with twelve pneumatic tires, had cut off the rear of the frame, had bolted four "H" beams crosswise and then had mounted and bolted on this frame a "draw works" weighing in excess of 20,000 pounds, consisting of a hoisting drum, sand reel, catheads and rotary sprocket with four chain driven shafts communicating the driving power to said hoisting drum, catheads and rotary sprocket, and with a gas engine also bolted to the frame. It was not self propelled, the draw works and gas engine fully occupied the entire surface of the chassis and no space was provided for the transportation of persons or property thereon and it has never been used for the transportation of persons or property other than the draw works itself, which was bolted on. It was moved over the highway only going from the place of storage to an oil well where it was to be used and back to the place of storage. The total weight of such portable draw works was 34,000 pounds.

"A 'trailer' is a vehicle designed for carrying persons or property on its own structure and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon any other vehicle." Sec. 36, Vehicle Code, St. 1937, p. 2450.

"'Special mobile equipment' is a vehicle, not self-propelled, not designed or used primarily for the transportation of persons or property, and only incidentally operated or moved over a highway, excepting implements of husbandry." Sec. 39, Vehicle Code, St. 1935, p. 96. The trial court concluded that the property of plaintiff herein described as a "portable draw works" was not a "trailer" but was "special mobile equipment", and by the provisions of section 142, subdivision (d) of the Vehicle Code, St. 1935, p. 108, exempt from tax imposed by sections 370 and 372 of that code, St. 1935, p. 147, St. 1937, p. 615, which would have to be paid if it were a "trailer".

Since the portable draw works (1) was not self propelled, (2) was not designed or used primarily for the transportation of persons or property and (3) was only incidentally operated or moved over a highway, it complied with the requirements of section 39 of the Vehicle Code and the ruling of the trial court exempting it from tax must be upheld. The fact that if the draw

works and cross beams were unbolted and removed the frame and wheels might be fitted with a body and used for other purposes does not alter our view as to the category into which, as at present constituted, the equipment falls.

The case of State v. Griswold, 225 Iowa 237, 280 N.W. 489, construed the definition of "special mobile equipment" under a statute differing from our own but tending to support our view that the trial court correctly ruled in this case.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concurred.



47 Cal.App.2d 594

PETRY v. PETRY.

Civ. 13387.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1941.

1. Divorce ⇐172

A final decree of divorce conclusively determines, as between the parties thereto, that they were legally married, regardless of the true facts and despite the most flagrant fraud practiced by one of the parties.

2. Divorce ⇐168, 172

A final decree of divorce may not be collaterally attacked by the parties thereto and all facts found or necessary to be found in granting final decree of divorce, such as the fact of marriage, are conclusive upon the parties in subsequent proceedings regardless of whether such proceedings pertain to divorce.

3. Divorce ⇐255

Former husband could not secure cancellation of property settlement agreement, entered into between him and former wife and incorporated into divorce decree previously granted, on the ground that he would not have executed agreement had he known, as former wife did, that their marriage was invalid because she had not been divorced from a prior husband, since final divorce decree conclusively determined as between the parties that they had been legally married and since proof of ground relied on for relief amounted to a "collateral attack" on divorce decree.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

4. Pleading ⇐214(2)

In ruling on demurrer, facts, which could not be proved, because conclusively determined to the contrary as between the parties by prior decree, could not be regarded as well pleaded.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Frederick Petry against Helen M. Petry to cancel a property settlement agreement entered into between plaintiff and defendant and incorporated in a decree of divorce granted to plaintiff several years previously. From a judgment in favor of defendant entered after demurrer to the complaint had been sustained without leave to amend, plaintiff appeals.

Judgment affirmed.

Redmond & Redmond, of Los Angeles, for appellant.

Merritt D. Jergins and Simon Miller, both of Long Beach, for respondent.

HANSON, Justice pro tem.

This is an appeal from a judgment entered upon an order sustaining a demurrer to the complaint without leave to amend.

In this action the former husband of the defendant seeks the cancellation of a property settlement agreement entered into between them and which was incorporated in a decree of divorce granted to him several years ago. The ground alleged for cancellation is that when plaintiff married the defendant, and when the property settlement agreement was made, the latter had not been divorced from her former husband, a fact which was unknown to the plaintiff but known to the defendant. As it appeared from the complaint in this suit that a final decree of divorce had been rendered, the trial court sustained without leave to amend the demurrer of the ex-wife on the ground that under the controlling facts as disclosed by the complaint, and upon which plaintiff would have to rely, no cause of action could be stated. We think the ruling was correct.

[1-4] It is well established in this state that a final decree of divorce conclusively determines, as between the parties thereto, that they were legally married; and this regardless of the true fact (Kelsey v. Miller, 203 Cal. 61, 263 P. 200; Blumenthal v. Blumenthal, 97 Cal.App. 558, 275 P. 987; Estate of Lee, 200 Cal. 310, 253 P. 145; Borg v. Borg, 25 Cal.App.2d 25, 76 P.2d 218; 9 R.C.L. sec. 270; 17 Am.Jur., sec. 486; 27 C.J.S., Divorce, § 174) and seemingly despite the most flagrant fraud practiced by one of the parties. Such being the case, the decree of divorce may not be collaterally attacked by the parties thereto, and all the facts therein found or necessary to be found, such as the fact of marriage, are conclusive upon the parties in subsequent proceedings whether they pertain to divorce or not. The attack here on the validity of the property settlement agreement is predicated upon the ground that the marriage was invalid under the statute and that had plaintiff known that fact, as defendant did, he would not have executed the agreement. But these are matters which cannot be shown in the face of the decree. To permit such a showing to be made would necessarily amount to a collateral attack on the decree. Accordingly, as one cannot well plead what one cannot prove (Hubbard v. Lowe, D.C., 226 F. 135), the demurrer was rightly sustained.

The judgment is affirmed.

WOOD, Acting P. J., and McCOMB, J., concurred.



47 Cal.App.2d 605

In re CHAPIN'S ESTATE.

CHAPIN et al. v. CHAPIN et al.
CHAPIN v. SAME.

Civ. 13376.

District Court of Appeal, Second District, Division 2, California.

Nov. 6, 1941.

Rehearing Denied Dec. 4, 1941.

Hearing Denied Dec. 31, 1941.

1. Wills ⇐706

Question, whether testator's widow as beneficiary of testamentary trust was entitled to have arrearages paid up before certain other beneficiaries received any payment from trust income, involved only a question of construction of terms of will, and was matter for determination of the trial court.

2. Wills ⇐684(7)

Where will establishing trust directed distribution of income, and provided that, in event net income was insufficient to fully make all payments, payments were to be made to testator's wife and to certain son, and that the remainder of the net income should be paid monthly in equal shares to other children, trial court's construction that testator intended the amount for his wife and the named son to be paid first each month, and then the monthly balance should be used to pay amounts provided for other children, and that it was only after such sums had been paid that trustees could retain any balance on hand to be divided among the beneficiaries at the end of the year, was reasonable and would not be disturbed as against the wife's contention that she was entitled to have her arrearages paid before payments were made to the other children.

3. Wills ⇐470

To properly construe a sentence as part of will in its entirety, it was duty of trial court to give effect to all the terms of the instrument and, if reasonably possible, to reconcile any apparent inconsistency.

4. Appeal and error ⇐1008(3)

Where the construction given an instrument by trial court appears to be reasonable and consistent with the intent of the party making it, courts of appellate jurisdiction will not substitute another interpretation even though it seems equally tenable.

5. Wills ⇐785

Where contemporaneously with execution of will testator's widow executed an instrument assenting to will and waiving community property rights to make will establishing trust effective, the wife's co-operation with testator in that regard did not entitle her to any preference beyond that provided in the will itself.

6. Wills ⇐785

Where contemporaneously with execution of will establishing trust testator's wife executed an instrument consenting to the will and waiving community property rights to make will effective, the wife was bound by the terms of the will to which she expressly consented.

7. Wills ⇐706

Where, under will establishing trust, illness of testator's son entitled him to extra allowance only so long as the illness continues, order of court construing will would be amended to provide that the additional payments provided for son in event of his illness should continue only so long and for such period as the illness and resulting incapacity continued. Code Civ.Proc. § 956a.

Appeals from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceedings in the matter of the estate of Lon F. Chapin, deceased, wherein Mary Bean Chapin and another, trustees, filed a petition opposed by Ned Leroy Chapin and others. From the order Mary Bean Chapin and another as trustees, and Mary Bean Chapin individually, appeal.

Order amended and as amended affirmed.

Mabel Clausen, of Pasadena, for appellants Mary Bean Chapin and H. Mitchell, trustees.

James C. Hyne, of Los Angeles, for appellant Mary Bean Chapin, beneficiary.

T. W. Ward and Luther M. Reed, both of Pasadena, for respondents.

SCOTT, Justice pro tem.

Two appeals herein are consolidated and will be considered as one. The first is by Mary Bean Chapin, widow of Lon F. Chapin, deceased, and H. Mitchell, as trustees under a testamentary trust; and the second is by Mary Bean Chapin as beneficiary under the same trust. Respondents are children of decedent by a prior marriage and are likewise beneficiaries under the provisions of the trust. The appeals are from the orders for payment of income of trust estate.

In the first case the trustees assert that the trial court erred in requiring distribution based on monthly receipts instead of on annual income; and in the second case Mary Bean Chapin claims certain "arrearages" in payments to her should have been satisfied before funds were allocated to beneficiaries other than Ralph Owen Chapin.

In establishing the trust the will in paragraph Seventh thereof provided as follows:

"After deducting from the income derived from said trust estate all charges and expenses in the administration thereof, I direct said trustees to pay the balance of said income, hereinafter referred to as 'net income', as follows, towit:

"(1) To my wife, Mary Bean Chapin, the sum of Four Hundred and Fifty ($450.00) Dollars per month, for and during her lifetime, from the date of my death.

"(2) To my son, Ralph Owen Chapin, the sum of One Hundred ($100.00) Dollars per month, from the date of my death, until the termination of this trust. In the event that my said son, Ralph Owen Chapin, should suffer illness of more than temporary character and such as to incapacitate him from work for a protracted period, my trustees are authorized and empowered, in addition to the payments of net income made payable to him under the provisions of this subparagraph (2), to pay to my said son, or to expend and apply for his use and benefit, an additional sum of Fifty ($50.00) Dollars per month, for his comfortable support and maintenance in case of such illness or emergency.

"(3) To my children, towit: Grace June Mitchell, Ned Leroy Chapin and Alice May Fry, the sum of One Hundred ($100.00) Dollars per month, each, from the date of my death, until the termination of this trust. * * *

"(4) To my wife, Mary Bean Chapin, and to my children, towit: Grace June Mitchell, Ned Leroy Chapin, Alice May Fry and Ralph Owen Chapin, in equal shares, the remainder, if any, of said net income, until the termination of this trust, any such remainder of said net income to be paid to each such beneficiary at the end of each calendar year.

"(5) In the event there is not sufficient such net income to fully make all the payments thereof as hereinabove provided, I direct that the payment of said net income so provided to be made to my said wife, Mary Bean Chapin, and to my said son, Ralph Owen Chapin, shall be fully paid, and that *the remainder of said net income shall be paid monthly,* in equal shares, to my children named in sub-paragraph (3) of this Paragraph Seventh. (Italics added.)

"(6) In the event there is not sufficient such net income to pay two-thirds (2/3) of the payments of net income hereinabove provided to be made to my said wife, Mary Bean Chapin, and to my said son, Ralph Owen Chapin, then my said trustees are directed to deduct from the corpus or

principal of said trust so much thereof as shall be required, when added to said net income, to insure a monthly payment of Two Hundred and Fifty ($250.00) Dollars to my said wife, Mary Bean Chapin, a monthly payment of One Hundred ($100.00) Dollars to my said son, Ralph Owen Chapin, and an additional monthly payment of Fifty ($50.00) Dollars to my said son, Ralph Owen Chapin, in case of any serious and protracted illness he may suffer. * * *"

At the time of the hearing it appeared (1) that respondent Ralph Owen Chapin was incapacitated, due to an extended illness; (2) that the net income had been insufficient to pay the full amounts to Mary Bean Chapin and Ralph Owen Chapin, but since the latter's illness it had been prorated between them; and (3) that from the beginning of the trust to August 1, 1940, Mary Bean Chapin received $30,416.55, which was $11,883.45 less than she would have received if the monthly amount of $450 had been paid, and Ralph Owen Chapin received $9,546.22, being $1,153.78 less than the full amount provided for him.

After the hearing the trial court instructed the trustees as follows:

"It is further ordered, adjudged and decreed by the Court that said testator contemplated a monthly division of the monthly income received and earned by said trust estate.

"It is further ordered, adjudged and decreed by the Court that said testator did not have in mind or intend by the terms of his said will in the event that in any calendar month the net income available for distribution should be insufficient to make the payments of income directed in said will that in any future month or months any such arrearages of income should be made up to the beneficiary or beneficiaries who did not receive it in past months; and that said testator did not intend that the trustees under his will should accumulate any income received in any month to be applied in the payment of any arrearages that might occur thereafter.

"It is further ordered, adjudged and decreed by the Court that the trustees under the will of said Lon F. Chapin, deceased, be and they hereby are instructed to pay the monthly income received from said trust estate, beginning with the month of May, 1940, available for distribution * * as follows: * * *

"Second: To said Mary Bean Chapin Four Hundred Fifty ($450.00) Dollars and to Ralph Owen Chapin One Hundred Fifty ($150.00) Dollars, or so much thereof as the remainder will proportionately permit; provided, however, that this paragraph is supplemental to and is not to be construed as conflicting with that portion of the order made by this Court in the matter of said estate dated January 9, 1939, embraced between line 23 on page 3 thereof and line 12 on page 4 thereof.

"Third: If the monthly income exceeds the amounts required by paragraphs First and Second immediately hereinabove set forth, then there shall be paid to each of Grace June Mitchell, daughter of said decedent, Ned Leroy Chapin, son of said decedent, and Alice May Fry, daughter of said decedent, the sum of $100.00 each, per month, or so much thereof, proportionately, as the remainder will permit.

"Fourth: If the monthly income exceeds the amounts required as set forth in Paragraphs First, Second and Third immediately hereinabove set forth, then that excess should be impounded by said trustees to the end of the calendar year and on January 2nd of the succeeding year any such surplus, as provided by Paragraph 7, Subdivision 4 of the aforesaid will of said decedent should be divided equally, between the following named persons, viz.: Mary Bean Chapin, Ralph Owen Chapin, Grace June Mitchell, Ned Leroy Chapin, Alice May Fry.

"This order does not contemplate nor does it instruct the trustees as to any other than monthly receipts and monthly payments of income. Jurisdiction hereby is retrained to further instruct the trustees as to disposition of corpus and/or income of said trust estate, in the event that income is received in any other manner than monthly."

The portion of the court's order of January 9, 1939, above referred to is merely a direction as to the means of carrying into effect the provisions of sub-paragraph (6) of paragraph seventh of the will above quoted and is not in dispute.

[1-4] Appellants contend that the trial court erroneously construed the will in making the order for monthly distribution based on monthly receipts instead of on annual income. Appellant Mary Bean Chapin urges that it improperly disregarded her right to have her "arrearages" paid

up before the remaining beneficiaries other than Ralph Owen Chapin received any payments. These questions involve only a construction of the terms of the will and are matters for the determination of the trial court. The construction which the trial court placed on the will appears reasonable and consistent with the intention of the testator. The words in sub-paragraph (5), "the remainder of said net income shall be paid monthly", shows that he intended that the amounts for Mary Bean Chapin and Ralph Owen Chapin should be paid first each month and then the monthly balance should be used to pay the amounts provided for the other three children, and that it was only after these sums had been paid that the trustees could retain any balance on hand to be divided among the beneficiaries at the end of the year. The will does not provide that any balance left each month after paying the amounts provided for Mary Bean Chapin and Ralph Owen Chapin should be kept in reserve to pay any arrearages which, as shown by the terms of the will itself, testator anticipated might occur. The provision upon which appellants rely, to the effect that the amounts to Mary Bean Chapin and Ralph Owen Chapin "shall be fully paid", is part of the same sentence in which the language above quoted appears, requiring division of the monthly balance among the other children; and to properly construe this sentence as a part of the will in its entirety it was the duty of the trial court to give effect to all of the terms of the instrument and if reasonably possible to reconcile any apparent inconsistencies. The interpretation of the trial court has this effect. When the construction given an instrument by a trial court appears to be reasonable and consistent with the intent of the party making it, courts of appellate jurisdiction will not substitute another interpretation even though it seems equally tenable. In re Estate of Boyd, 24 Cal.App. 2d 287, 74 P.2d 1049; In re Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193.

[5, 6] Contemporaneously with the execution of the will appellant Mary Bean Chapin executed an instrument, annexed to the will, consenting to all the terms of the will and waiving community property rights to make it effective. Contrary to her contention on this appeal her cooperation with her husband in that regard does not warrant any preference beyond that provided in the will itself; for although it was an advantage to the testator to have her waiver, it is apparent that she has already benefited by the trust and will benefit still further, and she is bound by the terms of the will to which she expressly consented.

[7] All parties concede that the extended illness of respondent Ralph Owen Chapin entitled him to the extra allowance so long as it continues. Appellants dislike to be bound to pay the additional amounts in the event of his restoration to health. To conform to the provisions of the will and the obvious intention of the trial court the order should be and it is hereby amended to add the following: "The additional payments to Ralph Owen Chapin which are provided to be made in event of his extended illness shall be in effect and continue only so long and for such periods as such illness and resulting incapacity to work shall continue." Code Civ.Proc. § 956a.

As thus amended the order is affirmed.

MOORE, P. J., and WOOD, J., concurred.

FREIRE v. MATSON NAV. CO.

S. F. 16587.

Supreme Court of California.

Nov. 14, 1941.

Rehearing Denied Dec. 11, 1941.

1. Workmen's compensation ⇐52

The Workmen's Compensation Act is to be liberally construed in favor of jurisdiction in the Industrial Accident Commission with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment, thus sparing them the necessity of speculative and expensive litigation and at the same time protecting the employer against excessive judgments. St.1937, p. 265, § 3202.

2. Workmen's compensation ⇐52, 2084

The rule that the Workmen's Compensation Act is to be liberally construed in favor of jurisdiction in the Industrial Accident Commission is not altered because injured employee believes that he can establish negligence on the part of his employer and brings a civil action for damages. St. 1937, p. 265, § 3202.

3. Workmen's compensation ⇐2084

If an injury falls within the scope of the Workmen's Compensation Act, a proceeding thereunder constitutes the injured employee's exclusive remedy. St.1937, p. 269, § 3601.

4. Workmen's compensation ⇐1103, 2106

If an employee is in doubt regarding whether his injury is sustained in course of his employment, he can protect himself against running of statute of limitations and be certain that his claim will be heard in the proper tribunal by filing both a civil action in the superior court and an application for compensation before the Industrial Accident Commission. St.1937, pp. 265, 269, §§ 3202, 3601.

5. Workmen's compensation ⇐719, 748, 750

Ordinarily, an employee is not entitled to workmen's compensation for an injury sustained in going to or departing from work, but he is entitled to compensation if the employment creates a special risk, for injuries sustained within the field of that risk, and such a risk may attend the employee as soon as he enters the employer's premises or the necessary means of accesses thereto, even when the latter is not under the employer's control or management.

6. Workmen's compensation ⇐756

Where steamship janitor, whose time for commencing work was 8:00 a. m., arrived at pier about 7:45 a. m., and was injured while alighting from taxicab on bulkhead when taxicab was struck by employer's automobile driven by another employee in scope of his employment, the bulkhead, which was under control of harbor commission and which was only means of reaching pier that had been assigned to employer and at which ship was moored, constituted the "means of access" within rule that an employee is entitled to workmen's compensation for injuries if employment creates a special risk which may attend employee as soon as he enters necessary means of access to employer's premises. St.1937, pp. 265, 269, §§ 3202, 3601.

See Words and Phrases, Permanent Edition, for all other definitions of "Means of Access".

7. Workmen's compensation ⇐645

Fact that an accident happens upon a public road and the danger is one to which general public is likewise exposed does not preclude the existence of a causal relationship between accident and employment, so as to render Workmen's Compensation Act applicable, if the danger is one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree. St.1937, pp. 265, 269, §§ 3202, 3601.

8. Workmen's compensation ⇐707, 756, 2084

Where steamship janitor, whose time for commencing work was 8:00 a. m., arrived at pier where ship was moored about 7:45 a. m., and was injured when automobile owned by employer and driven by another employee in scope of employment backed into taxicab from which janitor was alighting on bulkhead between pier and street, which bulkhead was under management of harbor commission, but which was used primarily for purposes of the employer, the injury was one "arising out of and in course of employment" precluding janitor from bringing action for personal injuries since his remedy was under the Compensation Act. St.1937, pp. 265, 269, §§ 3202, 3601.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of and in Course of Employment".

9. Workmen's compensation ⇐707

Where steamship janitor, whose time for commencing work was 8:00 a.m., arrived at

pier where ship was moored about 7:45 a.m., and was injured when automobile owned by employer and driven by another employee in scope of employment backed into taxicab from which janitor was alighting on bulkhead between pier and street, which bulkhead was under management of harbor commission, but which was used primarily for purposes of employer, the fact that the accident happened some minutes before the janitor was to begin work was immaterial in determining whether the janitor's remedy was under the Workmen's Compensation Act. St.1937, pp. 265, 269, §§ 3202, 3601.

10. Workmen's compensation ⇐707

An employment contemplates employee's entry upon and departure from employer's premises as much as it contemplates his working there, and must include a reasonable interval of time for that purpose, as regards whether injury sustained by employee some minutes before he was to begin work was within protection of Workmen's Compensation Act. St.1937, pp. 265, 269, §§ 3202, 3601.

In Bank.

Appeal from Superior Court, City and County of San Francisco; I. M. Golden, Judge.

Personal injury action by John Freire against the Matson Navigation Company. From a judgment entered on a directed verdict in favor of defendant, plaintiff appeals.

Affirmed.

For prior opinion of District Court of Appeal, see 109 P.2d 1022.

Rehearing denied; CURTIS and CARTER, JJ., dissenting.

Carl W. Wynkoop and Philander B. Beadle, both of San Francisco, for appellant.

Hoge, Pelton & Gunther, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondent.

TRAYNOR, Justice.

Plaintiff was employed as a janitor upon a steamship owned and operated by defendant company. He did not reside on the ship when it was moored, but reported regularly for duty at 8 a. m. at the steward's office on the vessel. On November 7, 1938, about 7:45 a. m., he arrived in a taxicab at pier 32 in San Francisco, where the ship was moored. The taxicab came to a stop on the bulkhead in front of the pier and plaintiff opened the door to get out. As he stepped upon the running board, an automobile owned by defendant company and driven by one of its employees in the scope of his employment, backed into the side of the taxicab, crushing plaintiff's foot. Plaintiff brought an action for damages in the superior court, contending that the injury occurred while he was going to work and therefore, under the going and coming rule, did not arise out of or occur in the course of his employment. Defendant contends that the plaintiff sustained the injury within the zone of employment and that his sole remedy lies under the Workmen's Compensation Act, with exclusive jurisdiction in the Industrial Accident Commission. The trial court directed a verdict for defendant company and plaintiff appeals from the judgment entered thereon.

[1-4] The Workmen's Compensation Act is to be liberally construed in favor of jurisdiction in the commission with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment, thus sparing them the necessity of speculative and expensive litigation, and at the same time protecting the employer against excessive judgments. Labor Code, sec. 3202, St.1937, p. 265; Fenton v. Industrial Acc. Comm., 44 Cal.App.2d 379, 112 P.2d 763. The rule is not altered because a plaintiff believes that he can establish negligence on the part of his employer and brings a civil suit for damages. If the injury falls within the scope of the act, a proceeding thereunder constitutes his exclusive remedy. Labor Code, sec. 3601, St.1937, p. 269; see cases cited in 27 Cal.Jur. 262, and 12 Cal. Jur.Ten Year Supp. 4-5. If an employee is in doubt whether or not his injury is sustained in the course of his employment, he can protect himself against the running of the statute of limitations and be certain that his claim will be heard in the proper tribunal by filing both a civil action in the superior court and an application for compensation before the commission. Schumacker v. Industrial Acc.Comm., 46 Cal. App.2d 95, 115 P.2d 571.

The question whether plaintiff's injury arose out of and in the course of his employment turns upon the relation of the bulkhead upon which the accident occurred to plaintiff's place of employment. The bulkhead is a strip of pavement approximately 62 feet wide that lies between the public street known as the Embarcadero

on the west and the piers and buildings on the east. The State Board of Harbor Commissioners have assigned to defendant company the use of piers 30 and 32, inclusive of the building thereon and the premises up to the bulkhead upon which the pier entrances face, but not inclusive of the bulkhead. While the bulkhead is under the control and management of the Harbor Commission, it constitutes the only means of reaching the pier, where the ship was moored, from the Embarcadero. That part of the bulkhead adjoining the premises assigned to defendant company appears to be used primarily for the purposes of the company. Thus, it serves to facilitate the handling of cargoes during periods of congestion and is used by persons having business with the company as a thoroughfare for their trucks, drays, and other vehicles, and by stevedores, seamen, passengers and visitors as a parking place. Defendant employs a large number of special officers who, in the course of their duties, control traffic on the bulkhead and keep the entrances to the piers clear. The gate to the piers opens at 8 o'clock, and those who arrive earlier must wait upon the bulkhead until that time. On the morning of the accident, the bulkhead was crowded with stevedores and other employees of defendant company who were waiting for the gate to open. The vehicles that were on the bulkhead at the time were there for the most part in connection with company business.

[5] It is well settled that while an employee is ordinarily not entitled to workmen's compensation for an injury sustained in going to or departing from work, he is entitled to compensation if the employment creates a special risk, for injuries sustained within the field of that risk. Such a risk may attend the employee as soon as he enters the employer's premises or the necessary means of access thereto, even when the latter is not under the employer's control or management. Starr Piano Co. v. Industrial Acc. Comm., 181 Cal. 433, 184 P. 860; Judson Mfg. Co. v. Industrial Acc. Comm., 181 Cal. 300, 184 P. 1; Globe Indemnity Co. v. Industrial Acc. Comm., 208 Cal. 715, 719, 284 P. 661. See Makins v. Industrial Acc. Comm., 198 Cal. 698, 701, 247 P. 202, 49 A.L.R. 411; Jimeson v. Industrial Acc. Comm., 23 Cal. App.2d 634, 638, 639, 73 P.2d 1238; Cromwell v. Los Angeles Ry. Corp., 102 Cal. App. 499, 502, 283 P. 375; 23 Cal.L.Rev. 366-367.

[6] It is evident from the facts in the instant case that the bulkhead is "the means of access" to the pier "required and authorized by the company", that it is "in fact, dominant as to user in the employer, servient to its purposes, and intimately associated with its plant as a part of its necessary establishment". Judson Mfg. Co. v. Industrial Acc. Comm., supra, 181 Cal. page 301, 184 P. page 1. In Judson Mfg. Co. v. Industrial Acc. Comm., supra, the employee was killed while walking on a path leading from the end of a public street to the gate of his employer's factory. The path was on the railroad right of way and was neither owned nor controlled by the employer, but the court awarded compensation upon the grounds that it was the necessary means of access to the employer's premises, required by the employer and contemplated in the employment, and that as between the employer and his employee it was in practice a part of the employer's plant. The only difference of note between the path in the Judson case and the bulkhead in the instant case is that the first was owned by a private third party while the latter is public property.

[7] Plaintiff contends that since the bulkhead is public property, he encountered no more hazard there than would any member of the public, that he was exposed to no special hazard incidental to his employment. The fact that an accident happens upon a public road and the danger is one to which the general public is likewise exposed, however, does not preclude the existence of a causal relationship between the accident and the employment if the danger is one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree. State Compensation Ins. Fund v. Industrial Acc. Comm., 194 Cal. 28, 31, 227 P. 168; Cudahy Packing Co. v. Parramore, 263 U.S. 418, 44 S.Ct. 153, 68 L.Ed. 366, 30 A.L.R. 532. In State Compensation Ins. Fund v. Industrial Acc. Comm., supra, the employee was awarded compensation for an injury sustained on a public sidewalk outside the entrance to her employer's premises. The entrance was one that she was required to use and the injury directly resulted from the slippery condition of this entrance and the adjoining runway over the sidewalk, caused

by the acts of other employees. In Cudahy Packing Co. v. Parramore, supra, the Supreme Court of the United States held that a causal relationship could be found between the employment and the death of an employee killed while crossing a railroad track on a public road that constituted the customary and only practical way of reaching the employer's plant. See also cases cited in note, 85 A.L.R. 97. Cf. Jimeson v. Industrial Acc. Comm., supra, 23 Cal.App.2d page 638, 73 P.2d 1238.

[8] In the instant case the plaintiff by reason of his employment was subjected to the risks arising on the bulkhead peculiarly and to an abnormal degree. At the time of his injury plaintiff was upon the bulkhead solely in the line of his duty as an employee. See Judson Mfg. Co. v. Industrial Acc. Comm., supra, 181 Cal. page 302, 184 P. 1. He was obliged to be there on the morning of the accident before 8 o'clock in readiness to go on the pier and thence to his ship at that time. The injury to plaintiff occurred upon the only practical means of access to the employer's premises. The hazard to which he was subjected when he arrived upon the bulkhead was created by his employer, its agents and those with whom it did business. See State Compensation Ins. Fund v. Industrial Acc. Comm., supra. Under these circumstances, the hazard was one directly connected with the employment and, under the authority of the cases cited, the injury was one arising out of and in the course of plaintiff's employment.

[9, 10] The fact that the accident happened some minutes before plaintiff was to begin work is immaterial. Judson Mfg. Co. v. Industrial Acc. Comm., supra. See Cromwell v. Los Angeles Ry. Corp., supra. "The employment contemplated his entry upon and departure from the premises as much as it contemplated his working there, and must include a reasonable interval of time for that purpose." Cudahy Packing Co. v. Parramore, supra, 263 U.S. page 426, 44 S.Ct. page 155, 68 L.Ed. 366, 30 A.L.R. 532.

The plaintiff's remedy, therefore, is under the Workmen's Compensation Act and the judgment from which plaintiff appeals is affirmed.

GIBSON, C. J., and SHENK and EDMONDS, J., concurred.

IRVINE v. GIBSON, County Treasurer, et al.

Sac. 5430

Supreme Court of California.

Nov. 14, 1941.

Rehearing Denied Dec. 11, 1941.

1. Mandamus ⇐7

Whether writ of mandamus should issue lies, to a considerable extent, in discretion of court to which the application is made. Code Civ.Proc. § 1086.

2. Mandamus ⇐10

The right to writ of mandamus must be clear and certain. Code Civ.Proc. § 1086.

3. Mandamus ⇐3(2)

Mandamus may not be resorted to as substitute for an adequate legal remedy. Code Civ.Proc. § 1086.

4. Mandamus ⇐1

The purpose of writ of mandamus is to prevent a failure of justice.

5. Mandamus ⇐5

Where an action at law was pending in superior court involving right of holder of bonds issued by reclamation district to recover principal and interest thereon, a petition for writ of mandamus to compel payment of principal and interest upon the bonds was denied on ground that petitioner was concurrently pursuing an "adequate legal remedy" for enforcement of right which he claimed. Code Civ.Proc. § 1086; Pol.Code, § 3480.

See Words and Phrases, Permanent Edition, for all other definitions of "Adequate Legal Remedy".

CARTER, J., dissenting.

In Bank.

Mandamus proceeding by James Irvine against California Gibson, Treasurer of the County of Colusa, as trustee, etc., and others, to compel payment of principal and interest from date of maturity upon bonds issued by Reclamation District No. 108.

Proceeding dismissed, without prejudice to petitioner's right to prosecute an action pending in the superior court.

For prior opinion, see, Cal.App., 104 P.2d 697.

Rehearing denied; SHENK and CARTER, JJ., dissenting.

W. Coburn Cook, of Turlock, for petitioner.

George Herrington, of San Francisco (Orrick, Dahlquist, Neff & Herrington, of San Francisco, of counsel), for Mary E. Morris, amici curiae for petitioner.

Horace B. Wulff, of Sacramento, Thomas Rutledge, of Colusa, Huston, Huston & Huston, of Woodland, and Hudson Ford, of Colusa, for respondents.

Milton T. Farmer and Edward G. Chandler, both of San Francisco, amici curiae for respondents.

EDMONDS, Justice.

The petitioner is the owner of bonds in the face amount of $16,000 issued by the respondent reclamation district pursuant to the provisions of section 3480 of the Political Code. The bonds matured on January 1, 1936, and $10,400 of the original principal sum was paid on April 26, 1939. Interest upon the total amount of $16,000 has been paid in full to date of maturity. The purpose of this proceeding in mandamus is to compel the payment of the $5,000 of principal remaining unpaid, together with interest upon $16,000 from date of maturity to April 26, 1939, and upon $5,600 from the last named date.

As grounds for the issuance of the writ of mandate, the petitioner pleaded the facts which have been stated and that there is sufficient money in the bond fund of the respondent district to pay the amounts claimed by him as well as all other obligations of that fund. The following was also alleged: On December, 27, 1938, petitioner commenced an action in the superior court, naming as defendants the persons who are the respondents in this proceeding and also the reclamation district. As the cause of action in that suit he stated the same facts relating to his ownership of the bonds and the payment of principal and interest thereon as are alleged in the present proceeding and prayed judgment for $5,600 and interest upon unpaid principal from January 1, 1936. That action is now at issue and is ready for trial.

The respondents demurred to the petition and by answer denied the allegations of the petitioner that the respondent treasurer "refuses to pay the amount remaining of the principal of said bonds except upon surrender of the bonds and waiver of interest." They also pleaded, in both demurrer and answer, that the petitioner's right to recover is barred by the statute of limitations.

[1-4] The writ of mandate must be issued "in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law". Sec. 1086, Code Civ.Proc. Whether, in a particular case, the writ should issue, lies, to a considerable extent, in the discretion of the court to which the application is made. Rogers v. Board of Directors of Pasadena, 218 Cal. 221, 22 P.2d 509; Hitch v. Superior Court 2 Cal.App.2d 406, 38 P.2d 190; 16 Cal. Jur. 768. The right to the writ must be clear and certain (Dobyns v. Cheshire, 9 Cal.App.2d 77, 48 P.2d 743), and mandamus may not be resorted to as the substitute for an adequate legal remedy. McPherson v. City of Los Angeles, 8 Cal.2d 748, 68 P.2d 707; Northrup v. Haynes, 15 Cal.App.2d 665, 59 P.2d 1056; Coon v. Biscailuz, 1 CalApp.2d 346, 36 P.2d 430; Potomac Oil Co. v. Dye, 10 Cal.App. 534, 102 P. 677. The purpose of the writ in this state, as at common law, is to prevent a failure of justice.

[5] The petitioner in the present proceeding has not only shown that there is an adequate legal remedy for the enforcement of the right which he claims, but also that he is concurrently pursuing that remedy. Without bringing his action in the superior court to trial, he is attempting, by this proceeding in mandamus, to attain the same result for which he brought suit. In this respect he is in exactly the same position as the petitioner in Keyston v. Banta-Carbona Irr. Dist., 19 Cal.App.2d 384, 65 P.2d 371, where the proceeding was dismissed upon a showing that there was an action pending which involved the same parties and issues.

In the present case, the petitioner is not only proceeding in both courts but he is relying upon the pending action in the superior court as the basis of his asserted right to a writ of mandate. In his brief, he contends that the statute of limitations applicable to the bonds is four years and that it is not suspended by the lack of funds in the hands of the county treasurer to meet principal and interest upon them. But he declares that he is entitled to the writ because the suit which he filed has tolled the statute.

Under these circumstances, it is obvious that, even if the rule of the Keyston case was not applied, the issues presented in the instant proceeding may not properly be de-

cided by this court. So far as the bar of the statute of limitations is concerned, the petitioner's rights should be determined by the superior court as of the date when he filed the suit. That court should also determine the question of fact raised by the treasurer's answer here, which, under long established practice, would compel a reference.

The proceeding is dismissed without prejudice to the petitioner's rights to prosecute the pending action.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent.

The petitioner first sought a writ of mandate in this case in the District Court of Appeal, Third Appellate District. Respondents demurred and answered, but there was no denial of petitioner's allegation that he had no speedy or adequate remedy at law. The District Court of Appeal prepared a comprehensive decision on the merits of the controversy. No suggestion was made in that decision or by any of the parties to the proceeding that mandamus was not the appropriate proceeding to determine the issues. The decision being against petitioner he petitioned the District Court of Appeal for a rehearing and filed therein an amended petition for a writ of mandate in which he alleged that prior to the filing of the original petition for a writ of mandate he had commenced an action at law in the superior court to recover the principal and interest on the bonds, the payment of which was sought to be compelled by the mandamus proceeding, and that that action tolled the statute of limitations. The rehearing and amended petition were denied. A hearing by this court was granted and the cause thereby transferred to this court for hearing and decision.

The case has been comprehensively and ably briefed on the merits. Several amici curiae have filed briefs in the case.

One of the main issues in the controversy is whether or not reclamation district bonds bear interest after maturity, an issue which is of considerable public importance and may well involve many bondholders as well as numerous public corporations and agencies of the state. It may well be that an uncertainty in the law in that respect will result in such agencies being burdened with additional obligations, that is, the interest accruing pending a determination of the issue, if the ultimate conclusion is that interest is payable after maturity. The time attendant upon a trial of the case in the superior court followed by an appeal, would bring about such a result.

Under the circumstances above outlined, I believe that it is an improper and unjustifiable exercise by this court of its discretion to refuse to decide the merits of this case merely because petitioner has a remedy at law in the lower court. If the writ is to be denied on that ground it should have been done in the first instance and not after counsel have expended valuable effort and time, as well as money presenting the case, and a decision thereon has been rendered on the merits by the District Court of Appeal, and a hearing granted by this court. While it may be true as a general rule that this court in its discretion may refuse to issue the writ for the reasons advanced in the majority opinion, I believe that under the circumstances here presented, technicalities and form should give way to considerations of public importance and fair treatment of counsel and the litigants here involved. No useful purpose can be served by compelling the parties to litigate the cause anew in the superior court. An appeal would in all probability be taken from any judgment entered therein. The whole subject would have to be again briefed and presented to an appellate court and a decision prepared by the latter. To require that unnecessary delay and repetition is not consonant with the function of courts or with the worthy policy of speeding up the judicial machinery to the end that justice shall be a reality rather than a myth.

MITCHELL, Insurance Commissioner, v. AUTOMOBILE OWNERS INDEMNITY UNDERWRITERS.

L. A. 17146.

Supreme Court of California.

Nov. 13, 1941.

Rehearing Denied Dec. 11, 1941.

1. Limitation of actions ⇐167(1)

The statute providing that a lien is extinguished by lapse of time within which action can be brought on principal obligation prevents pledgee from taking affirmative action to enforce his pledge lien for purpose of collecting a barred principal indebtedness. Civ.Code, § 2911.

2. Limitation of actions ⇐165

The bar of statute of limitations affects the remedy only and does not impair the obligation.

3. Limitation of actions ⇐167(1)

While a pledgee cannot take affirmative action to enforce his pledge lien for purpose of collecting a principal indebtedness which is barred by statute of limitations, the pledgee nevertheless has the negative right to retain the pledged security until the principal obligation is satisfied. Civ.Code, § 2911.

4. Limitation of actions ⇐167(1)

The statute providing that lien is extinguished by lapse of time within which an action can be brought on principal obligation does not prohibit all affirmative action by pledgee in connection with pledged collateral, but merely a proceeding against debtor to collect outlawed obligation by foreclosing the pledge lien. Civ.Code, § 2911.

5. Limitation of actions ⇐167(1)

An action to collect pledged securities is not a proceeding on principal indebtedness, and can be maintained, notwithstanding that the principal indebtedness is barred by lapse of time. Civ.Code, § 2911.

6. Pledges ⇐30(2)

A pledgee has not only the right but also the duty to collect the evidence of a debt pledged, lest the remedy on the collateral be barred by statute of limitations and he be held liable to pledgor for failure adequately to protect security left in his possession. Civ. Code, § 3006.

7. Limitation of actions ⇐167(1)

A pledgee's right to collect evidence of a debt pledged as security for principal indebtedness is not lost by running of statute of limitations on principal indebtedness, since otherwise no one would have a cause of action to enforce payment of the collateral when due, and the statute of limitations would ultimately run upon it.

8. Limitation of actions ⇐172

A junior lienholder is in the same position as debtor and can invoke aid of statute of limitations only when pledgee or mortgagee is seeking to foreclose his lien in an effort to collect an outlawed obligation. Civ. Code, § 2911.

9. Limitation of actions ⇐172

A pledgee had right to collect on collateral more than four years after note for which collateral was given had matured, notwithstanding that rights of junior lienholder were involved, where junior lienholder was the debtor upon the outlawed principal obligation, and was not entitled to benefit of equity when he was not offering to do equity. Civ.Code, § 2911.

10. Judgment ⇐489

In absence of some ground of estoppel, parties and their privies can collaterally impeach a judgment void on its face for lack of jurisdiction, and such right of impeachment does not depend upon any showing of prejudice to their interests.

11. Judgment ⇐494

Strangers to record may attack a void judgment only when, if the judgment were given full effect, some right in them would be affected by its enforcement.

12. Appeal and error ⇐1036(4)

Where pledgee of note and deed of trust given as collateral security for principal note had right, at the time the pledgee instituted proceedings for substitution of trustee, to collect the pledged collateral by foreclosing the deed of trust, the decree of substitution, if void, was not prejudicial to bankruptcy trustee of estate of maker of principal note, since a successful attack on the decree of substitution would avail him nothing.

In Bank.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Liquidation proceeding by E. Forrest Mitchell, as Insurance Commissioner, against the Automobile Owners Indemnity Underwriters, an inter-insurance exchange.

E. Forrest Mitchell was succeeded by Rex B. Goodcell. From a judgment denying the petition of Harry Ashton, as trustee in bankruptcy of the estate of Jerome M. Glaze, bankrupt, for an injunction restraining a sale by which the liquidator sought to collect on collateral pledged by bankrupt to secure a note executed by bankrupt to the inter-insurance exchange, the trustee in bankruptcy appeals.

Affirmed.

Rehearing denied; CARTER, J., dissenting.

Edwin J. Miller, of Los Angeles, for appellant.

Eugene P. Fay, of Los Angeles, for respondent.

EDMONDS, Justice.

Considering only the essential facts relating to the controversy which is the subject of this appeal, the question for decision concerns the right of a pledgee to collect upon collateral more than four years after the note for which the collateral was given had matured.

The Insurance Commissioner of the state is liquidating Automobile Owners Indemnity Underwriters, an inter-insurance exchange, under appointment of the superior court. In his capacity as liquidator, the Commissioner holds a note and deed of trust made by one Bassett which were given to the underwriters as collateral security for a note executed by Jerome M. Glaze in its favor. Glaze has been adjudicated a bankrupt; Ashton is the trustee of his estate.

Among the assets of the Glaze estate is a note made by Bassett also secured by a deed of trust of the property described in the one held by the liquidator. It is conceded that the deed of trust held by Ashton is junior to the one in the possession of the liquidator. Each of the Bassett notes and that of Glaze is in default.

The liquidator filed a petition in the superior court of Kern county alleging an inability to find the two trustees named in the Bassett deed of trust and requesting an order discharging them and the appointment of W. P. Wood in their stead. The court entered a decree as requested. Thereafter, at the request of the liquidator, Wood filed a declaration of default and election to sell and proceeded to sell the property described in the deed of trust.

Thereupon Ashton, as trustee, petitioned the superior court for leave to sue the liquidator for the purpose of enjoining such sale. His petition was granted to the extent that he was authorized to submit the question concerning the respective rights of the parties to that court. Ashton then filed a petition asking that the liquidator and the trustee under the Bassett deed of trust held by the liquidator be enjoined from selling the real property described therein. As the basis for such an order, Ashton alleged that because the note made by Glaze had become due more than four years before, the lien of the pledgee upon the Bassett note and deed of trust had expired and the liquidator could not by the affirmative action of a sale, collect upon the collateral.

The liquidator and the trustee under the deed of trust held by him answered the allegations of Ashton's petition and set up certain affirmative defenses. Upon a hearing of the issues thus presented, the superior court denied the petition with prejudice. The appeal is from that order.

According to petitioner, where collateral securities are pledged to the payment of a note, any affirmative action on the part of the pledgee to collect such collateral is barred when the right of action on the note is extinguished by lapse of time. To hold otherwise, he asserts, would permit the pledgee to collect an outlawed debt in contravention of section 2911 of the Civil Code; therefore, the liquidator should be enjoined from collecting the Bassett note in his possession by a foreclosure of the deed of trust, since the Glaze note, to the payment of which such securities were pledged, is now barred by the statute of limitations. Petitioner also challenges the authority of Wood to act as trustee, contending that the proceedings which resulted in his substitution were void.

[1-3] Section 2911 of the Civil Code provides: "A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." The effect of this section, it has been held, is to prevent a pledgee from taking affirmative action to enforce his pledge lien for the purpose of collecting a barred principal indebtedness. Puckhaber v. Henry, 152 Cal. 419, 93 P. 114, 125 Am.St.Rep. 75, 14 Ann.Cas. 844; Anglo-California Trust Co. v. Holbrook, 218 Cal. 531, 24 P.2d 169; Knoll v. Melone, 1 Cal.App. 637, 82 P. 982; Goldwater v. Hibernia Savings etc., Soc., 19

Cal.App. 511, 126 P. 861, 863. The bar of the statute of limitations, however, affects the remedy only and does not impair the obligation. Accordingly, although the pledge lien is extinguished and the affirmative action of foreclosure thus lost, the pledgee nevertheless has the negative right to retain the pledged security until the principal obligation has been satisfied. Zellerbach v. Allenberg, 99 Cal. 57, 33 P. 786; Puckhaber v. Henry, supra; Bridge v. Connecticut Mutual Life Ins. Co., 167 Cal. 774, 141 P. 375; Woodruff v. Benbow, 118 Cal.App. 318, 5 P.2d 73.

[4] Moreover, contrary to the claim of petitioner, neither the language of the Code section nor the decisions construing it prohibit all affirmative action by the pledgee in connection with the pledged collateral; the affirmative action which, it has been held, may not be taken, is a proceeding against the debtor to collect the outlawed obligation by foreclosing the pledge lien. In seeking to collect the Bassett note by a sale in accordance with the provisions of the deed of trust securing it, the liquidator is not foreclosing his lien by way of pledge nor proceeding affirmatively upon the outlawed Glaze note. He is merely collecting the proceeds of collateral pledged as security for such note.

[5] That an action to collect pledged securities is not a proceeding upon the principal indebtedness is clearly established by the case of Merced Security Sav. Bank v. Casaccia, 103 Cal. 641, 37 P. 648, 649. There, the note and mortgage of a third party were assigned to the creditor as collateral security for the debtor's note. In deciding whether an action to foreclose the mortgage was a proceeding for the recovery of the principal debt, the court said: "The mortgage was not given to secure the principal debt of defendant to plaintiff. It was a collateral matter. The suit to foreclose it was not an action for the recovery of the principal debt. It was an act for the preservation of the security. * * *" This decision was later approved and followed in McArthur v. Magee, 114 Cal. 126, 45 P. 1068.

To the same effect is Puckhaber v. Henry, supra, which concerned a policy of insurance on the life of a debtor pledged to secure a promissory note. At the time of the debtor's death the obligation evidenced by the note had become barred by lapse of time. The amount due upon the policy was paid into court and was claimed by the administratrix of the debtor's estate and the creditor-pledgee. In rejecting the contention of the administratrix that, because the statute of limitations had run upon the note, the pledgee could not collect the proceeds of the insurance policy, the court reasoned that the pledgee's authority to retain possession of the policy until his debt was satisfied included the additional right to collect the proceeds thereof when due. In the language of the court, "the money paid into court as proceeds of the policy has merely taken the place of the policy held in possession by the plaintiff, and for all the purposes of this action should be deemed to be in the possession of the plaintiff" [152 Cal. 419, 93 P. 116].

This case was cited and followed in Bridge v. Connecticut Mutual Life Ins. Co., supra, upon an identical factual situation. And in Savings Union Bank v. Crowley, 176 Cal. 543, 169 P. 67, it was held that the pledgee of stock could lawfully collect the dividends declared on such stock and apply them in satisfaction of her debt notwithstanding the running of the statute of limitations upon the note representing that debt.

[6, 7] It is not only the pledgee's right but also his duty to collect the evidence of a debt pledged lest the remedy on the collateral be barred by the statute of limitations and he be held liable to the pledgor for failure adequately to protect the security left in his possession. Civ.Code, sec. 3006; Traders' Bank v. Wilcox, 42 Cal.App. 24, 183 P. 256; Hawley Bros., etc. v. Brownstone, 123 Cal. 643, 56 P. 468. This right is not lost by the running of the statute of limitations on the principal indebtedness. In fact, it is of paramount interest to the pledgor that the pledgee retain the right of collection under such circumstances. Under the cases cited, unless he is able and willing to satisfy the outlawed debt, the pledgor may not compel the pledgee to relinquish the pledged collateral. Without the right of collection in the pledgee, no one would have a cause of action to enforce payment of the collateral when due, and the statute of limitations would ultimately run upon it.

[8, 9] Petitioner contends that this rule is inapplicable when the rights of a junior lienholder are involved. The authorities, however, indicate that the junior lienholder is in the same position as the debtor and may invoke the aid of the statute of limita-

tions only when the pledgee or mortgagee is seeking to foreclose his lien in an effort to collect an outlawed obligation. Flack v. Boland, 11 Cal.2d 103, 77 P.2d 1090; Anglo-California Trust Co. v. Holbrook, supra. In the present case the liquidator is attempting no such affirmative action but is seeking merely to collect pledged collateral in accordance with his right and duty as a pledgee; the junior lienholder is the debtor upon the outlawed principal obligation and, under the circumstances here shown, is not entitled to the benefit of equity when he is not offering to do equity.

The question remains whether the order of the Kern county superior court discharging the two former trustees under the Bassett deed of trust and appointing Wood as their successor was void. It is the contention of petitioner that the court was without jurisdiction to enter the decree of substitution because the liquidator, as a pledgee, was without power to institute such proceedings. The petitioner asserts in this regard that neither the removed trustees nor petitioner, as beneficiary under the trust deed, were made parties in the action or served with notice therein; and the cause for removal of the former trustees, as stated in the petition, is not one of the statutory grounds included in sections 2281, 2282, and 2287 of the Civil Code.

[10, 11] It is elementary that, in the absence of some ground of estoppel, parties and their privies may collaterally impeach a judgment void on its face for lack of jurisdiction. Forbes v. Hyde, 31 Cal. 342; Rue v. Quinn, 137 Cal. 651, 66 P. 216, 70 P. 732; Estate of Pusey, 180 Cal. 368, 181 P. 648; see cases cited in 15 Cal.Jur. 49. This right does not depend upon any showing of prejudice to their interests. As to strangers to the record, however, a different rule obtains. They may attack a void judgment only when, if the judgment were given full effect, some right in them would be affected by its enforcement. Swallow v. Tungsten Products Co., 205 Cal. 207, 270 P. 366; Bennett v. Wilson, 133 Cal. 379, 65 P. 880, 85 Am.St.Rep. 207; Freeman on Judgments, vol. 1, pp. 636–639.

[12] Neither the petitioner nor Glaze, in whose shoes he stands, was a party to the proceedings for the substitution of the trustee. Accordingly, under the principles which have been heretofore stated, as the liquidator has the right to collect the pledged collateral by foreclosing the Bassett deed of trust held by him, he had this right at the time he instituted proceedings for the substitution of Wood as trustee. The petitioner therefore has not been prejudiced by the decree of substitution, assuming it to be void. None of his substantive rights has been injured. A successful attack on the decree of substitution would avail him nothing, for the liquidator is entitled to foreclose the deed of trust held by him through action of the trustees therein named or another validly substituted.

These conclusions make it unnecessary to discuss the points raised by the respondents.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.



DAVIS v. STATE BAR OF CALIFORNIA.

L. A. 17656.

Supreme Court of California.

Nov. 14, 1941.

Rehearing Granted Dec. 12, 1941.

1. Attorney and client ⇐54

Under statute requiring Board of Governors to make findings of fact in all disciplinary proceedings resulting in a recommendation to the Supreme Court for disbarment or suspension, board may adopt or reject findings of a local administrative committee in whole or in part, and may also take additional evidence and make other findings. St.1939, pp. 351, 356, §§ 6043, 6080.

2. Attorney and client ⇐53(1)

In a disbarment proceeding, intendments are in favor of the accused attorney.

3. Attorney and client ⇐39

An attorney, to whom client pledged diamond rings to secure payment of attorney's fees for services rendered to others, could not sell the rings without notice to client and a reasonable opportunity to redeem the rings, and in failing to give notice of their sale notwithstanding client's demand for return of the rings attorney "embezzled" his client's property, on issue whether attorney was guilty of conduct involving moral turpitude authorizing disbarment.

See Words and Phrases, Permanent Edition, for all other definitions of "Embezzle".

4. Attorney and client ⇐44(2)

In dealing with property pledged by a client, attorney's professional duty requires him to act toward client in the utmost good faith as well as to comply with the law concerning bailments.

5. Attorney and client ⇐123(1)

An agreement between an attorney and his client by which attorney receives any advantage is presumed to be void and burden is upon attorney to prove that client freely entered into the agreement.

6. Attorney and client ⇐38, 39

An attorney who embezzled his client's diamond rings which client pledged with attorney to secure payment of attorney's fees, who signed a verification in blank which was thereafter used in connection with a cross-complaint filed in a replevin action against the attorney, and who committed perjury in his deposition given in replevin action was disbarred.

CARTER, J., dissenting.

In Bank.

Proceeding by Harold L. Davis to review the recommendations of the Board of Governors of the State Bar of California that petitioner be disbarred from the practice of law.

Petitioner disbarred.

For prior opinion, see 110 P.2d 659.

Morris Lavine, of Los Angeles, for petitioner.

Claude Minard, of San Francisco, and Louis W. Myers, and Guy Richards Crump, both of Los Angeles, (Paul Vallée and B. E. Ahlport, both of Los Angeles, of counsel), for respondent.

PER CURIAM.

This proceeding was brought to review the recommendations of the board of governors of the State Bar that the petitioner be disbarred from the practice of law.

The petitioner's difficulties arose out of his dealings with Mrs. Marie Monast, who was arrested and placed in jail on a charge of possessing narcotics. Through a man named Evans, a self-styled "bouncer" in a Hollywood night club, she employed the petitioner and another lawyer to represent her. To secure the payment of their fee of $2,000 she pledged with Davis two diamond rings having a value in excess of that sum. The petitioner signed a typewritten receipt for them which, as originally written, recited that they were deposited as security for attorneys' fees "and bond". When the receipt was offered in evidence, a line had been drawn through the words "and bond".

Davis procured a bail bond from a surety company and Mrs. Monast was released from jail. She paid the premium on the bond. The attorneys' fee was paid in three instalments, the last of which was made on May 26, 1937. On July 19, 1937, when she failed to appear for trial in the superior court, the bond was forfeited. Later, upon representations of Davis that she was ill, the matter was continued one week. At that time there was a trial by the court, a jury having been waived, and judgment of conviction. She immediately filed an application for probation, which was granted the same day. A condition of probation was that she should leave California and not return. A few days later she sailed for Honolulu and has not returned. Upon this disposition of the case her bond was exonerated.

On July 17, 1937, Irene Davidson and Catherine Wall were arrested and jailed in Los Angeles on charges of grand theft. They too, through Tom Evans, retained Davis and his associate as counsel. Shortly after their arrest, Davis filed a petition for writ of habeas corpus and secured their release on bail by posting a bond of $1,000 for each one of them. These bonds were secured by Davis from the same surety company which had posted bail for Marie Monast. When arraigned in municipal court, the bail of each defendant was increased to $3,500. This they were unable to furnish, and in consequence they were remanded to the county jail, where they remained until sentenced.

When these two women were arrested, Marie Monast had paid the premium on her bond and all of her attorneys' fees in her case. On the day after she was to appear for trial, the petitioner pawned for $350 the two diamond rings pledged with him by her. Approximately two months after Mrs. Monast left for Honolulu, Davis sold the pawn ticket for $200, and the purchaser subsequently redeemed the rings from the pawnbroker. Thereafter Mrs. Monast brought a replevin action against Davis to secure possession of the rings. Davis then repurchased the rings and after the institution of the disciplinary proceedings against him, returned them to her.

All of the facts which have been stated stand undisputed. But there is a direct conflict between the petitioner and Mrs. Monast concerning the agreement under which she pledged the rings with him. He testified that when he signed the receipt for the rings the words "and bond" had not been crossed out. Mrs. Monast testified positively that she refused to accept it until this was done.

In further explanation of his action in disposing of the jewelry the petitioner testified that "they were to be returned to her when the bond was either exonerated or otherwise had been disposed of and the fee had been paid". He also testified that he represented Catherine Wall and Irene Davidson upon the representation of Evans "that he had talked to Mrs. Monast and that she was willing to take care of their case and for me to come and get them out [of jail]". Later, he said, he talked with Mrs. Monast and told her Tom Evans had called him in connection with the case of these women. "And did she indicate", he was asked, "in any wise whatsoever that she was not going to be responsible for their bond and attorneys fees"? "No", was his reply. "If she had, I wouldn't have gone ahead with them." According to his testimony, he told Mrs. Monast "in the beginning" that his fee would be $250 for each woman and that he was going to keep the jewelry. But he also related a conversation he had with Mrs. Monast at the county jail when "she apparently was highly dissatisfied and said that these two girls were dissatisfied the way the preliminary hearing had been handled; said they were going to get other counsel and that she didn't intend to pay for their fee or bond".

The testimony of Mrs. Monast, taken by deposition, is in direct contradiction to that of petitioner. She said: "I never talked to Mr. Davis concerning Katherine Wall and Irene Davidson. * * * I am positive that I never told Harold L. Davis, or anyone else, that I would pay the fees for [them] * * *, or either of them, as I had no reason for assisting these women. * * * I never told [them] * * * that I would be responsible for their bonds or attorney's fees at any time in the county jail in Los Angeles, or any place else."

The charges made against the petitioner are that he improperly disposed of the diamond rings pledged with him, that he filed a false and improper cross-complaint in the replevin action, and that he gave false testimony in a deposition taken in connection with that litigation. The local administrative committee of The State Bar before whom the issues were tried found in petitioner's favor on all charges with the exception of that concerning the allegations of the cross-complaint. On that issue it found that such allegations were due to the error of Davis' associate in preparing the cross-complaint and through the careless conduct of the petitioner in signing a verification of it in blank. Upon these findings the committee recommended that Davis be given a private reprimand. When the board of governors received the findings and recommendations of the administrative committee it set a time at which the matter would be heard and notified the petitioner to appear and show cause why a greater degree of discipline than that fixed by the committee should not be recommended to the Supreme Court. Following the hearing, at which the petitioner testified in his own behalf, the board adopted findings of fact contrary to those of the committee and recommended his disbarment.

[1] Petitioner contends that without a trial de novo the board of governors was without jurisdiction to do more than accept the determination of the local administrative committee. But the State Bar Act requires the board of governors to make findings of fact in all disciplinary proceedings resulting in a recommendation to the Supreme Court for disbarment or suspension. § 6080, Bus. and Prof. Code, St. 1939, p. 356. In fulfillment of this duty, the board may adopt or reject the findings of a local administrative committee in whole or in part and it may also take additional evidence and make other findings. See Smallberg v. State Bar, 212 Cal. 113, 297 P. 916; Sawyer v. State Bar, 220 Cal. 702, 707, 32 P.2d 369. The authority given the board by section 6043 of the State Bar Act St. 1939, p. 351, to take additional evidence without a trial de novo would have no purpose if the board, after hearing that evidence, could not make additional findings or findings different from those of the committee.

The conclusion of the board of governors that the petitioner violated his oath as an attorney at law and is guilty of conduct involving moral turpitude rests upon its

findings that although the agreement of Mrs. Monast, to secure the performance of which she had pledged the rings, had been fully performed, Davis sold them as his own property; that he testified falsely upon the taking of his deposition concerning the transaction; and that he swore to certain allegations in a cross-complaint which were false and untrue. In reaching its decision, the board of governors considered not only the record of the proceeding before the local administrative committee, but also the testimony of the petitioner given when this record was under review.

[2] The State Bar recognizes the rule that in a disbarment proceeding the intendment should be in favor of the accused attorney. But it insists that, deciding every question of fact upon which there was the slightest conflict in testimony in favor of the petitioner, his testimony shows that he embezzled his client's property and in his deposition in the replevin suit committed perjury. His testimony also shows, says the State Bar, that as a basis for his defense to that suit, he endeavored to induce the bail bondsmen to falsify their records concerning the bonds of Wall and Davidson. It also contends that the record justifies its finding that the petitioner's verification of his cross-complaint was not an inadvertence.

[3] The circumstances under which Davis disposed of the rings were related by Irving Glasser, a friend of the petitioner. He declared Davis told him "he had these rings in pawn, that he wanted to dispose of the ticket, and thereby sell the rings". His testimony is uncontradicted, and is corroborated by that of the petitioner, who stated in his deposition that when he sold the ticket to Glasser it was understood the latter could "take it and sell it or do as he pleased with it". Assuming that Mrs. Monast had told the petitioner she would pay for his services in behalf of Catherine Wall and Irene Davidson and that he might hold her rings as security therefor, he had no authority to sell the rings without notice to her. The law required him to give her notice and a reasonable opportunity to redeem her property. The petitioner admits that she had demanded the return of her rings and that he gave her no notice whatever of their sale. Under these circumstances, it conclusively appears, from his own testimony, that he embezzled his client's property. People v. Fleming, 220 Cal. 601, 32 P.2d 593; People v. Tambara, 192 Cal. 236, 219 P. 745.

[4, 5] In dealing with the property pledged by his client, the petitioner's professional duty required him to act toward her in the utmost good faith as well as to comply with the law concerning bailments. An agreement between an attorney and his client by which the attorney receives any advantage is presumed to be void and the burden is upon the attorney to prove that the client freely entered into the agreement. The record in the present case shows, without contradiction, that Mrs. Monast, because of her addiction to morphine, was not responsible at all times between her arrest and her departure for Honolulu; indeed, the petitioner testified that on one occasion when he talked with her concerning the rings, she had not fully recovered from the the effects of the drug. Moreover, when Mrs. Monast demanded the return of the rings and commenced suit against him, he attempted to justify his actions by having the bail bond broker change his books to show a charge of $500 for the bail bonds of Irene Davidson and Catherine Wall instead of $200, which was the premium fixed for them when they were issued. But neither the original premiums nor the increased amounts were ever charged to the petitioner.

Concerning the verified cross-complaint in the replevin action, the petitioner admits that its allegations are untrue. He testified that he signed and swore to it before the pleading was completed and that the attorney who drew it for him misunderstood the facts. It is significant that the petitioner did not call this attorney as a witness in his behalf and that the cross-complaint pleaded a cause of action for the recovery of an attorney's fee of $500 and $500 for bail bond premiums which were never paid by him. He admitted before the board of governors that he asked Glasser to change his records as the basis of an offset to Mrs. Monast's claim against him and Glasser corroborated his testimony in this regard. The board of governors found that "the allegations of said cross-complaint were wholly false and were known by said Harold L. Davis to be false when he verified the same". This finding is fully supported by the evidence.

[6] The petitioner's own testimony as to the other charges against him shows clearly that he committed perjury in his

deposition given in connection with Mrs. Monast's suit to replevin the rings. He testified that the rings had been delivered to the bail bond company as security for premiums due on bonds. But the petitioner testified before the local administrative committee that he pledged the rings with the Provident Loan Association. Moreover, Glasser, the bail bond broker, who was the petitioner's witness, not only testified that these premiums were never charged against Davis, but that he purchased the rings in a personal transaction.

Under these circumstances, the testimony of the petitioner at his deposition as to the disposition of the rings warrants disciplinary action even if his version of the agreement with Mrs. Monast concerning the rings is accepted. Authority to dispose of them, conceding it to exist, cannot justify perjury committed in an explanation of the manner of exercising that authority.

It is, therefore, ordered that the petitioner be disbarred from the practice of the law in California and that his name be stricken from the roll of attorneys, this order to become effective thirty days after it is filed.

CARTER, Justice (dissenting).

I dissent.

The majority opinion, which is the second decision by this court in this case, while stating that "The State Bar recognizes the rule that in a disbarment proceeding the intendment should be in favor of the accused attorney", clearly ignores this rule in the disposition of this case, as both the board of governors and majority of this court have resolved all intendments against the accused and ignored the specific findings of fact by the local administrative committee in his favor as well as the conclusion of said committee, which is as follows:

"From the foregoing facts the committee concludes that the respondent did not violate his oath and duties as an attorney and counselor at law within the meaning of subdivision 2 of section 287 of the Code of Civil Procedure of the State of California.

"The committee further concludes that respondent did not commit any act or acts involving moral turpitude and dishonesty within the meaning of subdivision 5 of section 287 of the Code of Civil Procedure of the State of California.

"The committee does conclude that the act of respondent in signing a verification in blank which was thereafter used in connection with a pleading was reprehensible conduct and conduct which should severely be condemned and is hereby so condemned. The committee recommends that respondent be advised of this in an appropriate communication."

While it is true that petitioner testified at the hearing of this proceeding before the board of governors of the State Bar of California, there is nothing in his testimony which in any way tends to support the findings and recommendation of the board of governors and there was no other evidence before the board except the record of the proceedings before the local administrative committee upon which its findings were based.

The record shows that the local administrative committee considered the testimony of Mrs. Monast entirely unreliable and from the circumstances surrounding the case it appears that adequate grounds for that conclusion existed. With respect to the charge of embezzlement the pivotal point in the case is whether the pledge of the jewelry was changed from that relation to one in which petitioner had authority to dispose of it. The evidence on that subject as partially related by the majority opinion is that: "In further explanation of his action in disposing of the jewelry the petitioner testified that 'they were to be returned to her when the bond was either exonerated or otherwise had been disposed of and the fee had been paid'. He also testified that he represented Irene Davidson and Catherine Wall upon the representation of Evans 'that he had talked to Mrs. Monast and that she was willing to take care of their case and for me to come and get them out (of jail)'. Later, he said, he talked to Mrs. Monast and told her Tom Evans had called him in connection with the case of those women. 'And did she indicate', he was asked, 'in any wise whatsoever that she was not going to be responsible for their bond and attorneys fees'? 'No', was his reply. 'If she had, I wouldn't have gone ahead with them.' According to his testimony, he told Mrs. Monast 'in the beginning' that his fee would be $250 for each woman and that he was going to keep the jewelry. But he also related a conversation he had with Mrs. Monast at the county jail when 'she apparently was highly dissatisfied and said that these two girls were dissatisfied the way the preliminary hearing had been handled; said they were going to get other

counsel and that she didn't intend to pay for their fee or bond'."

In addition to that evidence the following also appears: Q. "* * * that you made the following statement, quoting, 'I was seeing her (Mrs. Monast) off and on from day to day, and I don't know whether it was in the hospital or in the office, and she told me that she had spent all the money she had getting herself out of trouble, and she had to pay her way back. She expected to be released on condition that she go to Honolulu. She told me to take those' —the rings, I take it—'that if she couldn't pay them, to *use them as I saw fit to take care of the bond and my fee'*. Is that a correct statement that Mrs. Monast told you that *if she didn't pay you for the girls' (Davidson and Wall) bond and fee, that you could use them as you saw fit?* A. That is the substance of it, yes.

"Q. By what right, Mr. Davis, did you think you could sell that jewelry? A. That I had a right to sell it, it was mine; that *was the understanding* in the original agreement.

"Q. By that you mean what? That she had agreed with you or told you that if she didn't pay *for these girls, (Davidson and Wall) the fee and bond, that you could dispose of the jewelry?* A. That was my understanding; yes." That evidence clearly shows that petitioner honestly believed the arrangement to be that he was free to dispose of the jewelry. The circumstance that after he was given such authority by Mrs. Monast she attempted to change her mind in regard to being responsible for the representation of Davidson and Wall, is obviously of no force because it was merely an attempt to repudiate a previous agreement.

In face of this evidence the majority opinion concludes: "Assuming that Mrs. Monast had told the petitioner she would pay for his services in behalf of Catherine Wall and Irene Davidson and that he might hold her rings as security therefor, he had no authority to sell the rings without notice to her. The law required him to give her notice and a reasonable opportunity to redeem her property. The petitioner admits that she had demanded the return of her rings and that he gave her no notice whatever of their sale. Under these circumstances, it conclusively appears, from his own testimony, that he embezzled his client's property." That assumption does not coincide with the facts. Mrs. Monast had given petitioner carte blanche to dispose of the jewelry as he saw fit. He therefore was justified in pawning or selling it, and even if it were only a pledge the authority granted to him was sufficiently comprehensive to constitute a waiver of any notice of the sale of the pledged property. There is therefore no basis for the statement that petitioner was guilty of embezzlement. There is no showing of any fraudulent intent on petitioner's part; nor of fraud or bad faith. Even if it be conceded that he was guilty of a technical conversion, that is not sufficient. It is said in Re Marvin, 180 App.Div. 778, 168 N.Y.S. 555, 563: "That is not very material here on an inquiry based upon the allegation that Marvin has acted dishonestly and in bad faith and defrauded his clients. Those questions are to be settled by *considering the acts done by him and the intent with which they were done.* They do not rest upon the technical question whether or not an equitable or a legal action is the proper remedy in a certain case, *or whether certain acts may or may not constitute a technical conversion of money without regard to intent.* Marvin can be convicted here only for an intentional fraud, an intentional and wicked violation of his professional duties, and in determining that question we must consider his acts and motives with reference to the situation as it existed and the injury his clients are suffering from his wrongful acts." In Barbee v. State Bar, 213 Cal. 296, 299, 2 P.2d 353, 354, this court said: "But in this case also the record does not satisfactorily establish an intent to defraud. Petitioner was, we believe, stubbornly but honestly mistaken in his understanding of his rights in the matter. We are not prepared to hold that such a dispute over the fixing of a fee is grounds for the drastic punishment inflicted by the order herein." It is stated in Re Irwin, 162 Or. 221, 91 P.2d 518, 524: "The defendant argues that a technical conversion alone does not afford a sufficient basis for disciplinary action against him and that it is essential that fraud or dishonesty must have accompanied the conversion. With that we agree." See, also, 7 C.J.S., Attorney and Client, § 23.

The majority opinion contains several inaccurate statements relative to the facts which find no support whatever in the rec-

ord, and I shall call attention to these inaccuracies and quote from the record, which will disclose the true factual situation. The majority opinion states: "Moreover, when Mrs. Monast demanded the return of the rings and commenced suit against him, he attempted to justify his actions by having the bail bond broker change his books to show a charge of $500 for the bail bonds of Irene Davidson and Catherine Wall instead of $200, which was the premium fixed for them when they were issued." And again the majority opinion states: "He admitted before the board of governors that he asked Glasser to change his records as the basis of an offset to Mrs. Monast's claim against him and Glasser corroborated his testimony in this regard." The record does not show that petitioner asked the bonding company to change its books or records or that any such change was made at his request or otherwise. The witness Glasser testified before the local administrative committee as follows:

"Q. Well, then, what was your understanding at the time this premium in each case was raised from $100.00 to $250.00 with reference to Mr. Davis's liability on that; was his actual liability increased so far as you were concerned, or was that fictitious?

"A. Your question, the way I want to answer it, is rather compound to me. The original premium on the bail was fixed at $100.00. That was done without my knowledge or consent. I knew nothing of the transaction whatsoever. Months subsequent to that, Mr. Davis came in of his own volition and stated that he would pay $250.00 for each bond. I so told Mr. Cantillon and the bookkeeper so entered it.

"Mr. Prichard: Q. Was there a correction on your books changing it from $100.00 to $250.00, or at the time of that conversation had there been no entry up to that moment, so that there was made an entry original in character of $250.00? A. I believe the entry was original in character of $250.00, but no entry was ever made and Mr. Willard saw the books and he can either verify it or make the corrections.

"Q. But your recollection now is that the entry was the original entry charge of $250.00? A. Yes sir."

This witness further testified:

"Mr. Prichard: May I ask just one question?

"Q. At the time you had this conversation with Mr. Davis about the entry on the books of $250.00 against each bond, was there anything said in that conversation to the effect that the entry on the books had to be an original entry instead of an alteration from $100.00 to $250.00 in order to keep him from being pushed around? A. In the first place, you are making a misstatement, Mr. Prichard. There never was to my knowledge an alteration. I believe when you examine the sheets it will show there was only one entry of $250.00 now, on each date. *There never was an alteration.*

"Q. You don't understand me. I am simply asking you whether there was any conversation at that time that any entry made would have to be an original entry? A. No sir. Mr. Davis said that he wanted the books to show that he owed $250.00 on each bond." (Emphasis added.)

The witness Glasser did not testify before the board of governors, as one might be led to believe from the above quoted statement from the majority opinion, and the only testimony given at the hearing of this matter before the board of governors relative to the premium on said bonds was given by petitioner. His testimony is as follows:

"Q. Now the premium on those two bonds for the women were $100.00 each, weren't they? A. I don't know what they were; I never found out what they were. So far as that is concerned, it was derived from the testimony of Mr. Glasser and Mr. Groves.

"Q. Mr. Glasser and Mr. Groves testified that you asked them to have their books changed to read $250.00 each instead of $100.00? A. I am sorry, I don't think you read the record right. What I asked them, to show it on the books.

"Q. As $250.00 each? A. I am sorry, I can't recall.

"Q. They testified to $250.00 each, I believe. A. Whatever they testified is correct.

"Q. Did you ask them to have the books show $250.00 each? A. I asked them what the books showed. I asked them in the presence of Mr. Parsons."

It will be observed that there is nothing in the foregoing testimony justifying the above quoted statement from the majority opinion, and said statement finds no support in the record in this case.

The majority opinion also states: "The petitioner's own testimony as to the other charges against him shows clearly that he committed perjury in his deposition given in connection with Mrs. Monast's suit to replevin the rings. He testified that the rings had been delivered to the bail bond company as security for premiums due on bonds. But the petitioner testified before the local administrative committee that he pledged the rings with the Provident Loan Association. Moreover, Glasser, the bail bond broker, who was the petitioner's witness, not only testified that these premiums were never charged against Davis, but that he purchased the rings in a personal transaction."

The foregoing statement contains many inaccuracies. First, Glasser was not petitioner's witness, as the record discloses that he was called on behalf of the State Bar. Second, I do not believe the testimony given by petitioner relative to his disposition of the rings is susceptible of the interpretation placed on it in the majority opinion. In this regard petitioner testified before the local administrative committee as follows:

"Mr. Burgess: Q. Do you recall having testified in a deposition on Friday, the 29th of April, 1938, in a case in which Marie Monast appeared as plaintiff and you and others appeared as defendants in the case, beginning at page 7, line 3, the question was asked you, 'Where was the jewelry?' You replied, 'It was in the possession of Irving Glasser, the bail bondsman.' The question was, 'Who gave the jewelry to Mr. Glasser?' Answer, 'I did.' 'Q. And do you recall the circumstances surrounding the delivery of this jewelry to Mr. Glasser by you? A. No, not particularly, no.' The next question was, 'You just gave him the jewelry? A. No, it was on account of the fact that they owed the fee—they owed the bonding company for two cases which is part of the same transaction, that is, Mrs. Monast and one Irene Davidson and Catherine Wall.' You recall testifying to that, do you? A. Yes.

"Q. And next on page 10 at line 1, 'Q. Well, lawyer to lawyer, what was the result of these conversations in so far as your right to retain this jewelry? A. So far as her case was concerned, the agreement was that she was to pay a $2,000.00 fee, and that she was remaining out on bail, and the bondsmen were allowing her to remain out on bail without any security on the understanding that I kept possession of this jewelry.' You didn't finally sell this pawn ticket until the 20th of September, did you? A. No.

"Q. And at that time she had not only been released from custody and from bail, but had been out of jail and gone to Honolulu a period of two months and twenty days, hadn't she? A. Yes, but in the meantime, another case intervened.

"Q. Now then, again in the same deposition on page 24, line 26, beginning there, you were asked, 'Do you know whether or not Irene Davidson and Catherine Wall paid off the bonding company for their bond? A. The last information I had they did not; that was the reason that it was turned over to Mr. Glasser. Q. So this jewelry was turned over by you to Mr. Glasser to insure him or the company he appears for for any charges he or they may have for furnishing the bond to secure their release? A. That is correct.' That was your understanding, was it? That is your statement, is it?

"A. It may have been my statement, but it isn't a complete answer for it."

To my mind the foregoing testimony affords a very tenuous ground to support a charge of perjury. This is particularly true when we take into consideration that the local administrative committee found that any discrepancy in petitioner's testimony on this subject was due to inadvertence, and that he did not wilfully and deliberately give false testimony on this or any other subject in this proceeding.

The majority opinion contains the following statement which is somewhat misleading: "In reaching its decision, the board of governors considered not only the record of the proceeding before the local administrative committee, but also the testimony of the petitioner given when this record was under review." If the majority opinion purports to infer from this statement that the board of governors had before it testimony given by petitioner at the hearing before the board on which it was justified in predicating the findings of fact adopted by it, such statement is clearly in error, as petitioner was asked only a few questions at the hearing before the board of governors, and the total space in the the transcript of the proceedings before the board covered by the questions propounded to petitioner and his answers thereto is not to exceed six pages, and there is nothing

in any of his testimony before the board of governors which in any way tends to support the findings and recommendation approved and adopted by the board.

Supplementing its findings of fact, the local administrative committee prepared and filed an opinion consisting of twelve typewritten pages in which it reviewed and analyzed the evidence in considerable detail, making reference to pages of the transcript where the testimony could be found supporting the facts contained in its opinion. I have read the transcript in this case and find that the opinion of the local administrative committee is fully supported by the evidence.

After making a somewhat minute analysis of the evidence contained in the transcript, the opinion of the local administrative committee contains the following statement:

"Weighing the evidence before us and having due regard to the fact that there is no presumption against the accused respondent, but rather that, as stated in Bar Association of San Francisco v. Sullivan, 185 Cal. 621, 198 P. 7, we must be clearly satisfied of respondent's guilt and that this means something more than a mere preponderance of the truth, we accept as true respondent's testimony in these particulars as against the contrary story of Marie Monast. Respondent appeared before us personally and while his testimony was not as precise as some others might give it, it is obvious, both from his testimony before us, and on depositions, that often his statements were conclusions which as an attorney he reached and stated as facts rather than the facts themselves. We did not have the benefit of the personal appearance of Marie Monast and her deposition was far from satisfactory. Under these circumstances we have resolved the conflict in favor of respondent. We conclude that respondent was authorized to hold the rings as security for the Marie Monast bond and for the bond and fee of the Wall and Davidson women.

"Respondent as pledgee of these rings for his fee had the right to pledge the same to the extent of his lien. Civ.Code, § 2990. However, in addition to this right, respondent testified that Marie Monast told him to use the rings as he saw fit to take care of the bond and fee. Also respondent testified that he told Mr. Monast, the husband, that he had sold the rings. This was after the matter was under discussion between respondent and Monast, after Marie Monast had gone to Honolulu. This was at the time Mr. Monast and respondent went out to the gambling boat to discuss the circumstances with Evans.

"From the entire evidence we accept respondent's statement on these matters. As previously stated, his story is corroborated in several particulars and Marie Monast's story as told in her deposition is impeached in several instances by other witnesses. It is well to add in passing that Marie Monast knew respondent had these rings and her husband knew respondent claimed a right to them, yet no suit was brought by Marie Monast until a number of months after she left California. Accepting respondent's story, as we do under all the circumstances here, he proceeded within his rights.

"After a civil suit was brought against respondent, respondent obtained the rings from Irving Glasser, to whom he sold the pawn ticket, and delivered them to the attorney bringing the action for Marie Monast. We have studied that situation carefully and do not believe that the circumstances of the return prove a guilty taking.

"With respect to the cross-complaint respondent explained that this was in error as he told the facts to an office associate and signed a verification in blank. The practice of attorneys having clients sign verifications in blank is all too common, and, as stated by the Supreme Court in Glenn v. State Bar of California, 14 Cal. 2d 318, 94 P.2d 43 [45], such practice is highly reprehensible, and, in our opinion, should be most severely condemned'. However, carelessness and improperly signing a blank verification do not, in our opinion, establish perjury. On this phase of the case we state in the aforesaid language of the Supreme Court that respondent's conduct was highly reprehensible and is severely condemned. Such conduct, in our opinion, warrants a private reprimand and we so state in our findings and conclusions.

"The charges of false swearing on the giving of several depositions in the main are based on the assumption that the story told by Marie Monast is true and that of respondent false. We have found it the other way, and accepting respondent's story, as we do, for the reasons hereinbefore set forth, such charges of false swearing fall. Respondent was not as precise and accurate

in his testimony on the depositions as many witnesses might have been expected to be, but judging by his testimony before us it is evident that the respondent is slow in thinking and does not have a ready command of language to meet and describe situations which occurred in the past. His testimony as given in such depositions, when they are considered together, was substantially as given before the Committee. In those depositions, as before us, he claimed he was 'within his rights' in turning the jewelry to Irving Glasser.

"The record was that respondent testified in one of those depositions that while representing Marie Monast he had told Judge Fricke, before whom her case was pending, that she had no previous criminal record. He stated he found this was not the case and in accordance with his deposition he states he had her change her plea from guilty to not guilty and stand trial before the court and put her on the stand to be asked questions on the subject.

"We do not understand that the Notice to Show Cause charges respondent with unethical conduct in not correcting any misstatement he may have made to the court based upon misinformation from his client. The duty of an attorney to a court and his client in a situation where he may impart information received from his client or believe with respect to his client and thereafter finds the information incorrect is one as to which there might be quite a difference of opinion, assuming the latter knowledge was a confidential communication to the attorney from the client. However, in the present situation we do not see anything for which respondent could be condemned. His determination to put his client before the court for examination of the facts so that all matters pertaining to her or her probation would be available was apparently a fair solution. There is nothing before us to show other than that the court was informed as to the facts pertaining to Marie Monast and her past record, if any, either by examination or through the probation officer's report.

"The fact that in one of his depositions respondent testified that he had Marie Monast change her plea from guilty to not guilty and waive a jury trial, so as to be tried before the court, whereas the record shows she pleaded not guilty and waived a trial by jury and submitted to a trial by the court, we do not deem is proof of perjury. The important item obviously was that respondent had caused the client to waive a jury trial and have a trial by the court and submit to examination by the trial judge. An honest misrecollection as to whether the plea had been changed as part of that procedure is not startling nor unusual. Obviously to say respondent intentionally swore falsely on this subject of whether the plea was changed is to hold an attorney to an absolute recollection of the steps and conduct of the various cases he may handle beyond the power of the average human mind to fulfill. Court records are kept of such matters and testimony given without the presence of those records based on recollection is bound to be faulty with the average person, be he layman or attorney."

The local administrative committee in this case consisted of three of the ablest and most outstanding members of the Los Angeles bar. That they gave more careful and thorough consideration to this case than is given to the ordinary disciplinary proceeding is manifest from an examination of the record in this case and the carefully prepared findings and opinion in which the members of said committee unanimously concurred. In my opinion, it is impossible for any fair-minded individual to review the proceedings in this case and not entertain a reasonable doubt as to the guilt of the petitioner of any of the charges contained in the Notice to Show Cause, which is the basis of this proceeding.

A review of the proceedings in this case before the board of governors discloses that petitioner was asked a few questions by some of the members of the board. The transcript of his testimony at the hearing before the board of governors consists of only six pages and no fact was developed by such examination to justify a different conclusion than that reached by the local administrative committee. In fact, petitioner's testimony before the board of governors was substantially the same as that which he gave before the local administrative committee. However, the board of governors made findings directly contrary to those made by the local administrative committee and found against petitioner in almost every instance where his testimony was contrary to that of Mrs. Monast.

At the conclusion of the hearing before the board of governors, twelve members of said board voted in favor of disbarring pe-

titioner, one voted against disbarment and one declined to vote.

I think I am justified in assuming that the record of the proceedings in this case before the local administrative committee was not read by all of the members of the board of governors, and I think it is obvious that even if the record had been read by each member of the board, he would still not be in as favorable a position to pass upon the credibility of the witnesses as the members of the local administrative committee who heard these witnesses testify. See Werner v. State Bar, 13 Cal.2d 666, 91 P.2d 881.

From the foregoing, I am forced to conclude that to sustain the findings and recommendation of the board of governors in this case is not only denying to petitioner any intendments which may arise in his favor from the record in this case, but is resolving all of such intendments against him which is contrary to the settled rule of this court in cases of this character.

I am firmly of the opinion that a grievous miscarriage of justice will result from the majority opinion in this case and that the proceeding against the petitioner should be dismissed.



47 Cal.App.2d 770

SOUTHERN COUNTIES THRIFT CO. v. RAIRDON et al.

Civ. 2911.

District Court of Appeal, Fourth District. California.

Nov. 14, 1941.

Rehearing Denied Dec. 11, 1941.

1. Corporations ⇐1

Corporations are creatures of law and their functions are regulated largely by statute, but their claims, liabilities, or acts are not created only by statute because of such facts.

2. Limitation of actions ⇐34(1)

The term "created by law", as used in three-year statute of limitations relating to actions to enforce liability created by law, is confined and restricted to liability existing by virtue of express statute and does not include or extend to actions arising under common law. Code Civ.Proc. § 359.

See Words and Phrases, Permanent Edition, for all other definitions of "Created by Law".

3. Corporations ⇐306

Where corporation's charter or statute, expressly prohibiting certain acts by corporation officers, imposes no liability on them for violation thereof, their doing of such acts does not make them personally liable.

4. Corporations ⇐306

Corporation directors' liability to corporation for damages caused by their unauthorized acts rests on common-law rule that every agent violating his authority to principal's damage is liable therefor, and statutory prohibition of such acts is material merely as indicating express restriction on powers delegated to directors when corporation was formed.

5. Corporations ⇐306

A corporation officer is not liable to corporation for damages merely because of his violation of statute, but he must be shown to have acted as corporation's agent to render him liable.

6. Limitation of actions ⇐28(1)

The liability of industrial loan corporation's directors to corporation for losses resulting from unlawful loans, made with their knowledge, consent, and approval, rests on agent's duty under common law, and hence is governed by two-year statute of limitations, not three-year statute, though some of loans were prohibited by statute. Code Civ.Proc. § 339, subd. 1, and § 359; St.1917, p. 658, as amended.

Appeal from Superior Court, Orange County; Harry C. Westover, Judge.

Action by the Southern Counties Thrift Company against C. W. Rairdon and others for the amount of unlawful loans made by plaintiff with the knowledge, consent and approval of defendants as plaintiff's directors. Judgment for defendant Rairdon, and plaintiff appeals.

Affirmed.

See also, 43 Cal.App.2d 149, 110 P.2d 679.

Frank T. O'Neill, of San Francisco, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana (C. E. Sprague and A. M. Bradley, both of Santa Ana, of counsel), for respondents.

MORTON, Justice pro tem.

Plaintiff corporation was operating as an industrial loan company, having been organized under the Statutes of 1917, page 658, and amendments thereof. Defendant C. W. Rairdon was a director of said corporation and a member of the finance committee composed of three directors having authority to pass upon loans. Contrary to the statute and the by-laws of the corporation a number of loans were made to individuals and also to defendant Rairdon, some of which proved to be uncollectable. Plaintiff's amended complaint alleges, in six separate counts, unauthorized and negligent acts on the part of defendants C. W. Rairdon, John Martel, J. G. Sutherland, William Ketler, John Ketler, John Knox, M. Johnson and A. N. Bertelsen, in that loans contrary to law were made with the knowledge, consent and approval of defendants and each of them as the directors of the plaintiff corporation. Judgment was asked against the defendants for the total amount so loaned with interest thereon.

Defendant Rairdon appeared and demurred to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action and that the causes of action were barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure.

The trial court sustained the demurrer and judgment was subsequently entered in favor of defendant Rairdon.

[1] It appears that on November 1, 1937, all of the defendants retired from the board of directors. The original complaint was filed on April 12, 1940, more than two years later, and also more than two years after the loans involved were made. It would appear that the alleged liability or obligation of the former directors is not based upon an instrument in writing and is not a liability created by statute. Appellant contends that if the loans were made in good faith then only the restriction of the statute made them illegal. Therefore, the liability is one created by statute. Here the defendant directors are charged with negligent mismanagement of the corporation funds in the making of loans. Corporations are creatures of law and their functions are regulated largely by statute, but that does not make their claims or liabilities or their acts those created only by statute.

[2] The court in Coombes v. Getz, 217 Cal. 320, 333, 18 P.2d 939, 945, stated: "The term 'created by law,' as used in section 359 of the Code of Civil Procedure, has a somewhat restricted meaning. In one sense every liability giving rise to a cause of action may be said to be a creature of the law. Whitten v. Dabney, 171 Cal. 621, 628, 154 P. 312. But, in the sense in which the term is used in said Code section, it is confined and restricted to a liability which exists by virtue of an express statute, and it does not include nor extend to actions arising under the common law. Whitten v. Dabney, supra; Brinckerhoff v. Bostwick, 99 N.Y. 185, 1 N.E. 663."

[3-5] In Fletcher's Cyclopedia Corporations, volume 3, section 1024, page 421, we find the liability of directors discussed as follows: "If acts are expressly prohibited by the charter or a statute, but liability for violation thereof is not imposed on corporate officers by the charter or statute, the doing of such an act does not make the officers personally liable merely because the act is a violation of the charter or a statute. So far as liability of directors to the corporation is concerned, it has been said that the liability 'for damages caused by unauthorized acts rests upon the common-law rule which renders every agent liable who violates his authority to the damage of his principal. A statutory prohibition is material under these circumstances merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed'. Moreover, an officer of a corporation is not liable to the corporation for damages merely because he violates a statute, but it must be shown that he was acting as agent of the corporation in so doing."

[6] While the statute involved in this action prohibited some of the loans made by defendants, no statute places on them the duty of making good to the corporation any losses resulting from those loans. That obligation rests upon the duty imposed on an agent by the common law. It is therefore clear that this alleged liability is governed by the statute of limitations as set forth in subdivision 1 of

section 339 of the Code of Civil Procedure, to-wit, a period of two years, and the demurrer of defendant Rairdon was properly sustained.

The judgment is therefore affirmed.

MARKS, Acting P. J., and GRIFFIN, J., concurred.



47 Cal.App.2d 758

UNITED MILK PRODUCERS OF CALIFORNIA et al. v. CECIL, Director of Agriculture et al.

Civ. 6744.

District Court of Appeal, Third District, California.

Nov. 14, 1941.

1. Courts ⇐209(2)

In mandamus proceeding to compel Director of Agriculture to rescind order denying milk distributors' licenses and to compel issuance of licenses to petitioners, appellate court would presume that facts found by Director were proved at hearing before Director, where findings were exhaustive and no exception was taken by petitioners to such findings. St.1937, p. 53, § 757.11.

2. Statutes ⇐181(1), 184

Statutes are construed according to intention, or apparent or evident intention or purpose, of lawmakers, if such intention can be reasonably ascertained from the language used.

3. Food ⇐2

Provisions in Milk Control Act defining distributor as meaning any person whether or not such person is a producer or an association of producers, engaged in business of distributing or handling fluid milk, and defining person as meaning an individual, firm, corporation, association or any other business unit, indicated a legislative intent to include all associations within scope of act. St.1937, p. 44, § 735.3(f, k).

4. Food ⇐2

The legislative declaration in Milk Control Act that milk is a business affected with a public interest and that production and distribution thereof is an industry affecting health and public welfare and that public policy requires elimination of improper marketing and unfair trade practices, indicated legislative intent to include all associations within scope of the act and not to exclude cooperatives. St.1937, p. 43, § 735 et seq.

5. Food ⇐2

The provision in Cooperative Marketing Act that general corporation laws are applicable to cooperative marketing associations except where such laws are in conflict with Cooperative Marketing Act did not establish a rule of construction to be followed in resolving conflicts between Milk Control Act and Cooperative Marketing Act. St. 1933, p. 264, § 1219; St.1937, p. 43, § 735 et seq.

6. Statutes ⇐149

Generally, Legislature cannot enact irrepealable legislation or limit or restrict its own power or power of its successors as to the repeal of statutes, and an act of one Legislature is not binding upon and does not tie the hands of future Legislatures.

7. Statutes ⇐149

Every legislative body can modify or abolish the acts passed by itself or its predecessors, and the power of repeal can be exercised at the same session at which the original act was passed, and even while a bill is in its progress and before it becomes a law.

8. Statutes ⇐149

The Legislature cannot bind a future Legislature to a particular mode of repeal and cannot declare in advance the intent of subsequent Legislatures or effect of subsequent legislation upon existing statutes.

9. Statutes ⇐158

The legislative intention to repeal statute is ascertained as the legislative intent is ascertained in other respects, when not expressly declared, by construction.

10. Statutes ⇐159

An implied repeal of statute results from some enactment, the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of an earlier statute, and in such case the later statute prevails as the last expression of the legislative will, and the former statute is constructively repealed.

11. Statutes ⇐159

Subsequent legislation repeals previous inconsistent legislation, whether or not the subsequent legislation expressly declares such repeal.

12. Statutes ⇐158, 159

The intention of subsequent legislation to repeal previous legislation will not be presumed, nor the effect of repeal admitted, unless inconsistency between subsequent and previous legislations is unavoidable, and then only to the extent of the repugnance.

13. Food ⇐4

The word "price" in provision of Milk Control Act authorizing Director of Agriculture to fix minimum price which producer may receive for his milk, was not used in technical sense, and meant any return received by producer from distributor in the marketing of the milk. St.1937, p. 44, § 735.4(b) (4).

See Words and Phrases, Permanent Edition, for all other definitions of "Price".

14. Food ⇐2

The Cooperative Marketing Act of 1933, permitting members to enter such marketing contracts as they wished and to distribute proceeds from sale of milk among themselves, after deducting necessary expenses, was inconsistent with Milk Control Act of 1937, authorizing Director of Agriculture to fix minimum price which producer may receive for his milk, and the Cooperative Marketing Act was impliedly repealed by the Milk Control Act in respect to such inconsistency. St.1933, p. 162, § 671 et seq.; St.1937, p. 44, § 735.4(b) (4).

15. Food ⇐2

Cooperative marketing associations are "distributors" for their members, and therefore are subject to operation and control of Milk Control Act. St.1937, p. 44, § 735.3(f).

See Words and Phrases, Permanent Edition, for all other definitions of "Distributor".

16. Food ⇐2

That a cooperative, because of nature of its organization, cannot return to its members a price fixed by Director of Agriculture for milk if cooperative's net returns are less than such price, and that member of cooperative must bear any loss did not indicate that Legislature intended, in enacting Milk Control Act authorizing Director to fix minimum amount which producer may receive for his milk, not to impliedly repeal prior Cooperative Marketing Act permitting members to enter such marketing contracts as they wished and to distribute proceeds from the sale of milk among themselves after deducting necessary expenses. St.1933, p. 162, § 671 et seq.; St.1937, p. 44, § 735.4(b) (4).

17. Food ⇐4

Under Milk Control Act, Director of Agriculture could fix minimum price which cooperative marketing association must pay to members for their milk. St.1937, p. 44, § 735.4(b) (4).

18. Food ⇐4

Under Milk Control Act authorizing Director of Agriculture to fix minimum price which producer may receive for his milk, any producer, irrespective of how he places his milk upon the market, must receive the minimum amount fixed by the Director. St.1937, p. 44, § 735.4(b) (4).

19. Food ⇐4

The Milk Control Act was not primarily aimed at what the dealer or consumer shall pay, but what the producer shall receive. St. 1937, p. 43, § 735 et seq.

20. Food ⇐2

The Milk Control Act should not be emasculated by unduly technical construction. St.1937, p. 43, § 735 et seq.

21. Statutes ⇐220

The failure of passage of 1941 amendments to Milk Control Act, which would have included cooperatives within scope of the act, did not conclusively show that original act was intended to exclude cooperatives. St.1937, p. 43, § 735 et seq.

22. Statutes ⇐181(1)

The question of legislative intent must be decided from the peculiar facts and circumstances of each enactment of the Legislature.

Mandamus proceeding by the United Milk Producers of California and others against W. J. Cecil, Director of Agriculture, and others, to compel the Director to rescind his order denying milk distributors' licenses to petitioners and to compel issuance of such licenses to them.

Demurrer to petition sustained and writ denied.

Carlton L. Rank, of Oakland, and Pillsbury, Madison & Sutro, Eugene M. Prince,

and Thomas E. Stanton, all of San Francisco, for petitioners.

Earl Warren, Atty. Gen., and Ralph H. Cowing, Walter L. Bowers and W. R. Augustine, Deputies Atty. Gen., for respondents.

Howard B. Crittenden, Jr., of Tracy, amicus curiae for respondents.

TUTTLE, Justice.

Petitioners seek by writ of mandate to compel respondent Director of Agriculture of California to forthwith rescind and revoke an order made by him denying milk distributors' licenses to them, and also to compel said director to issue to each of petitioners such licenses for the year 1941. An alternative writ was issued by this court, and a demurrer to said petition was filed by the attorney general on behalf of respondents. All parties agree that the petition sets forth all necessary facts, and that decision of this court upon the demurrer will dispose of the entire litigation.

Under the provisions of section 737.11 of the Agricultural Code, St.1937, p. 53, orders to show cause were issued by the Director of Agriculture (hereinafter referred to as the "Director") why petitioners' licenses should not be revoked. A hearing was had, at which petitioners both appeared. Oral and documentary evidence was introduced, the transcript of said hearing being some two hundred pages in length. Upon the conclusion of said hearing, the order under attack here was made and entered.

[1] The refusal to grant a license, or the suspension or revocation of a license may occur "when he [the 'Director'] is satisfied that any applicant or licensee has violated any provision of this chapter [Div. IV, Chapter 10, Agricultural Code, § 735 et seq.,], or any provision of any stabilization and marketing plan formulated under the provisions of this chapter". (Agricultural Code, sec. 737.11.) No exception is taken by petitioners to the facts found by the "Director". Such findings are very exhaustive, and take up some eighteen pages of the petition. It may thus be properly concluded that the facts found were proven at said hearing. The order of revocation was not absolute, it being provided "that such application of said respondent, The Borden Company, may be renewed upon presentation of satisfactory evidence to the Director of Agriculture that said contract between it and United Milk Producers of California, dated August 1, 1940, has been terminated and abandoned, and that said, The Borden Company, has paid to the individual producer-members and to all other producers from whom it has received fluid milk since August 1, 1940, the full, applicable minimum prices therefor as established under the stabilization and marketing plan or plans effective during said time".

As we view the several contentions of the parties, the real question is whether or not the "Director" has authority, under the Milk Control Act (Agricultural Code of California, chap. 10, div. IV), to fix the minimum price which must be paid to its members by cooperative marketing associations organized under the provisions of chapter VI, division 4 of said code, St.1933, p. 162, § 671 et seq. The litigants appear to concede that if the Milk Control Act governs the situation, the order under attack must be sustained. It is admitted by petitioners that the individual producers who constitute United Milk Producers (hereinafter referred to as "United"), for a number of months prior to, and also at the time of said hearing, did not receive the minimum price for their milk prescribed and fixed by the "Director". This was held by the "Director" to constitute a violation of the law and regulations made pursuant thereto. The exact nature of the controversy, and the conflicting views in respect thereto, are thus aptly summarized by petitioners in their reply brief:

"As pointed out at the argument, the above contention of respondents assumes the point in issue. The question is whether the Milk Control Act requires that the equivalent of the Directors' control prices be paid in *all* cases, or whether under the laws of the State there is an exception applicable to cooperatives. * * * Respondents, however, contend that all cooperative-distributors, without exception, are required by the Milk Control Act to return to their members at least the control prices. If a cooperative is unable to return the equivalent of these prices, presumably it must go out of the distributing business. This, we submit, is something which, if it is to be said, should be said by the legislature, and not by the courts. The statute does not expressly say that cooperatives must go out of the distributing business under these circumstances, and a provision of this kind, we submit, should not go into the statute by implication."

Petitioner, "United", was organized May 16, 1933, under the said provisions of the

Agricultural Code relating to non-profit marketing associations (hereinafter designated as "Marketing Associations"), and passed by the legislature in 1933. From the date of its organization until August 1, 1940, "United" sold milk and cream, produced by its members, to various distributors. On August 1, 1940, "United" entered into a contract with "Borden", whereby "Borden" agreed to process and distribute the fluid milk and cream produced by the members of "United", and to return to "United" the proceeds of such operations less all expenses of operation and compensation to "Borden", all as specified in the contract. The contract was to continue for two years and thereafter until terminated by either party upon six months' notice. Ever since August 1, 1940, "United" and "Borden" have been, and they now are operating under the contract, and "Borden" has accounted to "United" for the proceeds of such operations, less the deductions provided in the contract.

In 1937, the Milk Control Act was passed. The first section thereof (Agricultural Code, sec. 735) is headed "Legislative Declaration", and it reads in part as follows:

"(a) The production and distribution of fluid milk and of fluid cream and the dissemination of accurate, scientific information as to the importance of milk and other dairy products in the maintenance of a high level of public health, is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of police powers of this State for the purpose of protecting the health and welfare of the people of this State.

"(b) It is hereby declared that fluid milk and fluid cream are necessary articles of food for human consumption; that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare, and that the production, transportation, processing, storage, distribution or sale of fluid milk and fluid cream in the State of California is an industry affecting the public health and welfare; that unfair, unjust, destructive and demoralizing trade practices have been carried on and are now being carried on in the production, marketing, sale, processing or distribution of fluid milk and fluid cream, which constitute a constant menace to the health and welfare of the inhabitants of this State and tend to undermine sanitary regulations and standards of content and purity, however effectually such sanitary regulations may be enforced; that health regulations alone are insufficient to prevent disturbances in the milk industry which threaten to destroy and seriously impair the future supply of fluid milk; and to safeguard the consuming public from future inadequacy of a supply of this necessary commodity; that it is the policy of this State to promote, foster and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including milk, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers."

Under subsequent provisions the "Director" is the administrative agent of the state, and he is given authority to "prescribe minimum prices to be paid by distributors in accordance with a stabilization and marketing plan for fluid milk * * *". (Sec. 735.4, subs. [b] and [4].) Section 735.3, subdivision (f), provides: "'*Distributor*' means any person whether or not such person is a producer or *an association of producers, engaged in the business of distributing milk or handling fluid milk* * * *".

It must be admitted that on the face of the law all persons are included within its scope. Section 735.3, subdivision (k), reads: "'*Person*' means an individual, firm, corporation, association or any other business unit."

[2] In 23 Cal.Jur., page 725, section 107, it is stated: "It is a cardinal rule that statutes are construed according to the intention, or at least according to the apparent or evident intention or purpose, of the lawmakers. Such intention controls, if it can be reasonably ascertained from the language used. Indeed, it has been said that the legislative intent in enacting a law is the law itself."

[3, 4] The foregoing provisions indicate clearly that the legislature intended to include all associations within its scope. "United" was an association of producers. Further indication of such intent is found in the "legislative declaration" quoted above. Production of milk is declared to be a business affected with a *public interest.* Production, and distribution or sale of milk is declared to be an industry *affecting health and public welfare.* It is declared to be the public policy of the state to eliminate improper marketing and unfair

and destructive trade practices. From the record before us it is apparent that a considerable portion of fluid milk was, and still is distributed directly by cooperatives to consumers. It is not reasonable to suppose that the legislature intended to make an exception to that sort of distribution, in a matter of such vital concern to the people of the state. If it intended to exclude cooperatives from the application of the law, it would have so declared.

Petitioners strongly rely upon section 1219 of the Agricultural Code, which is a portion of the law dealing with cooperative marketing associations. Said section reads as follows: "The general corporation laws of this State and all powers and rights thereunder, shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this chapter."

[5-8] They argue that the foregoing section establishes a rule of construction which must control here. It will be noted, however, that it has reference only to "the general corporation laws of this State". The inconsistency and conflict here do not come from such laws, but from the Agricultural Code. There is therefore no rule of construction laid down for our guidance. Furthermore, it is the general rule that one legislature cannot enact irrepealable legislation or limit or restrict its own power or the power of its successors as to the repeal of statutes, and an act of one legislature is not binding upon, and does not tie the hands of future legislatures. 59 C.J., § 500, pp. 899, 900. In Lewis' Sutherland Statutory Construction, volume 1, section 224, pages 456, 457, the rule is thus stated: "Every legislative body may modify or abolish the acts passed by itself or its predecessors. This power of repeal may be exercised at the same session at which the original act was passed; and even while a bill is in its progress and before it becomes a law. The legislature cannot bind a future legislature to a particular mode of repeal. It cannot declare in advance the intent of subsequent legislatures or the effect of subsequent legislation upon existing statutes."

[9-12] In the same volume, section 247, pages 461, 462, 463 and 464, it is said: "Such repeals are recognized as intended by the legislature, and its intention to repeal is ascertained as the legislative intent is ascertained in other respects, when not expressly declared, by construction. An implied repeal results from some enactment the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of an earlier act. In such case the later law prevails as the last expression of the legislative will; therefore, the former law is constructively repealed, since it cannot be supposed that the law-making power intends to enact or continue in force laws which are contradictions. The repugnancy being ascertained, the later act or provision in date or position has full force, and displaces by repeal whatever in the precedent law is inconsistent with it. Subsequent legislation repeals previous inconsistent legislation whether it expressly declares such repeal or not. In the nature of things it would be so, not only on the theory of intention, but because contradictions cannot stand together. The intention to repeal, however, will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance."

[13-15] It must be apparent that the Cooperative Marketing Act, passed several years prior to the Milk Control Act, was inconsistent with the latter. Under the Marketing Act, the members were permitted to enter such marketing contracts as they wished, and to distribute the proceeds from the sale of milk among themselves, after deducting necessary expenses. On the other hand, the Milk Control Act gives authority to the "Director" to fix the minimum amount which a producer may receive for his milk. In this connection the word "price" is used in the latter act. Considering the act in its entirety, we think the legislature did not use that word in a technical sense, and that it can be reasonably construed to include any return which is received by the producer from the distributor in the marketing of his product. It is therefore our conclusion that the Cooperative Marketing Act, in respect to the particulars mentioned, was impliedly repealed by the Milk Control Act, and that cooperative marketing associations are distributors for their members, and therefore subject to its operation and control.

[16, 17] Petitioners, in attempting to show lack of legislative intent to repeal, point out that a cooperative, from the very nature of its organization, cannot return

to price fixed by the "Director" for milk, if its net returns are less than such price; that in cooperatives, the producer-member is the owner, and that he receives the profits from its marketing activities, and should therefore bear any loss. It must be assumed that the foregoing effect upon cooperative organizations must have been foreseen by the legislature, but that they considered that the health and general welfare of the people as a whole were paramount over such matters as the internal management of such associations, and their customary method of operation. The proof of a legislative intent to make the Milk Control Act all inclusive is so apparent and strong that considerations of the foregoing nature must give way before it. By its very terms the act covered the distribution by "United". The burden was therefore upon "United" to show that it was excepted from the enactment. This burden, as we have indicated, they have failed to sustain.

The authorities relied upon by petitioners are practically all directed toward the use and meaning of the word "price" in the Milk Control Act. It is contended that the use of that word indicates an intent to exclude cooperatives from its operation. They state: "We assume that respondents will contend that the term 'price', as used in the Milk Control Act and in the marketing and stabilization plan, must be given a broader and more inclusive meaning than its ordinary sense in order to effect the purpose of the Act by assuring all producers a minimum return for their milk. We point out, however, that if the term were given this broad construction, the Director would be authorized to fix not only the minimum return which Borden must make to United under the agency contract, but also the minimum return which every cooperative-distributor must make to its members. In no event could the term 'price' be given a broad meaning to cover the one situation and a different and narrower meaning to exclude the other."

They rely chiefly upon the case of Green v. Milk Control Commission, 1940, 340 Pa. 10, 16 A.2d pages 9 and 10, where it is said: "The principle guiding to decision is this: The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. * * * With the principle stated before us, turning to the law embodying the powers of the Milk Control Commission, we find nothing said about milk shipped to dealers on consignment. It speaks of the 'purchase' of milk by dealers, its 'delivery and sale' to them; it uses the words 'buy', 'purchase', 'prices', 'bought or sold', 'sell or buy.' The words 'consign' or 'consignment' nowhere appear. We are asked by the Commonwealth to interpolate these words into the Act. This we cannot do without violating the important principle to which we have adverted. If the legislature desires to change the law, this can shortly be demonstrated by an amendment at the coming session, writing into the Act a provision covering milk sent to dealers on consignment."

[18, 19] As stated above, we are of the opinion that the word mentioned was used in a broader sense, and that, under the statute, any producer, irrespective of how he places his milk upon the market, must receive the minimum amount fixed by the "Director". We accept the view of the dissenting opinion in the Green case, wherein the following language is used:

"Plaintiffs are a handful of dealers who have contrived an ingenious scheme by which, although for all practical purposes transactions in the business are carried on as before, a new relationship, from a legalistic standpoint, is imposed upon the contracting parties. Instead of producers selling to dealers and the latter in turn to consumers, a form of agreement between producers and dealers has now been prepared whereby the dealer calls himself a 'factor' [agent], the milk is said to be 'consigned' to the 'factor' [agent], the title is to remain in the producer until the milk is sold 'whereupon it shall pass directly from producer to the person purchasing same.' * * * The obvious purpose of this device [as in the proceeding at bar] is to enable the plaintiffs to obtain milk from producers at prices lower than those fixed by the Milk Control Commission. If they succeed in this attempt the force of competition will naturally compel the entire industry to adopt the same arrangement, so that price-fixing by the Commission will become a nullity, the Milk Control Law will be effectively torpedoed, and the industry will be reduced to the condition which the act was designed to remedy. * * * The act is not primarily aimed *at what the dealer or consumer shall pay, but what the producer shall receive.* * * *" (Italics ours.)

"The majority opinion stresses the fact that the Milk Control Law uses only the words 'buy', 'purchase', 'prices,' etc.; from this it is argued that consignment transactions are not within the purview of the act. It has already been pointed out that these 'consignment' agreements [just as does the contract between the petitioners in the instant case] necessarily involve also sales somewhere down the line, and that the Commission is empowered to fix the minimum price to be charged in such sales and to prevent the price thus fixed from being undermined by the device of paying commissions to so-called 'factors' or by any similar scheme. But there is high authority even for the broader proposition that the 'consignment' phase of the transaction is itself directly subject to the power of the Commission irrespective of any subsequent sales of milk by the 'factor' [agent]. In United States v. Rock Royal Co-Operative, Inc., 307 U.S. 533, 579, 580, 59 S.Ct. 993, 83 L.Ed. 1446, the Court construed the word 'purchased' in the Agricultural Marketing Agreement Act of 1937, 7 U.S.C.A. § 601 et seq., as being not confined merely to technical 'sales,' but as having the more general meaning of 'acquired for marketing.' So here, since the act defines a dealer not as one who 'purchases' but also one who 'handles' milk [in Section 735.3 (f), California Agricultural Code "distributor" is defined as anyone "who purchases or *handles* fluid milk or fluid cream for sale"], the power to fix 'prices' as between producer and dealer properly includes the power to regulate the terms of transactions by which the milk is merely 'acquired' by the dealer 'for marketing,' or, in other words, 'consigned,' instead of being 'bought' outright by him, and particularly to prescribe the amount of commissions, if any, to be allowed in such cases.

[20] *"Having regard,* then, *to* the *fundamental purpose* of the Milk Control Law and the *necessity* of *judicially implementing* its provisions for the welfare of the people of the Commonwealth, especially the children, the *act,* in my opinion, *should not be emasculated by unduly technical construction."* (Italics ours.)

[21] It is urged by petitioners that in the 1941 session of the legislature, proposed amendments to the Milk Control Act which would have included cooperatives within its scope, failed of passage. Thus, they say, the legislature must have intended, when the original act was passed, to exclude cooperatives from its scope. While this may be some evidence of legislative intent, it can be argued with equal force that the omission to include the amendments was due to the fact that the legislature considered that the bill already included cooperatives, and that such amendments would be mere surplusage.

[22] We have examined the other authorities cited by petitioners, but find nothing in them which is controlling. When it comes to a question of legislative intent, that matter must be decided from the peculiar facts and circumstances of each enactment.

The parties devote considerable time to the discussion of the question whether or not the contract between petitioners was one of agency or one under which "Borden" actually purchased the milk from "United". We do not deem it necessary to discuss that phase of the matter. We have shown that "United" was subject to the provisions of the Milk Control Act. If "Borden" was its agent, as petitioners contend, they were in exactly the same predicament as their principal, and violated the Milk Control Act, as the member-producers of "United" did not receive the minimum amount fixed by the "Director" as the price of the milk.

In conclusion, we hold that there was ample evidence before the "Director" to sustain the order in question.

The demurrer to the petition is sustained and the writ denied.

THOMPSON, Acting P. J., concurred.

47 Cal.App.2d 674

DIERDORFF v. HOMESTEADERS LIFE ASS'N.

BARTLETT et al. v. DIERDORFF et al.

Civ. 2920.

District Court of Appeal, Fourth District, California.

Nov. 7, 1941.

1. Insurance ⇐793

A divorced wife who prior to the divorce had been named as beneficiary in certificate issued to her husband by fraternal insurance association was not precluded under California and Iowa statutes from continuing as the beneficiary after the divorce was granted, in absence of the naming of a new beneficiary by the husband. St.1935, pp. 692, 693, 694, §§ 11111, 11114, 11121; Code Iowa 1935, § 8777 et seq.

2. Divorce ⇐244

The rights of wives, and the obligation of husbands to contribute to their support after divorce, are well recognized and these rights are often protected by liens upon husband's property and almost anything may be subjected thereto, including property rights in insurance policies.

3. Insurance ⇐793

Where wife, prior to divorce, had been named as beneficiary in certificate issued to husband by fraternal insurance association, as authorized by by-laws of the association and by California and Iowa statutes, the husband was not prohibited by "public policy" from continuing the wife as beneficiary after the divorce. St.1935, pp. 692, 693, 694, §§ 11111, 11114, 11121; Code Iowa 1935, § 8777 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

4. Insurance ⇐793

Where wife who, prior to divorce, was named as beneficiary in certificate issued to husband by fraternal insurance association, paid premiums prior to the divorce, partly from her separate property and partly from community property, and thereafter continued to pay the premiums, the fact that association's by-laws provided that the beneficiary should have no "vested interest" in the certificate until death of the insured did not prevent the wife from having an "interest" which was recognized in law, and was enforceable upon the husband's death.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Interest".

5. Insurance ⇐793

Where divorced wife, prior to the divorce, was named as beneficiary in certificate issued to husband by fraternal insurance association, and husband handed policy to wife and told her she could have it if she kept up premiums, and wife retained policy and paid premiums partly from community funds and partly from wife's separate property, and continued to pay premiums after the divorce and no change in beneficiary was made, the wife had at least equitable rights in proceeds of certificate which were not defeated by laws of California or Iowa, nor by any by-law of the association. St.1935, pp. 692, 693, 694, §§ 11111, 11114, 11121; Code Iowa 1935, § 8777 et seq.

6. Insurance ⇐793

By-laws of fraternal insurance association to effect that where insured and beneficiary are divorced and no other designation has been made, proceeds shall be disposed of as if beneficiary had predeceased the insured were intended to cover situation where no provision had been made by insured with respect to the rights of the beneficiary under their changed status, and where the insured continues to pay premiums but overlooks matter of changing beneficiary, and in such a case the by-law provisions as part of the "insurance contract" apply, and the beneficiary has no rights equitable or otherwise.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurance Contract".

7. Insurance ⇐793

Provisions of by-laws of fraternal insurance association that where insured husband, and wife who is beneficiary, are divorced and no other designation has been made proceeds shall be disposed of as if wife had predeceased husband, does not require the naming of a different beneficiary in event of divorce, and merely provides that result in absence of a new designation, and the obvious purpose of requiring new designation is to ascertain the intention of the husband.

8. Insurance ⇐793

Under by-laws of fraternal insurance association to effect that where insured husband and his wife, who is beneficiary, are divorced, and no other designation has been made proceeds shall be disposed of as if wife had predeceased husband, anything which discloses husband's intention to continue wife as his beneficiary regardless of divorce and which is communicated by husband to association should be considered a new "designation" sufficient to entitle wife to proceeds of certificate if no other beneficiary is named.

The usual and common meaning of "designation" is a pointing out, or an indication.

See Words and Phrases, Permanent Edition, for all other definitions of "Designation".

9. Insurance ⇐793

Where husband handed to wife certificate issued to him by fraternal insurance association, telling wife that she could keep it if she paid premiums, and subsequently the parties were divorced and husband made no claim to any rights under certificate, and wife continued to pay premiums until husband's death, the husband made a "designation" of wife to continue as beneficiary, within provisions of association's by-laws that if husband and wife were divorced and no other designation was made the proceeds should be disposed of as if wife had predeceased her husband, and hence the by-laws did not preclude wife from receiving proceeds of the certificate.

10. Insurance ⇐793

Where fraternal insurance association's by-laws provided that wife might be made beneficiary of certificate issued by association, and provided that where insured and beneficiary were divorced and no other designation had been made, proceeds should be disposed of as if beneficiary had predeceased insured, actions of insured husband whose divorced wife had been made beneficiary prior to divorce, which established desire that wife remain the beneficiary, did not constitute a new appointment of wife as beneficiary at a time when she was ineligible.

11. Witnesses ⇐188(1)

In action on certificate issued by fraternal insurance association, brought by insured's divorced wife who was the named beneficiary, wherein insured's children contended that the wife was not an eligible beneficiary, admission of wife's testimony with respect to certain statements made to her by her husband during coverture did not violate provision of Code of Civil Procedure relating to confidential communications between husband and wife, since wife was not being examined for or against her husband. Code Civ.Proc. § 1881.

12. Evidence ⇐252

In action on certificate issued by fraternal insurance association brought by insured's divorced wife who was the named beneficiary, wherein insured's children contended that the wife was not an eligible beneficiary, trial court did not err in permitting two agents of the association to testify concerning what was said to them by the husband, in form of statements against husband's interest.

Appeal from Superior Court, Riverside County; Harry C. Westover, Judge.

Action by Hilma Dierdorff against the Homesteaders Life Association for proceeds of a death benefit certificate issued by the defendant, wherein the defendant paid the amount of the certificate into court to abide result of the action, and wherein Carlta O. Bartlett and others intervened and the controversy was between the plaintiff and the interveners. From an adverse judgment, the interveners appeal.

Affirmed.

Blodget & Tobias, of Santa Ana, for appellants.

William A. Wood, of Riverside, for respondents.

BARNARD, Presiding Justice.

This is an action involving the proceeds of a death benefit certificate issued by a fraternal insurance association. The certificate or policy was originally issued by the Fraternal Brotherhood, a California corporation which was later merged with the Homesteaders Life Association, an Iowa corporation, licensed to do business in this state. That defendant paid the amount due under the policy into court to abide the result of this action, and the controversy here is between the named beneficiary, who is the divorced wife of the insured, and his two daughters by a former marriage.

Charles C. Dierdorff, the insured, and Hilma Dierdorff were married in 1921.

The insurance policy in question was issued in 1926. It named Mrs. Dierdorff as beneficiary and no change of beneficiary was ever made. A month after the policy was issued the insured handed the policy to his wife and told her she could have it if she kept up the premiums. Thereafter, she retained the policy in her possession and paid the monthly premiums partly from community funds and partly from money which was her separate property. The parties separated on October 22, 1935, and Mrs. Dierdorff immediately filed an action for a divorce. On November 9, 1935 the parties signed a property settlement agreement which made no mention of the policy and which contained no reference to any community property. An interlocutory decree of divorce was granted the wife on November 25, 1935, and a final decree was entered on December 2, 1936, neither of which referred to this insurance policy. Mrs. Dierdorff continued to pay the monthly premiums on this policy until the death of the insured on November 24, 1938. He had not remarried and had not changed or attempted to change the name of the beneficiary under this policy.

The court found in all respects in favor of the divorced wife and awarded her the proceeds of this insurance. The daughters of the insured by the former marriage, who had filed a complaint in intervention, have appealed from the judgment which was entered. The divorced wife will be referred to as the respondent.

While the equities would appear to be entirely on the side of the respondent, the appellants contend that certain provisions of the by-laws of the two fraternal insurance associations and certain statutes prevent her recovering the proceeds of this policy. They rely on several sections of the Iowa code, Code 1935, § 8777 et seq. One of these provides that a certificate may not be issued by a fraternal association unless the beneficiary named therein is the wife or another of the designated relatives of the insured. Other sections provide that the insured shall have the right to change his beneficiary from time to time, and that no beneficiary shall have a vested interest in the benefit until the same has become due and payable upon the death of the insured. Another section provides that no contract between a member and his beneficiary to the effect that the beneficiary shall pay the premiums shall deprive the insured of his right to change the name of the beneficiary.

The appellants also rely on sections 11111, 11114 and 11121 of the Insurance Code of this state, St.1935, pp. 692, 693, 694. The first of these provides that where a member has a family only his wife and certain designated relatives may be made beneficiaries. The second provides that a beneficiary shall have no vested interest in the benefits provided for until the same become due and payable, and that the member may change the beneficiary in accordance with the laws, rules and regulations of the society. The third provides that the constitution and laws of the society may provide that the same shall not be waived by its subordinate officers or members.

The appellants further rely on certain by-laws of the original association which issues this policy and of the Iowa association into which it was merged. The original association had a by-law naming certain relatives, including a wife, who might be made beneficiaries and providing that these persons "and none other, except as hereinafter provided, may be named as beneficiaries in the benefit certificates". Another section provided that, in the event of the death of all beneficiaries named by a member and if he has made "no other or further disposition thereof", the benefit shall be divided equally among his widow and children. Another by-law provided:

"Divorce of beneficiary. In the event of the divorce of a member from the member's husband or wife named as beneficiary, and if no other designation shall have been made, the proceeds of the certificate shall be paid in the same manner as if the divorced wife had died before the member and no new designation had been made."

The Homesteaders Life Association had a by-law which provided, so far as material here: (1) that where a named beneficiary died before the insured and no other beneficiary had been designated the proceeds should be paid to the wife, if there was one, otherwise to the children of the insured; (2) "In the event benefits are made payable to the wife or husband of a member, and they be subsequently divorced from each other and no new designation of beneficiary made, the payment of death benefits shall be made as if the divorced beneficiary had predeceased the member and no new designation had been made;" (3) that in the event any beneficiary shall be ineligible under the laws of the society to take the benefits otherwise due such benefits shall be paid to the remaining bene-

ficiary or, if none, to the children of the insured.

The appellants' main contention is that these statutes and by-laws prohibited this respondent wife from receiving the benefits of this insurance; that under the statutes she was not eligible to be a beneficiary; that under the by-laws her position is the same as if she had died before the insured; that this situation could not be altered by any agreement between the insured and the respondent, or by any gift of the policy from him to her; and that these statutes establish a public policy under which a divorced wife may not be permitted to receive the benefits of such a policy or certificate.

[1-3] The statutes referred to provide that no person shall be named as beneficiary in such a certificate unless he or she be a relative of the insured within the classes named, which include a wife. They also are quite liberal in giving the insured the right to change the beneficiary. Nothing in these statutes specifically makes a wife who has been named as beneficiary ineligible to remain such after a divorce has been granted. The respondent was eligible under these statutes to be named as beneficiary at the time the certificate was issued and no change of beneficiary was ever made by the insured. We see nothing in these statutes which would prevent a wife who has been named as beneficiary in such a certificate from continuing as such after a divorce, where no other beneficiary is named by the husband. Courtois v. Grand Lodge A. O. U. W., 135 Cal. 552, 67 P. 970, 87 Am.St.Rep. 137; Sullivan v. Union Oil Co. of California, 16 Cal.2d 229, 105 P.2d 922. This would be true, for example, where the divorce decree awarded her that right as a part of her share of the property rights of the parties, or where she is given continuing rights in the policy by agreement with her husband, and especially when she herself makes the benefits available by keeping up the premium payments. There is nothing in such a situation which is against public policy. The rights of wives and the obligation of husbands to contribute to their support after divorce are well recognized in our laws. These rights are often protected by liens upon the husband's property and almost anything may be subjected thereto, including property rights in insurance policies. While the court made no such order in the instant case there is nothing in our public policy which would prohibit this husband from continuing his divorced wife as the beneficiary under this certificate.

[4, 5] This was not a case where the individual respondent was merely a beneficiary under the policy without any other interests therein or claim thereto. While she was, and remained to the end, the named beneficiary she also had an interest because part of the premiums were paid from community property. The fact that she could have no vested interest until the death of the insured would not prevent her having an interest which is recognized in law. Moreover, the insured had an interest in the policy which he had given to this respondent on the condition that she keep up the premiums. While he may have had the right to thereafter change the beneficiary he did not do so. Since he made no such change his gift to the respondent and her subsequent payment of the premiums would give her at least equitable rights in the proceeds which are not defeated by any provision of the policy or by any statutes which are called to our attention. Shoudy v. Shoudy, 55 Cal.App. 344, 203 P. 433; Jory v. Supreme Council, 105 Cal. 20, 38 P. 524, 26 L.R.A. 733, 45 Am.St.Rep. 17; Grimbley v. Harrold, 125 Cal. 24, 57 P. 558, 560, 73 Am.St.Rep. 19. In the last case cited, the court said: "Decisions of the courts of other states differ regarding the effect to be given to the contract of a member in societies such as the Ancient Order of United Workmen, whereby he assumes to dispose of his interest in the beneficiary fund of the order, virtually the proceeds of a policy of life insurance; but the question is hardly an open one here, so strong have been the intimations of this court that such a contract, when valid and not in conflict with the lawful conditions upon which the order grants the insurance, is effectual as against the subsequent attempt of the member to violate or annul it; and this must be held to be the law."

In the instant case, the insured continued to recognize his understanding or agreement with the respondent, and made no attempt to change the beneficiary.

[6] Aside from the considerations just mentioned we think the provisions of the by-laws relied upon do not compel the obviously unjust result sought by the appellants, under the facts of this case. The provisions in the two sets of by-laws, to the effect that where the insured and the beneficiary are divorced and no other desig-

nation has been made the proceeds shall be disposed of as if the divorced beneficiary had predeceased the insured, seem to have been intended to cover a situation where no provision has been made by the insured with respect to the rights of the beneficiary under their changed status, and where the husband continues to pay the premiums but overlooks the matter of changing the beneficiary. In such a case the by-law provisions which are a part of the insurance contract apply and govern, and the divorced wife has no rights, equitable or otherwise.

[7, 8] It is to be noted, however, that these provisions are to apply, in the event of a divorce, only where no other designation has been made. The language used is significant. The whole matter is conditioned not upon the necessity for a different beneficiary, but upon whether there has been a new designation. In other words, in the event of a divorce this by-law does not require a different beneficiary, either by a change made by the insured or by its own operation. It merely provides that result in the absence of a new designation. The obvious purpose of a new designation is that the intent of the insured may be known. If the insured intends his divorced wife to continue as his beneficiary there is no occasion for his making a change, and the language used seems to have been chosen with this in view. The other designation or new designation referred to may well be that of the divorced wife, in the nature of a confirmation of his existing beneficiary, rather than the naming of a new and different one. Moreover, no such formalities are provided as those required in making a change of beneficiary. All that is required is that there be a new designation, with nothing said as to just how or when it is to be made. The usual and common meaning of "designation" is "a pointing out; an indication". Under the language used anything which discloses an insured's intention to continue his wife as his beneficiary regardless of a divorce granted or about to be granted, and which is communicated by the insured to the insurer or its agents, should be considered a new designation under these by-laws, and sufficient to entitle the wife to the proceeds of the insurance where no other beneficiary has been named.

[9] We think there was sufficient evidence of such other designation here. This insured had turned over the policy to his wife, telling her she could have it if she kept up the premiums. Knowing that she had done so and was doing so he made no claim to any rights under the policy in the property settlement agreement between them. He recognized her rights in it at all times and shortly before the divorce was granted he signed the papers to enable her to borrow about $900 on the policy. He demanded and received $200 of this money, not as a matter of right but because she could not get the loan without his signature. Two witnesses, who were consecutive local secretaries or clerks of the respondent association and to whom the monthly premiums on this policy were regularly paid, testified that the insured, after he had separated from his wife and just before the divorce was granted, stated to them that he and his wife had separated and that "she can have the policy if she keeps the payments up on it". After the divorce was granted the respondent continued to pay the premiums and during the ensuing years and up until his death the insured accepted that situation and made no attempt to change his beneficiary. We think it sufficiently appears that an "other designation" was made by the insured after the separation of the parties and in connection with the divorce proceeding, by which he renewed his intention to designate or redesignate the respondent as his beneficiary under this policy and his intention to have her continue as such beneficiary. The court's finding that there is nothing in these provisions of the by-laws to prevent the respondent from receiving the proceeds of this policy is supported by the evidence.

[10] Under the statutes the respondent was within the class of permitted beneficiaries when the policy was issued. Nothing in these statutes or in our public policy prevents her continuing as such beneficiary after the divorce. And the by-laws in question do not purport to change this situation, or add any impediment to her redesignation as the beneficiary. At the time she was made beneficiary she was eligible therefor, and the new designation expressed the insured's desire that she remain his beneficiary. This was merely a confirmation of her position and not a new appointment of a beneficiary at a time when she was not eligible.

[11, 12] The appellants further contend that certain testimony given by the respondent with respect to certain statements made to her by her husband during coverture was inadmissible under section 1881

of the Code of Civil Procedure. The witness was not being examined for or against her husband, and no provision of that section was violated. Moreover, the testimony in question was largely immaterial in view of the other evidence and the views we take on the main question presented. It is further argued that the court erred in permitting the two agents of the respondent association to testify as to what was said to them by the insured. It is contended that this testimony was hearsay because the statements were not made to the respondent. The statements in question were not hearsay but were statements of the deceased against his own interest and no valid objection to their admissibility is here raised.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.



47 Cal.App.2d 385

SWEELEY v. GORDON et al.

Civ. 13162.

District Court of Appeal, Second District, Division 2, California.

Nov. 12, 1941.

Conspiracy ⇐8

A broker had no cause of action against purchaser of realty for conspiracy to deprive broker of his commissions on ground that purchaser wrongfully induced vendor to assert invalidity of contract with broker because of failure to comply with statute of frauds, since vendor had right to stand on statute of frauds and purchaser was not liable if he did in fact induce vendor to stand on his legal rights.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

On petition for rehearing.

Rehearing denied.

For prior opinion, see 118 P.2d 16.

W. W. Comstock, of Los Angeles, for appellant.

Gerard Remington, of Los Angeles, for respondent.

PER CURIAM.

Appellant's petition for a rehearing is denied. In the brief filed by respondent before the rendition of our decision it is stated that "the complaint alleges a conspiracy between the seller and the buyer * * *". Respondent based his argument on the allegations of a conspiracy contained in the original complaint. Appellant did not file any reply brief, but he now calls our attention to the fact that an amended complaint was filed in which his cause of action was based upon allegations that Neubeiser wrongfully induced Gordon to violate his contract with plaintiff and to assert the invalidity of the contract because of the failure to comply with the statute of frauds. Gordon had the legal right to stand upon the statute of frauds and Neubeiser did not become liable in damages to plaintiff if he did in fact induce Gordon to stand upon his legal rights.



47 Cal.App.2d 716

SUNSET OIL CO. v. MARSHALL OIL CO. et al.

Civ. 2824.

District Court of Appeal, Fourth District, California.

Nov. 12, 1941.

Hearing Denied Dec. 31, 1941.

1. Vendor and purchaser ⇐101

Where a contract for sale and purchase of realty provides that time is its essence and that failure of purchaser to pay any installment when due terminates the contract without further action by vendor, default terminates the contract and nothing need be done by vendor to terminate the purchaser's rights under it.

2. Quieting title ⇐44(1)

A purchaser, claiming in action to quiet title an interest in realty under a contract of sale and purchase wherein time is made of the essence, has burden of proving that he has complied with terms of contract and that his rights under it have not terminated.

3. Quieting title ⇐44(1)

In action to quiet title to realty which defendant claimed under contract of sale and purchase wherein time was declared to be of the essence, defendant as assignee of purchaser's rights had burden of proving that defendant had complied with terms of contract and that defendant's rights thereunder had not terminated.

4. Quieting title ⇐15

Where contract for sale and purchase of realty provided for selling price of $8,000, payable in $1,000 annual installments, and evidence only showed that purchaser paid first installment, trial court in action to quiet title against purchaser's assignee properly concluded that contract was terminated and that assignee could claim no rights thereunder.

5. Mines and minerals ⇐58

A purchaser under contract for sale and purchase of realty could not give a valid oil lease after purchaser's rights under contract had terminated by default.

6. Mines and minerals ⇐78(2)

Where oil lease contained provision that drilling must commence in one year and that, if oil in paying quantities was not obtained in five years, lessee should cancel and surrender the lease, lease was forfeited by lessee who never did any drilling on leased property.

7. Corporations ⇐617(1)

A corporation whose corporate powers were suspended and never reinstated was not in a position to execute an oil lease after suspension of such corporate powers.

8. Mines and minerals ⇐77

A corporation which abandoned an oil lease in which corporation allegedly had acquired an interest could not claim under such lease. St.1917, p. 377, § 11; Pol.Code, § 3669c.

9. Appeal and error ⇐907(5)

Where, on appeal from judgment for plaintiff in quiet title action, bill of exceptions recited that by recorded deed a corporation "and others" conveyed property involved to plaintiff which deed was not set forth in the record, and court was not informed who the "others" were, appellate court was required to presume that omitted evidence supported findings and judgment and that all persons necessary to complete plaintiff's record title appeared as grantors in the deed so that title to property was conveyed to plaintiff.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by the Sunset Oil Company against the Marshall Oil Company and others to quiet title to property. From an adverse judgment, named defendant appeals.

Affirmed.

See, also, 16 Cal.2d 651, 107 P.2d 393.

J. U. Hemmi, of Oceanside, and James R. Jaffray, of Los Angeles, for appellant.

Mitchell, Silberberg, Roth & Knupp and C. E. Erkel, all of Los Angeles, for respondent.

MARKS, Justice.

Plaintiff instituted this action against Marshall Oil Company (hereinafter called defendant) and others to quiet its title to property in San Diego county. The complaint was in the usual form. Defendant denied that plaintiff was the owner or entitled to the possession of the property and alleged title and the right to possession in itself. The trial court found all facts in favor of the plaintiff and entered judgment in its favor. This appeal followed.

Mary Shields and Ernest Shields are the common source of title of the parties.

Plaintiff claims under the following chain of title: Deed, Mary Shields and Ernest Shields to Josephine W. Shields, dated November 1, 1918, recorded July 24, 1920. Deed, Josephine W. Shields and Robert Shields to Allen H. Rabin, dated April 17, 1922, and recorded May 1, 1922, the transfer being made subject to a contract made November 1, 1918, between Josephine W. Shields and Percy W. Marshall. Deed, Percy W. Marshall and wife to E. A. Bullock, dated October 2, 1924, recorded October 4, 1924. Deed, Allen H. Rabin and wife and W. E. Day and wife to Paul W. Sampsell, dated February 15, 1926, recorded February 23, 1926, the transfer being made without certain warranties. Deed, Paul W. Sampsell and wife to Marine Refining Corporation, dated March 11, 1927, the deed being virtually in the form of a quitclaim. Judgment roll in the case of Marine Refining Corporation, Plaintiff, v. E. A. Bullock, Percy W. Marshall, Alice C. Marshall and Marshall Oil Company

(and perhaps others), Defendants. Lis pendens in that action recorded October 17, 1929. Commissioner's certificate of sale from the commissioner named by the court to Marine Refining Corporation, recorded August 4, 1931. Commissioner's deed to Marine Refining Corporation dated August 10, 1932, recorded on August 22, 1932. Deed, Marine Refining Corporation *and others* to Sunset Oil Company, dated December 29, 1934, recorded December 31, 1934.

Defendant claims under a contract of sale and purchase of the property in question here from Josephine W. Shields to Percy W. Marshall, dated November 1, 1918, recorded July 24, 1920, and assigned to defendant by an instrument dated June 22, 1922, recorded September 4, 1935, and also under an oil lease from Percy W. Marshall to Marshall Oil Company dated June 22, 1920, recorded June 15, 1921.

Defendant first claims that under the assigned contract of purchase it can hold its equitable interest in the property because the contract was never terminated, and because plaintiff was not in position to perform and did not tender a "deed with a certificate of title showing perfect title to said real estate" as required in the contract.

This contention is without merit. The agreed selling price was $8,000 payable in installments of $1,000 each, the first payable on delivery and the others on or before each November 1st following. The only evidence on the subject is that Marshall paid the first installment. The contract contained the following: "Time is hereby declared to be the essence of this contract, and should purchaser fail or neglect to make said deferred payments, or any of them, at the time and in the manner herein provided, then and in that event this receipt and contract shall at once become null and void, and the said party of the first part shall be at once released from any and all obligations to make any conveyance hereunder, or to convey the property herein described to said purchaser."

[1] Where a contract, like the one we have here, provides that time is its essence and also that the failure of the purchaser to pay any installment, when due, terminates the contract without further action on the part of the seller, the default terminates the contract and nothing need be done by the seller to terminate the purchaser's rights under it. Fresno Irr. Farms Co. v. Canupis, 39 Cal.App. 184, 178 P. 300; Pedrotti v. American Nat. Fire Ins. Co., 90 Cal.App. 668, 266 P. 376.

[2-4] Where a vendee claims an interest in real property under a contract of this kind the burden is upon him to prove that he had complied with its terms and that his rights under it had not terminated. Drips v. Moore, 179 Cal. 249, 176 P. 159. The same obligation rested on defendant as assignee of the purchaser's rights under the contract. As performance was not proved, the conclusion of the trial court that the contract was terminated and defendant could claim no rights under it must be sustained here.

[5] Nor can defendant claim under the oil lease for two reasons; (1) Marshall could not give a valid lease after his rights under his contract of purchase had terminated and, (2) the lease by its terms was forfeited by the lessee.

[6-8] The first proposition stated is obvious from the facts already detailed and needs no citation of supporting authority. The lease contained the provision that drilling must commence in one year and the further provision that if oil in paying quantities was not obtained in five years the lessee should cancel and surrender the lease. No drilling was ever done on the leased property. Further, the corporate powers of the Marshall Oil Company were suspended on March 6, 1922, and it has never been reinstated so that it was not in position to execute the lease on June 22, 1922. Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446; Silvey v. Fink, 99 Cal.App. 528, 279 P. 202. Nor has it since been in a position to conduct the business of drilling for oil on the leased property. Stats.1917, p. 377, sec. 11; sec. 3669c. Pol. Code. The evidence here clearly shows an abandonment of the lease by the lessee, assuming that it ever acquired any interest under the lease. Rice v. Lee, 44 Cal.App.2d 909, 113 P.2d 235; Hall v. Augur, 82 Cal.App. 594, 256 P. 232; Carlisle v. Lady, 109 Cal.App. 567, 293 P. 686; Garrison v. Hogan, 112 Cal.App. 525, 297 P. 87; Caswell v. Gardner, 12 Cal.App.2d 597, 55 P.2d 1222. It follows that defendant cannot claim under the oil lease.

Defendant urges certain alleged defects in the foreclosure proceedings instituted by the Marine Refining Corporation. We

will not consider these supposed defects in detail because if we assume everything said by defendant's counsel on this phase of the case to be true and sound it cannot affect our conclusions.

[9] The bill of exceptions recites that by a deed dated December 29, 1934, recorded December 31, 1934, the Marine Refining Corporation *and others* conveyed the property in question to plaintiff. This deed is not set forth in the record and we are not informed who were the other grantors who joined in the execution of this deed. Under these circumstances, it affirmatively appearing from the bill of exceptions that there were grantors other than the Marine Refining Corporation, without designating who they were, we are required to presume that the omitted evidence supports the findings and judgment. Under this rule we are required to assume that all persons necessary to complete plaintiff's record title appeared as grantors in the deed so that title to the property was conveyed to and vested in it.

It is unnecessary to consider the other questions argued by counsel.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.



47 Cal.App.2d 707

MIRANDA v. MIRANDA.

Civ. 17461.

District Court of Appeal, Second District, Division 2, California.

Nov. 10, 1941.

1. Exceptions, bill of ⇐39(1)

An appeal may be dismissed for failure to file printed bill of exceptions within time limited by court rule. Code Civ.Proc. §§ 950, 954; Rules for Supreme Court and District Courts of Appeal, rule 1, § 1.

2. Appeal and error ⇐554(2)

Where husband appealing from judgment requiring him to pay certain sums for separate maintenance and support of his wife relied wholly upon a bill of exceptions and no such record was before the appellate court, husband failed to furnish the requisite papers and the appeal was required to be dismissed. Code Civ.Proc. §§ 950, 954; Rules for Supreme Court and District Courts of Appeal, rule 1, § 1.

3. Appeal and error ⇐805

The failure of appellant to appear or to oppose motion to dismiss the appeal although duly served with notice of motion constituted an abandonment of the appeal justifying a dismissal. Rules of Supreme Court and District Courts of Appeal, rule 5, § 3.

4. Appeal and error ⇐554(2)

Where only points raised on appeal from judgment requiring husband to pay certain sums of money for separate maintenance and support of his wife related to sufficiency of evidence to sustain findings and there was no transcript of evidence by reference to which appellate court could decide questions raised, appeal was dismissed. Code Civ.Proc. §§ 950, 954.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Estella A. Miranda against M. Roy Miranda. From a judgment ordering defendant to pay certain sums of money for the separate maintenance and support of plaintiff, defendant appeals and plaintiff moves to dismiss the appeal.

Motion granted and appeal dismissed.

Fred M. Riedman, of Long Beach, for appellant.

Daniel N. Stevens, of Los Angles, for respondent.

PER CURIAM.

Respondent moves to dismiss the appeal in the above-entitled action upon the grounds that the appeal is frivolous and without merit; that appellant has failed to pay certain sums of money which the trial court ordered to be paid to enable respondent (appellant's wife) to defend this appeal; and that appellant has failed to furnish the requisite papers in that he has failed to file either a bill of exceptions or a reporter's transcript within the time provided by law.

[1] The appeal has been taken from a judgment ordering appellant to pay certain sums of money for the separate

maintenance and support of respondent. The clerk's transcript and appellant's opening brief were filed on March 16, 1940, but the record before us does not contain a transcript of any of the evidence produced on the trial of the action. From an examination of the opening brief it is evident that the only points raised on this appeal relate to the sufficiency of the evidence to sustain the findings. The clerk's certificate, filed in support of the motion to dismiss, shows that no reporter's transcript was filed in the trial court, but that an engrossed bill of exceptions was settled and filed there on January 16, 1940. It further appears from such certificate that no further time for perfecting the record on appeal has been granted appellant either by stipulation or order of court. The time for filing the printed bill of exceptions in this court has long since expired (Rule 1, sec. 1, Rules for Supreme Court and District Courts of Appeal) and no extension of time has been sought or granted. It is established that an appeal may be dismissed for the failure to file the printed bill of exceptions within the time limited by the above rule. Hewitt v. San Jose Pacific Co., 6 Cal.2d 372, 57 P.2d 907.

[2] Section 954 of the Code of Civil Procedure provides that an appeal may be dismissed where appellant fails to furnish the requisite papers. As part of the record on appeal, appellant is required to furnish any bill of exceptions upon which he relies. Code Civ.Proc., sec. 950. Since on this appeal appellant relies wholly upon a bill of exceptions and no such record is before us, he has failed to furnish the requisite papers and the appeal should be dismissed. Hewitt v. San Jose Pacific Co., supra.

[3] At the hearing of this motion appellant failed to appear or to oppose the motion in any manner, although duly served with notice thereof. We deem such conduct to be an abandonment of the appeal, justifying a dismissal. Rule V, sec. 3, Rules for Supreme Court and District Courts of Appeal.

[4] Moreover, from a mere examination of the judgment roll it appears that the findings and conclusions support the judgment. There is no transcript of the evidence by reference to which we could decide the questions raised on appeal.

For the foregoing reasons the motion to dismiss the appeal is granted and the appeal is dismissed.



47 Cal.App.2d 698

Ex parte CAVITT.

Cr. 3508.

District Court of Appeal, Second District, Division 1, California.

Nov. 8, 1941.

1. Criminal law ⇐90(5)

Under statutes providing that justices' courts in townships having population of 30,000 have exclusive jurisdiction in misdemeanor cases, justice's court of Whittier township, and not Los Angeles municipal court had exclusive jurisdiction of misdemeanor prosecution, both at time of commencement of trial in municipal court and at time of rendition of judgment therein, and hence municipal court was without jurisdiction to proceed with trial or pronounce judgment, where by writ of mandate the superior court had determined prior to commencement of trial that township had population in excess of 30,000, notwithstanding that municipal court may have possessed jurisdiction when complaint was filed. Pen.Code, §§ 1425, 1462; Code Civ.Proc. § 81.

2. Criminal law ⇐102

A court which by operation of law is divested of jurisdiction is without power to inflict punishment or enforce penalty for violations of law committed while court had jurisdiction, and under such circumstances court is equally without power to proceed in a matter of which it had jurisdiction at the time the action was commenced, unless some special provision is made for that purpose by statute.

3. Criminal law ⇐83

Jurisdiction is fundamental and must be continuing in the court throughout the proceeding, because it is jurisdiction alone that gives the court power to hear, determine and pronounce judgment on the issues before it.

4. Criminal law ⇐979(1)

Where a court that is divested of jurisdiction undertakes to pronounce a judgment in a cause which court did not have jurisdiction to hear or try, such judgment is void ab initio, even though the void judgment may be affirmed on appeal.

Habeas corpus proceeding by W. D. Cavitt to secure his release from the custody of the Chief of Police of the City of Los Angeles.

Petitioner discharged.

Morris Lavine and Wm. J. Clark, both of Los Angeles, for petitioner.

John F. Dockweiler, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

WHITE, Justice.

This is a proceeding in habeas corpus to secure the release of W. D. Cavitt from the custody of the chief of police of the city of Los Angeles. Petitioner was a supervisor at the Whittier State School, which is a reformatory maintained for the incarceration and training of boys committed thereto by the juvenile and superior courts of California.

On October 25, 1940, by complaint filed in the municipal court of the city of Los Angeles, petitioner was charged with six counts of violation of section 681 of the Penal Code and six counts of violation of section 242 of the same code. The complaint alleged that each of the offenses charged occurred "in Whittier Township in the County of Los Angeles". After pleas of not guilty were interposed, trial was had in the municipal court of the city of Los Angeles commencing on January 2, 1941, which trial resulted in the conviction of petitioner of the offenses charged in counts 2, 4, 5, 10 and 12, and his acquittal on the other counts set forth in the complaint. Judgment was pronounced on January 29, 1941. Petitioner was sentenced to the city jail for thirty days on count 2, twenty days on count 4, thirty days on count 5, fifteen days on count 10, and thirty days on count 12. The sentences were ordered to run consecutively. From these judgments petitioner appealed to the superior court of the state of California, in and for the county of Los Angeles, appellate department. That court affirmed the judgments on counts 2, 4, 10 and 12 and reversed the judgment on count 5, with directions to the municipal court to dismiss this last-mentioned count. People v. Cavitt, No.Cr.A. 1792. Upon the going down of the remittitur the municipal court issued four commitments based on the four charges of battery hereinabove referred to.

It is first contended by petitioner that he is entitled to be discharged from custody for the reason that when the complaint was filed in the Los Angeles municipal court, as well as when the case was tried and judgment rendered, the justice's court of Whittier township was vested with exclusive jurisdiction of the misdemeanor offenses charged, by reason of which fact the Los Angeles municipal court was without jurisdiction and its judgments consequently void.

Sections 1425 and 1462 of the Penal Code fix and determine the jurisdiction of the courts with which we are here concerned. Section 1425 declares that "Justices' Courts of Class A shall have jurisdiction exclusive of that of any municipal court established in the county, in all criminal cases amounting to misdemeanor only, except those of which the juvenile court is given original jurisdiction". As amended in 1939, section 81 of the Code of Civil Procedure provides that justice's courts in cities, towns and judicial townships having a population of 30,000 are of class A, while all others are of class B. The cited section provides that in determining the jurisdiction of any justice's court, "the population of a judicial township shall be deemed to be above or below thirty thousand as may have been found to be the fact in any proceeding in mandamus brought in a court having jurisdiction thereof; otherwise such population shall be deemed to be as shown by the last preceding census taken under the direction of the Congress of the United States".

[1] We do not deem it necessary to discuss the classification of the justice's court of Whittier township as determined by the census of 1940, for the reason that in any appropriate mandamus proceeding brought in the superior court of Los Angeles county, entitled, "County of Los Angeles, etc., Petitioner v. Justice's Court of Downey Township, County of Los Angeles, State of California, Guy B. Gamble, Justice of the Peace in and for Downey Township, etc., and Edward J. Guirado, Justice of the Peace in and for Whittier Township, etc.," and which proceeding was numbered 457659 in the files of the superior court, it was by judgment in said action rendered on December 12, 1940, which was subsequent to the last taking of

the census, judicially established that the justice's court of Whittier township was of class A. It must therefore be conceded that at the time of the trial of petitioner in the municipal court, commencing on January 2, 1941, as well as at the time judgment was rendered on January 29th, of the same year, the justice's court of Whittier township was clothed with exclusive jurisdiction of the offenses charged against petitioner. Even though it be conceded that the municipal court possessed jurisdiction at the time the complaint was filed, on October 24, 1940, that court was divested of jurisdiction when by writ of mandate it was determined on December 12, 1940, that Whittier township had a population numbering more than 30,000.

[2-4] The continued legal prosecution of the case and the pronouncement of judgment following conviction in the municipal court depended upon the continued existence and vitality of jurisdiction in that court. The return of respondent chief of police presents to us the four commitments of the municipal court of the city of Los Angeles upon which respondent relies as authority for holding petitioner in custody. In each of these commitments it is recited that petitioner was convicted in said court on January 16, 1941, and that judgment was pronounced January 29, 1941. Petitioner objected to the jurisdiction of such court to proceed with his trial or to pronounce judgment against him on the ground that the justice's court of Whittier township had been judicially declared to be of class A. We hold that the municipal court was without jurisdiction to proceed with the trial of petitioner or to pronounce judgment in the case against him. When by operation of law a court is divested of jurisdiction, it is without power to inflict a punishment or enforce a penalty for violations of law committed while it had jurisdiction, and a court under such circumstances is equally without power to proceed in a mattter of which it had jurisdiction at the time the action was commenced, unless some special provision be made for that purpose by statute. United States v. Chambers, 291 U.S. 217, 54 S.Ct. 434, 78 L.Ed. 763, 89 A.L.R. 1510. Jurisdiction is fundamental, and as heretofore pointed out, must be continuing in the court throughout the proceeding, because it is jurisdiction alone that gives the court power to hear, determine and pronounce judgment upon the issues before it. 7 Cal.Jur. 584; Lange v. Superior Court, 11 Cal.App. 1, 103 P. 908; In re Hatch, 9 Cal.App. 333, 99 P. 398. When a court that is divested of jurisdiction undertakes to pronounce a judgment in a cause which the court did not have jurisdiction to hear or try, such judgment is void ab initio. In re Wyatt, 114 Cal. App. 557, 559, 300 P. 132. And this is true even though a void judgment be, as in the instant case, affirmed on appeal.

By reason of the foregoing, other points raised do not require discussion.

The municipal court of the city of Los Angeles having lost jurisdiction of the proceedings during the pendency thereof, and therefore being without power to pronounce the judgments upon which petitioner is imprisoned, on the date such judgments were pronounced, it is ordered that he be discharged from custody.

YORK, P. J., and DORAN, J., concurred.



47 Cal.App.2d 713

PACIFIC EMPLOYERS INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 2680.

District Court of Appeal, Fourth District, California.

Nov. 12, 1941.

1. Constitutional law ⇐301
Workmen's compensation ⇐1947

Where permanent disability rating and award of Industrial Accident Commission were based on a report of superintendent of permanent disability rating department of the commission, which report was received by the commission after the open hearing of the case, the denial of the request of employer's insurance carrier to cross-examine the witness making the report and to introduce evidence in rebuttal of the report constituted a denial of constitutional right to "due process of law" and required annulment of the award. St.1937, p. 299, § 5704.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

2. Workmen's compensation ⇐1698, 1703

The rating of permanent disability of injured employee is a subject of expert testimony which should be made part of record available to both sides and the expert should be made available for cross-examination.

Proceeding by the Pacific Employers Insurance Company against the Industrial Accident Commission to annul an award in favor of William I. Gale, an employee of the Seaboard Oil Company.

Award annulled and case remanded with directions.

W. N. Mullen, of San Francisco, for petitioner.

Everett A. Corten and J. Gould, both of San Francisco, for respondents.

MARKS, Justice.

This is a petition filed by an insurance carrier to annul a permanent disability rating and award of the Industrial Accident Commission on the ground that a report forming a basis of the award was received by the Commission after the open hearing of the case, and that petitioner was denied the right to cross-examine the witness making the report upon which the award was based and to introduce evidence in rebuttal of the report. Sec. 5704, Labor Code, St.1937, p. 299.

In May, 1936, William I. Gale was employed by the Seaboard Oil Company and was injured on the eleventh day of that month. Petitioner was the employer's insurance carrier.

After proceedings duly had Gale was paid the compensation found to be due him and returned to work. On December 3, 1940, Gale filed another application. A hearing was had and an additional award was made. A rehearing was granted and another hearing was had. Medical reports were filed which clearly showed serious injury to his left leg and ankle, due to the previous injury, and the improper union of the bones. That the injury resulted in a permanent disability seems clear from these reports. No effort was made at or prior to the final open hearing to determine the percentage of this disability. This question was referred to R. E. Haggard, superintendent of the permanent disability rating department of the Commission, who, on June 9, 1941, recommended a 29¼ per cent permanent disability rating. A copy of this report was served on petitioner with the following notice attached:

"Notice is hereby given that the above entitled case will be submitted for decision seven days from the date hereof unless good cause be shown to the contrary in writing.

Dated at San Francisco, California, this 11th day of June, 1941.

Raymond G. Lindley
Referee
Industrial Accident Commission."

On June 18, 1941, petitioner served and filed a written request to have the case set down for further hearing "for the purpose of giving defendants the opportunity to cross-examine Mr. R. E. Haggard on his Report of Permanent Disability Rating for the Information of the Commission, dated June 9, 1941, and to offer testimony in rebuttal thereto. Copy of this report was mailed by your Commission to this defendant on June 11, 1941".

On June 19, 1941, without replying to the request of petitioner, the Commission made its findings of fact and award, basing its permanent disability rating on the report of Mr. Haggard and fixing the disability rating at 29¼ per cent.

[1] Petitioner maintains that the denial of its request denied to it its constitutional right to due process. This contention must be sustained.

A closely related question was before the court for review in Holmes Eureka Lumber Co. v. Industrial Acc. Comm., 41 Cal. App.2d 150, 106 P.2d 23, 24, where the court said: "We are of the opinion the Industrial Accident Commission exceeded its jurisdiction in submitting and determining the claimant's petition for additional compensation based on medical reports filed subsequent to the 'open hearing' which reports were not referred to or used on that hearing and the contents of which the employer and the insurer had absolutely no knowledge or opportunity of explaining or rebutting by cross-examination of the affiants or otherwise. That was a violation of the constitutional right to due process. Walker Mining Co. v. Industrial Acc. Comm., 35 Cal.App.2d 257, 262, 95 P.2d 188."

[2] An identical question was before the court in Young v. Industrial Acc.

Comm., 38 Cal.App.2d 250, 100 P.2d 1062, 1066, where the award was annulled. In the concurring opinion Mr. Presiding Justice Peters, concurred in by Mr. Justice Ward, the following appears:

"This problem is not a simple one of computation. The fact that the expert of the commission, at different times, has rated this particular injury in three or four different ways, demonstrates this. Obviously, no schedule can apply to every possible injury. No schedule can take into consideration the degree of pain, the ability of the injured man to continue to compete in the labor market, and other possible factors. This is the subject of expert testimony. This testimony should be made part of the record, available to both sides, and the expert should be made available for cross-examination."

Upon the authorities cited the award is annulled and the case is remanded to the Commission for further proceedings.

BARNARD, P. J., and GRIFFIN, J., concurred.



47 Cal.App.2d 693

WATKINS v. ROTH.

Civ. 2922.

District Court of Appeal, Fourth District. California.

Nov. 7, 1941.

1. Mandamus ⇐102(1)

Where parties to criminal appeal from superior court stipulated that transcript prepared by such court's stenographic reporter was full, true and correct copy of testimony and proceedings in case, whereupon it was approved and certified by trial judge and used on appeal, the fact, if assumed by appellate court, that trial judge exceeded his authority in ordering reporter to copy and certify portions of record not reported by him, is not controlling on county auditor's appeal from superior court's judgment granting writ of mandate requiring auditor to issue warrant in payment for reporter's services in preparing transcript. Rules for Supreme and Appellate Courts, rule 2, section 7.

2. Criminal law ⇐1104(6)

The object of appellate courts rule, requiring court to make order directing reporter who reported criminal case to transcribe necessary portions of his notes and requiring reporter to append to transcript and copies thereof affidavits that it is correct, is to secure a transcript correctly setting forth matters material to appeal, and when such object is attained, as shown by stipulation of parties to appeal, that reporter's transcript is full, true and correct copy of testimony and proceedings in case, necessity for such rule ceases. Rules for Supreme and Appellate Courts, rule 2, section 7.

3. Stipulations ⇐3

In criminal case, trial judge had power and authority to accept stipulation of district attorney and defendant's attorney that transcript, proffered by stenographic reporter, contained full, true and correct statement of testimony and proceedings in case and to approve and certify transcript on such stipulation. Rules for Supreme and Appellate Courts, rule 2, section 7.

4. Stipulations ⇐14(12)

Any possible error or insufficiency in connection with trial court's order to prepare transcript for use on criminal appeal was cured by subsequent stipulation of parties to appeal that transcript prepared by reporter was full, true and correct copy of testimony and proceedings in case and trial judge's certificate in accordance with such stipulation. Code Civ.Proc. § 953a; Rules for Supreme and Appellate Courts, rule 2, § 7.

5. Mandamus ⇐187(9)

On appeal from judgment granting writ of mandate, requiring county auditor to issue warrant in payment for services performed by superior court reporter in preparing transcript used on criminal appeal after trial judge's approval and certification thereof in accordance with parties' stipulation that it was full, true and correct copy of testimony and proceedings in case, the fact that other reporters were paid for preparing portions of similar transcript, which was never completed, certified to, or used, and question whether they should have been paid, need not be considered. Rules for Supreme and Appellate Courts, rule 2, section 7.

Appeal from Superior Court, San Bernardino County; Harry C. Westover, Judge.

Proceeding by Fred W. Watkins for a writ of mandate to compel Vincent L. Roth, auditor of San Bernardino County, to issue a warrant in payment for services performed by petitioner as a stenographic reporter of the Superior Court of such county in preparing a transcript used on a criminal appeal. From a judgment directing issuance of a peremptory writ, the auditor appeals.

Affirmed.

Jerome B. Kavanaugh, Dist. Atty., and Donald S. Gillespie, Deputy Dist. Atty., both of Los Angeles, for appellant.

Raymond E. Hodge, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This was a proceeding in mandate to compel the auditor of the county of San Bernardino to issue a warrant in payment for services performed by the petitioner in preparing a transcript used on a criminal appeal.

There is little or no dispute as to the facts. The petitioner has for many years acted as stenographic reporter in department one of the superior court of San Bernardino county. In July, 1940, a case was tried in that department in which John Reed and John Thurman were charged with murder. The trial judge ordered a daily transcript and ordered five copies made so that three copies would be available in the event of an appeal. Because of the absence of the petitioner the testimony and proceedings in this case up to the time the jury went out were taken down by two reporters who regularly acted in other departments of this court and by another reporter who had been assisting from time to time in all three departments. The petitioner, having returned to duty, took down and reported the proceedings in connection with the pronouncing of judgment and also those relating to Thurman's motion for a new trial.

A jury returned a verdict of guilty as to both defendants with a recommendation of life imprisonment for Thurman and without recommendation as to Reed. There was an automatic appeal to the Supreme Court as to Reed. See People v. Reed, 17 Cal.2d 405, 110 P.2d 394. The three extra copies of the daily transcript were used in making up the transcript on that appeal, together with a transcription of that portion of the proceedings which was reported by this petitioner, the three copies of the transcript thus compiled being forwarded to the governor, the attorney-general and the Supreme Court, respectively. All four reporters were paid for their respective services in connection with that transcript and no question in that connection is involved here.

A motion for a new trial was made on behalf of the defendant Thurman and denied after which he appealed to this court. This appeal was for good cause transferred to the Supreme Court and there decided. People v. Thurman, 17 Cal.2d 873, 110 P.2d 395. A written application for a transcript to be used on that appeal was duly filed and on the same day the trial judge signed an order at the bottom thereof "Let a transcript be prepared as requested". A few minutes after signing this order the trial judge orally instructed this petitioner, who was his regular reporter, to prepare a transcript to be used on the Thurman appeal, telling him, in effect, to copy the main portions of the transcript in the Reed appeal since the testimony and proceedings in both matters were identical.

On the same day, this petitioner informed the other reporters above referred to that he had been so instructed by the trial judge and that he would prepare the transcript and copies to be used on the Thurman appeal. The other reporters talked the matter over and as one of them put it, "We agreed that Mr. Watkins was not entitled to prepare the extra copies in a matter in which he did not do the reporting, and we decided at that time (after consulting with another judge and with the district attorney) that we would go ahead and make the copies, which we did". Thereupon, the other reporters wrote up or copied the portions of the testimony and proceedings which they had respectively taken and filed these copies in the office of the clerk of the court, where they remained up to the time of the trial of this proceeding. Although that partial transcript was never completed, certified or used, those three reporters had their claims for compensation in connection therewith approved by another judge of that court and presented the same to the county auditor who issued warrants which were paid.

On the other hand, this petitioner completed the copies of the record as he had been ordered to do and filed what purported to be a complete transcript, which was presented and settled by the trial judge. The district attorney and the attorney for the defendant Thurman were present and offered no objections, amendments or suggestions. Thereupon, the district attorney and the defendant's attorney stipulated that the copies presented were a full, true and correct copy or transcript of the testimony and proceedings. The trial judge then approved and certified the same and that transcript was filed in this court and became that part of the record on the Thurman appeal.

This petitioner's claim for compensation for thus preparing this transcript was approved and ordered paid by the trial judge. The petitioner presented his claim to the county auditor who refused to issue a warrant and that claim has not been paid. The petitioner then filed a petition for a writ of mandate commanding the auditor to audit and approve the claim and issue a warrant therefor. An answer was filed and after a trial a judgment was entered in favor of the petitioner which directed the issuance of a peremptory writ. From this judgment the auditor has appealed.

[1] The appellant's sole contention is that the petitioner's claim is invalid since it is based upon an order which the trial judge has not the power or authority to make. He relies on those portions of section 7 of rule II of the Rules for the Supreme and Appellate Courts which provide that the court shall "make an order directing the phonographic reporter who reported the case to transcribe such portions of his notes as in the opinion of the court may be necessary" and that the reporter "shall append to the original and to each copy an original affidavit that it is correct". The argument, briefly stated, is that it was intended by the provision of the rule first referred to to authorize the court to make an order directing the reporter or reporters who report a criminal case to transcribe such portion of their notes as the court considers necessary; that a reporter who has not taken a part of the testimony cannot swear to the correctness of such portions of the record, and thus cannot comply with the other quoted provision of this rule; and that it follows that a trial judge has no authority or power to order a reporter to copy and certify portions of a record not reported by him.

As this matter originally stood it would seem that the real difficulty was not so much a lack of authority on the part of the trial judge as the fact that a reporter would be unable to certify to the correctness of a report of proceedings which he had not reported. If nothing else had occurred it is rather difficult to see how the petitioner alone could have prepared an acceptable transcript. However, that is not the question now before us, and even if we assume that the trial judge exceeded his authority in making the order in question that fact is not controlling here since both parties to that appeal stipulated that the transcript thus prepared was a full, true and correct copy of the testimony and proceedings in the case and it was thereupon approved and certified by the trial judge and filed and used upon that appeal.

[2, 3] The object of the rule upon which appellant relies is to secure a transcript which correctly sets forth the matters material to an appeal. When that object is attained the necessity for the rule ceases, and there could hardly be better proof of such a result than the stipulation of the parties to that effect. Regardless of any question relating to the validity of the order in question the object and purpose of the order were fully accomplished. It cannot be questioned that the trial judge had power and authority to accept the stipulation of the district attorney and the defendant's attorney that the proffered transcript did contain a full, true and correct statement of the testimony and proceedings in the case, and upon such stipulation to approve and certify the transcript. This was done and the transcript thus prepared, stipulated to and certified, was filed in this court and became that part of the record in the Thurman appeal.

[4] In White v. Hendley, 35 Cal.App. 267, 169 P. 710, it was contended that there was no proper record on appeal because the court had not ordered the reporter to prepare the transcript as required by section 953a, Code of Civil Procedure. The transcript had, however, been prepared by the reporter and certified by the judge and it was held that any failure to comply with the statute was cured by the subsequent certification. Similarly, it must be held that any possible error or insufficiency in connection with the order to pre-

pare this transcript was cured by the subsequent stipulation of the interested parties and the certificate of the trial judge in accordance therewith.

[5] The fact that other reporters have been paid for preparing portions of a similar transcript which was never completed, certified to or used, and whether or not they should have been so paid are questions with which we are not now concerned. Nothing here appears which would justify a setting aside of the order for the issuance of the writ.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.



47 Cal.App.2d 755

MacQUIDDY v. RICE.

Civ. 13259.

District Court of Appeal, Second District, Division 1, California.

Nov. 14, 1941.

Hearing Denied Jan. 13, 1942.

1. Appeal and error ⇐1012(1)

Unless there was evidence in record which was contrary to findings of trial court, such findings were conclusive upon District Court of Appeal.

2. Mechanics' liens ⇐14

In suit to foreclose a mechanic's lien for improvements on land set apart to defendant as a probate homestead, defendant's conclusion that she had no interest in land, which was part of her husband's estate, on date of commencement of work of making improvements could not overcome specific finding that plaintiff had a valid lien upon property, which finding was supported by statutory rule that defendant, as husband's widow, on day of death of husband took title to land either under husband's will or by operation of law. Probate Code, § 300; Code Civ.Proc. § 1185.

3. Mechanics' liens ⇐281(1)

In suit to foreclose a mechanic's lien for improvements on land set apart to defendant as a probate homestead, where defendant claimed that a lien could not be impressed upon land because it was not set apart as a homestead until after commencement of work of making improvements, evidence warranted judgment for plaintiff on ground that defendant, being her husband's widow, had a sufficient ownership in land to subject it to plaintiff's lien. Probate Code, § 300; Code Civ.Proc. § 1185.

4. Mechanics' liens ⇐14

Although the mechanic's lien and probate homestead laws of California are favored, whenever the owner of a probate homestead contracts for labor and material to be placed upon it, and thereafter fails to pay therefor, the interest of owner of homestead may be foreclosed under a mechanic's lien for benefit of lienholder, and in such case foreclosure of rights of owner of homestead in and to homestead does not extinguish the homestead itself. Probate Code, § 300; Code Civ.Proc. § 1185.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Suit by D. H. MacQuiddy against Suzanne M. Rice for foreclosure of a mechanic's lien. From a judgment for plaintiff, defendant appeals.

Judgment affirmed and defendant's appeal from order denying a new trial dismissed.

W. Stuart Smith, of Santa Barbara, for appellant.

Schauer, Ryon & McMahon and Robert W. McIntyre, all of Santa Barbara, for respondent.

DRAPEAU, Justice, pro tem.

The plaintiff constructed a building upon land set apart to the defendant as a probate homestead. Payment for the improvements was not made, and the pending action to enforce a mechanic's lien was instituted in the superior court. The trial court found a lien in favor of the plaintiff and applied it to a portion of the probate homestead, and the judgment appealed from followed.

The judgment is attacked for the following reasons:

(a) A lien may not in any event be impressed upon a probate homestead.

(b) Assuming a lien may be had upon the property involved, the proof of it is not sufficient, because the probate home-

stead was set apart to the defendant about a month after work on the improvements was commenced. In other words, the defendant contends that when the work of improvement was *commenced* the land upon which the improvement was made did not belong to her, and that, therefore, no lien could be impressed upon the probate homestead. Section 1185, Code of Civil Procedure, is cited in support of this proposition.

(c) If the probate homestead is foreclosed for the benefit of the lien holder, and title to the probate homestead thereby passes out of the defendant, this will ipso facto terminate the probate homestead, and thus there will be nothing for the plaintiff in any event.

In a printed transcript on appeal presented to this court, there were included copies of the pleadings, findings, and judgment, and a very brief recital of evidence denominated "bill of exceptions, as settled by stipulation".

This evidence may be completely summarized as follows:

1. That the work of improvement was commenced August 20, 1936, and the last labor was performed October 12, 1936.

2. Evidence as to an appropriate area for the convenient use and occupation of the building constructed on the premises.

3. That the defendant was not executrix of her deceased husband's estate on or about August 20, 1936, having resigned the year before; that she had no interest in her husband's estate on or about said date; that she acquired the property here in question by decree in probate as a probate homestead September 16, 1936.

[1, 2] Unless there is evidence in the short record thus summarized which is contrary to the findings of the court below, the findings are conclusive upon this court. We do not think the mere conclusion of the defendant that on the day of the commencement of work of improvement she had no interest in her husband's estate can overcome the specific finding of the trial court that the plaintiff had a valid lien upon the property. This finding is, of course, supported by the basic rule of law set forth in our Probate Code section 300, that the defendant, as the widow of the decedent, on the day of the death of her husband, took title to the real property in question either under his will or by operation of law. Moreover, there is no evidence that any other person other than the defendant widow had any interest in the real property involved.

[3] Therefore, we must sustain the finding of the lower court that the defendant being the widow of the decedent did have a sufficient ownership in the property involved to subject it to the lien of the plaintiff.

[4] We have been cited no authority to support the proposition that a mechanic's lien may not be impressed upon a probate homestead in a proper case. The cases cited by counsel for appellant, and his argument that a widow's homestead is favored by our law, do not, in our opinion, support the proposition that a mechanic's lien cannot be enforced as against a probate homestead. It is true that both the mechanic's lien and probate homestead laws of our state are favored by our law; but we think that whenever the owner of a probate homestead contracts for labor and material to be placed upon it, and thereafter fails to pay the contractor or material man for such improvements, in all good conscience the interest of the owner of the probate homestead should be foreclosed for the benefit of the lien holder.

We are also of the opinion that in such a case the foreclosure of the rights of the owner of the probate homestead in and to it does not extinguish the probate homestead itself. We think we have a case here more nearly analogous to that of the levy of an execution upon the interest of a life tenant in real property, title to which the judgment creditor may enjoy until the death of the life tenant vests it in the remainderman.

Therefore, the judgment is affirmed; the appeal from the order denying a new trial is dismissed.

YORK, P. J., and DORAN, J., concurred.

47 Cal.App.2d 781

INNES v. McCOLGAN, Franchise Tax Com'r.

Civ. 2829.

District Court of Appeal, Fourth District, California.

Nov. 15, 1941.

1. Statutes ⇐226

It would be presumed that California Personal Income Tax Act was adopted with definition of "gross income" in mind that federal courts had placed on "gross income" as used in Federal Income Tax Law, in view that the state act follows the federal act in many particulars. St.1935, p. 1090, § 1 et seq.; 26 U.S.C.A. Int.Rev.Code, § 1 et seq.

2. Taxation ⇐104

Where income from trust fund is paid to wife to discharge a continuing obligation of husband to wife, income from the trust is "gross income" of husband and is taxable to him. St.1935, p. 1090, § 1 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Gross Income".

3. Taxation ⇐104

Where corpus of trust is transferred by husband to trustee without any reserved rights over or in it and is a full discharge of all present and future obligations to pay wife anything, and there is no existence of valid court order requiring future payments by husband to wife for her support, income from the trust is "gross income" of wife and is not taxable to husband. St.1935, p. 1090, § 1 et seq.

4. Divorce ⇐310

Divorced wife could not release former husband from his obligation to support their son during son's minority.

5. Divorce ⇐245(1)

Power to modify award of alimony, either as to amount, duration, or time and manner of payment, is inherent in the court, unhampered by terms of any contract which parties might have entered into providing for payment of any such alimony, when it is given in order or decree as maintenance only. Civ.Code, § 139.

6. Divorce ⇐245(1)

Where divorced wife and former husband entered into an agreement whereby husband established trust fund of $25,000, income of which, and such of corpus as might be necessary, to be used to pay wife $200 per month for support during balance of her life, upon wife agreeing to release husband from all claims, superior court was not required to modify divorce decree requiring husband to pay wife $300 per month for support of wife and children in accordance with the stipulation, but court was vested with a discretion in the matter. Civ. Code, § 139.

7. Taxation ⇐363½

Where divorced husband on May 8, 1935, created trust fund of $25,000 the income of which, and such of corpus as might be necessary, to be used to pay former wife $200 per month for support during balance of her life, in return for wife's agreement to release husband from all claims in favor of herself or any of her children, and divorce decree requiring husband to pay wife $300 per month for support of herself and children was not modified by superior court by eliminating support provision until after December 31, 1936, income from trust fund was "gross income" of husband for years 1935 and 1936 and was taxable to him. St.1935, p. 1090, § 1 et seq.; Civ.Code, § 139.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Murray Innes against Charles J. McColgan, as Franchise Tax Commissioner, to recover back a claimed overpayment under protest of income tax for 1935 and 1936, together with accrued interest. From a judgment for plaintiff, the defendant appeals.

Reversed.

Earl Warren, Atty. Gen., and H. H. Linney and Valentine Brookes, Deputy Attys. Gen., for appellant.

Irve C. Boldman and Bertrand L. Comparet, both of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment requiring defendant, as Franchise Tax Commissioner of the State of California, to pay plaintiff the sum of $107.58. This sum represented a claimed overpayment under protest of $48.82, plus $8.84 interest, on plaintiff's income tax for 1935, and $36, plus $4.36 interest, claimed overpayment on his income tax for 1936, together with $9.56 accrued interest on those amounts.

The facts of the case are not in dispute nor are they involved. Plaintiff and Katherine D. Innes were formerly hus-

band and wife. They had three children. Mrs. Innes was awarded an interlocutory decree of divorce from plaintiff in 1926, and a final decree in 1927. By the decree he was required to pay her $300 per month for the support of herself and their three children, subject to further order of the court. In 1935, or shortly before, differences arose between plaintiff and his former wife over the payment of this money which was adjusted by agreement between the parties.

Under date of May 8, 1935, plaintiff and Mrs. Innes entered into a written contract whereby plaintiff agreed to pay to Murray Innes, Jr., their son, as trustee, the sum of $25,000 in trust, the income, and such of the corpus as might be necessary, to be used to pay Mrs. Innes $200 per month for her support during the balance of her life. Plaintiff retained no control over the trust or the trust funds, nor was he obligated to pay her anything if the trust funds became exhausted during her lifetime. After her death the unexpended balance of the corpus of the trust was to be divided between the children.

The trust agreement contained the following covenants on the part of Mrs. Innes:

"The party of the second part hereby releases the party of the first part of and from all claims and demands of every name and nature including any claim or cause or causes of action in favor of herself or any of her children against the party of the first part, and covenants and agrees to obtain and procure from each and all of the said three children a general release to the party of the first part; and she further covenants and agrees to cause the dismissal, discontinuance and release of any action or proceeding now pending involving any claim for alimony or support for herself or support, maintenance and education of any of the said three children accrued or to accrue in the future, if any. Said party of the second part also covenants and agrees to consent to the making and entry of any Order or Decree in any action now pending to carry out the provisions of this agreement, including the entry of any Order or Decree modifying or striking out from the Final Decree of Divorce of any provision for alimony, support, maintenance and education contained in said Final Decree of Divorce, and to make, execute, and deliver all other necessary or proper papers or consents to carry out each and all of the provisions of this agreement. * * *

"Concurrently with the payment of said sum of twenty-five thousand dollars ($25,000) to said Murray Innes, Jr., as hereinabove provided, the party of the second part agrees to execute and deliver to the party of the first part a duly acknowledged satisfaction of the provisions of the decree of divorce hereinabove referred to requiring the payment of money."

Plaintiff paid the $25,000 to Murray Innes, Jr., and concurrently Mrs. Innes executed a satisfaction of judgment, which reads in part as follows: "Now, therefore, in consideration of the premises and the payment by defendant (Murray Innes) for the account of plaintiff (Katherine D. Innes) of the sum of Twenty-five Thousand Dollars ($25,000.00) receipt whereof is hereby acknowledged, full satisfaction is hereby acknowledged of a certain judgment rendered and entered in said Superior Court in the said action on the 28th day of April, 1927, in favor of Katherine D. Innes, Plaintiff, and against Murray Innes, Defendant, for the sum of $300.00 per month as a suitable allowance for the support of plaintiff and the support and maintenance of the children of plaintiff and defendant, beginning May 1, 1926, and thereafter on the first day of each and every month until further order of the court * * * and the plaintiff hereby authorizes and directs the clerk of said court to enter satisfaction of record of said judgment in the said action."

This was not presented to the superior court which had granted the divorce until 1937. On October 12, 1937, that court struck out the portions of the decree requiring plaintiff to pay Mrs. Innes the support money.

Plaintiff did not include the income from the trust funds in his personal income tax returns for the years 1935 and 1936. After proceedings duly had he was charged with this income and the amount of his tax increased in the amounts already mentioned.

The sole question here for decision is whether the income from the trust funds for the years 1935 and 1936 was properly charged to plaintiff.

[1] The California Personal Income Tax Act, St.1935, p. 1090, in many respects closely follows the provisions of the Federal Income Tax law, 26 U.S.C.A. Int. Rev.Code, § 1 et seq. The definitions of

gross income are similar in both enactments so we may presume that the California law was adopted with the definition in mind that the federal courts had placed on gross income. Union Oil Associates v. Johnson, 2 Cal.2d 727, 32 P.2d 360, 43 P.2d 291, 98 A.L.R. 1499. Therefore, we will look to the decisions of the federal courts to determine the definition of gross income in cases identical with or similar to the one we have here. The following decisions of the Supreme Court of the United States are determinative of that issue: Gould v. Gould, 245 U.S. 151, 38 S.Ct. 53, 62 L.Ed. 211; Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 49 S. Ct. 499, 73 L.Ed. 918; United States v. Boston & Maine R. R., 279 U.S. 732, 49 S.Ct. 505, 73 L.Ed. 929; Douglas v. Willcuts, 296 U.S. 1, 56 S.Ct. 59, 80 L.Ed. 3, 101 A.L.R. 391; Helvering v. Fitch, 309 U.S. 149, 60 S.Ct. 427, 84 L.Ed. 665; Helvering v. Clifford, 309 U.S. 331, 60 S.Ct. 554, 84 L.Ed. 788; Helvering v. Fuller, 310 U.S. 69, 60 S.Ct. 784, 84 L.Ed. 1082; Helvering v. Leonard, 310 U.S. 80, 60 S.Ct. 780, 84 L.Ed. 1087.

[2, 3] These decisions establish two rules of law that must be controlling here. They are: Where the income from the trust fund is paid to the wife to discharge a continuing obligation of the husband to the wife the income from the trust is gross income of the husband and is chargeable and taxable to him. Where the corpus of the trust is transferred by the husband to the trustee without any reserved rights over or in it and is a present and full discharge of all present or future obligations to pay the wife anything and there is no existing valid court order requiring future payments by the husband to the wife for her support the income from the trust is gross income of the wife and is not chargeable to the husband and he is not required to pay any income tax upon it. We must apply those rules to the facts of the instant case under the law in California to determine the correctness of the assessment of the income of the trust to plaintiff.

[4] Of course as between plaintiff and his divorced wife the documents they executed on May 8, 1935, and the payment of $25,000 into the trust fund, constituted a complete release by the wife of the obligation of the husband to support her in so far as that result could have been accomplished by a contract between them. Had the wife, by execution or otherwise, obtained further money from the plaintiff under the support provisions of the divorce decree it is probable that the plaintiff would have had his remedy against her for the damages suffered, recoverable in an action for breach of contract. But this does not settle the question we have here. The really important question is the obligation of the superior court to modify the decree of divorce by striking from it the provisions for the payment of support money by plaintiff to his former wife in accordance with their agreement. One of the children was a minor of the age of twenty years on May 8, 1935. Of course the mother could not legally release plaintiff from his obligation to support this son during his minority. As the parties do not argue this question we will give it no further consideration.

[5] Section 139 of the Civil Code gives the superior court power to require a husband to provide support for his divorced wife and the children of the marriage and from time to time to modify such orders for support where a divorce is granted for an offense of the husband. In Johnson v. Johnson, 104 Cal.App. 283, 285 P. 902, 904, it is said: "When the court awards alimony to an innocent wife it is not bound by the terms of a contract between the parties either as to its amount or its duration. The power to make the award is drawn from the terms of the statute and not from the agreement of the husband and wife. It follows that the power to modify the award of alimony, either as to amount, duration, or time and manner of payment, is inherent in the court, unhampered by the terms of any contract which the parties might have entered into providing for the payment of any such alimony, when it is given in the order or decree as maintenance only. Smith v. Superior Court, 89 Cal. App. 177, 264 P. 573; Soule v. Soule, 4 Cal.App. 97, 87 P. 205; Gates v. Gates, 54 Cal.App. 407, 202 P. 151; notes 58 A. L.R. 639." The case of Smith v. Superior Court, supra, is direct authority for the foregoing rule announced in the Johnson case, where it may be dicta.

[6] It would therefore seem clear that the superior court was not required by law to modify the divorce decree in accordance with the stipulation but was vested by the law of the state with a discretion empowering it to decide the question of the modification of the decree independent of and contrary to the agreement of the parties. This being true, it follows, as the divorce decree was not

modified until after December 31, 1936, the last day of the last tax year in question here, that during the years of 1935 and 1936 there remained in full force and effect a decree of court requiring plaintiff to pay his former wife three hundred dollars per month, which on the face of the decree created a valid and binding obligation on the part of plaintiff to pay Mrs. Innes this money until that decree was modified by order of court.

[7] Under the authorities already cited, we must hold that the income from the trust fund was used to satisfy this obligation and was chargeable to plaintiff. It follows that the Franchise Tax Commissioner properly assessed the income from the trust fund to plaintiff and collected the taxes on that income from him, and that he cannot recover them.

The judgment is reversed.

BARNARD, P. J., and WEST, Justice pro tem., concurred.



47 Cal.App.2d 730

In re NORSWING'S ESTATE.

NORSWING v. NELSON et al.

Civ. 2954.

District Court of Appeal, Fourth District, California.

Nov. 12, 1941.

1. Wills ⇦119

A "declaration", within statute providing that a testator at time of subscribing the instrument must declare to attesting witnesses that it is his will, need not be expressed in words, but may be sufficiently indicated by testator's conduct. Probate Code, § 50, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Declaration".

2. Wills ⇦119

In subscribing or acknowledging an instrument as a will, it is not necessary that testator should have spoken words declaring the instrument to be his will, or that he should expressly request attesting witnesses to sign it as such, and it is sufficient if such declaration and request are unmistakably indicated to persons signing as witnesses by testator's conduct. Probate Code, § 50, subd. 3.

3. Wills ⇦119

It is essential to the validity of an instrument offered as a will that each of the attesting witnesses understood that testator was promulgating instrument as his will at time of subscribing or acknowledging it. Probate Code, § 50, subd. 3.

4. Wills ⇦119

Where one of the attesting witnesses to an instrument offered by nephew and sister did not know that instrument, which had the word "Will" written at top of page, was intended by testator as his will, instrument was not executed as required by statute and could not be admitted to probate. Probate Code, § 50, subd. 3.

5. Appeal and error ⇦1010(1)

A finding by trial court based on uncontradicted evidence could not be disturbed on appeal.

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Proceedings in the matter of the estate of Knute B. Norswing, deceased, wherein Deno Nelson, etc., and another, proponents, filed a petition for the probate of an instrument as a will and asking that the probate of another instrument as a will be revoked. A contest was filed by Gunhild C. Norswing, contestant. From a judgment denying the petition, proponents appeal.

Affirmed.

Raymond Thompson, of Fullerton, and J. Harold Decker, of Los Angeles, for appellants.

William V. O'Connor (of O'Connor, Gray & Strock), of Los Angeles, and R. C. Mize and David D. French (of Mize, Kroese & French), both of Santa Ana, for respondent.

BARNARD, Presiding Judge.

Knute B. Norswing died on November 7, 1939. On August 1, 1939, he executed a will which consisted solely of a revocation of all former wills, and in which he stated that this was done to the end that all of his property should descend to his legal

heirs. This will was witnessed by H. Ustick and W. E. Askin. On August 3, 1939, he executed another will leaving his entire estate to his wife, which will was admitted to probate.

Thereafter, a petition was filed on behalf of a sister and a nephew of the deceased asking for the probate of a purported will "bearing incorrect date of 1st day of August, 1939", and alleged to have been "executed on or about August 15th, 1939", and asking that the probate of the will of August 3, 1939, be revoked. A contest was filed by the widow of the deceased. A hearing was had and the court found in favor of the contesting widow, finding, among other things, that "said decedent did not by his conduct or by his acts or by any declaration in words at any time declare that said document was his will". A judgment was entered accordingly and the sister and nephew have appealed.

The sole question presented is whether the evidence sustains the court's finding to the effect that the offered document was not executed with the formalities required by subdivision 3 of section 50 of the Probate Code, which reads as follows: "The testator, at the time of subscribing or acknowledging the instrument, must declare to the attesting witnesses that it is his will."

The offered instrument, except for signatures, is a carbon copy of the typewritten portion of the will which the decedent had executed on August 1, 1939. It consists of one sheet of paper, has the word "Will" at the top, is dated August 1, 1939, and has an attestation clause which bears no date. It has the signature of the decedent in the usual place and below the attestation clause it was signed by two witnesses, H. Ustick and J. P. Kenney.

There is no dispute as to the circumstances surrounding the execution of the offered document. On or about August 15, 1939, Kenney, who was employed by the deceased, took him to a barber shop in Fullerton. The decedent told Kenney to go over and see if Ustick was in his office as he wanted to see him. Kenney did so and on his return accompanied the decedent to Ustick's office. Kenney had not the "slightest idea" why the decedent wanted to see Ustick and the decedent said nothing to him in that connection. Ustick testified that when the others arrived at his office and in the presence of himself and Kenney the decedent said: "I want you to witness my signature"; that the decedent took from his pocket the document in question and handed it to Ustick, folded; that he, Ustick, unfolded the document and, after looking over it hastily, said to the decedent: "Mr. Norswing, this is a carbon copy of the instrument you signed two or three weeks ago"; that the decedent replied: "Yes, I know it"; that he then said: "Mr. Norswing, we can't change the dates on that"; that the decedent replied: "Okay, I don't want them changed"; that during this conversation both attesting witnesses were present and understood fully the words of the decedent; and that after this conversation the decedent signed the instrument, after which both Ustick and Kenney also signed. He further testified that on that occasion he did not read the attestation clause; that the decedent requested them to witness his signature but did not refer to the instrument as his will and made no statement to the witnesses as to the nature of the instrument; and that there was no mention of a will and the word "will" was never used during the entire conversation.

Kenney's testimony is substantially the same. He testified that the decedent asked them to witness his signature but did not state at any time what kind of a paper it was; that he heard the conversation between Ustick and the decedent about this being a carbon copy of a paper that had been previously signed and about the inability to change the date; that the paper was lying on the desk when he signed it; that he did not see the word "Will", did not read the paper, and did not read the portion just above his signature; that he just glanced at the paper and signed it after the decedent signed it; that nothing was said about a will at any time; and that he did not know "whether it was a deed or bill of sale or what it was".

[1-3] The code provision is that a testator at the time of subscribing the instrument "must declare to the attesting witnesses that it is his will". It is well settled that such a declaration need not be expressed in words, but may be sufficiently indicated by the conduct and acts of the testator. The general rule is thus stated in Re Estate of Silva, 169 Cal. 116, 145 P. 1015, 1016: "It is not necessary that the testator should have spoken words declaring the document to be his will, or that he should expressly request the witnesses to sign it as such. It is sufficient if this declaration and request are unmistakably

indicated to the persons signing as witnesses by the testator's conduct and actions, although there is no declaration in words to that effect." It is essential, however, that each of the witnesses shall understand that the testator was promulgating the document as his will. In re Estate of Silva, supra; In re Estate of Johnson, 100 Cal.App. 676, 280 P. 987.

In the instant case, the decedent did not expressly declare that this instrument was his will. A sufficient declaration probably appears in so far as Ustick is concerned because of his conversation with the decedent relating to the execution of the original document, of which this was a copy, and in which Ustick had participated as one of the witnesses. The question remains whether, with respect to the witness Kenney, such a declaration is to be implied from the acts and conduct of the deceased.

Both of the witnesses agree as to what was said and done and there is nothing in the facts thus established which would necessarily indicate to Kenney that the instrument in question was a will. In fact the only thing which was said about the instrument, the conversation relating to the prior execution of a document of which this was a copy, might well have tended to mislead Kenney in this regard rather than to indicate to him that this was a will. The facts thus brought out, that this was a copy of an instrument which had been previously executed and that the decedent did not want any of the dates changed, would naturally cause Kenney to believe that this was not the execution of a new instrument, intended to supersede the one of which it was a copy, much less such an important matter as the execution of a new will.

The appellants argue that Kenney should have known that he was witnessing a will because the paper lay on the desk before him and he could have seen the word "Will" and could have read the attestation clause. Nothing further appears than that he had an opportunity to read the instrument had he so desired. This witness was employed as a ranch hand and when his employer asked him to "witness my signature", without explaining the nature of the document, he might well have had a natural reluctance about reading the instrument and his failure to do so is quite understandable. Even the witness Ustick, who also had the paper before him, testified that he did not read the attestation clause at that time. And the instrument itself was unfolded by Ustick and not by the decedent.

[4, 5] The uncontradicted evidence is that one of the witnesses to this instrument did not know that it was intended as a will. There is no evidence of acts or conduct on the part of the decedent which required a finding that the nature of this instrument was unmistakably indicated to this witness. It follows that the court's finding in this connection cannot be disturbed on appeal. In re Estate of Krause, Cal.Sup., 117 P.2d 1.

For the reasons given the judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.



47 Cal.App.2d 709

SCHNEIDER et al. v. PASCOE et al.

Civ. 11059.

District Court of Appeal, First District, Division 1, California.

Nov. 12, 1941.

1. Boundaries ⇐40(1)

In suit to restrain defendants from using that portion of their building claimed to encroach upon plaintiffs' adjoining property, the date of erection of a fence marking the boundary line between the properties was a question of fact for trial court's determination.

2. Boundaries ⇐25

In determining boundaries of land, the original and record survey, unless shown to be inaccurate, should be followed, if possible.

3. Boundaries ⇐46(3)

In suit to restrain defendants from using that portion of their building claimed to encroach upon plaintiffs' adjoining property, whether a surveyor's testimony was sufficient to establish an encroachment was immaterial where boundary line had been fixed by agreement and subsequent acquiescence of parties prior to commencement of suit.

4. Boundaries ⇐46(3)

Where there is a disagreement by contiguous owners relative to property lines, and a parol agreement is in good faith entered into between them fixing the dividing line by marked designations, and parties acquiesce in such agreed location for a period equal to the statute of limitations, the line becomes the fixed boundary against protests of either party or a successor in interest, irrespective of fact that subsequently it may appear that the line agreed upon is not the true line as delineated or referred to in deeds, and the legal basis of such rule is reinforced when parties erect structures in form of substantial buildings.

5. Boundaries ⇐46(1)

A "dispute", within rule regarding parol agreements fixing dividing line between contiguous property owners, consists of uncertainty in minds of contracting parties as to location of boundary line.

See Words and Phrases, Permanent Edition, for all other definitions of "Dispute".

6. Boundaries ⇐37(5)

In suit to restrain defendants from using that portion of their building claimed to encroach upon plaintiffs' adjoining property, evidence warranted judgment for defendants on ground that each of respective property owners was uncertain as to true boundary line and that they in good faith agreed upon and designated a line and subsequently, approximately 20 years before commencement of suit, erected buildings in accordance therewith, the removal of which would result in substantial loss.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Suit by Theodore Schneider and others against W. F. Pascoe and others, to restrain defendants from using a portion of their building claimed to encroach upon plaintiffs' adjoining property. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Fred M. Riedman, of Long Beach, for appellants.

Houser, Houser & Houser and J. Everett Houser, all of Long Beach, for respondents.

WARD, Justice.

This is an appeal from a judgment in favor of defendants in an action to restrain them by injunction from maintaining or using that portion of their building claimed to encroach about fourteen inches upon plaintiffs' adjoining property. Two questions are involved: Was the testimony of a civil engineer sufficient to substantiate an encroachment; and, was there ever established an agreed boundary line?

[1] Defendants purchased their property in 1903. In 1918, one Price built a private garage on his adjoining property. Shortly thereafter a neighbor called defendants' attention to the fact that the Price garage was encroaching upon the Pascoe property. Thereupon Price and Pascoe, after making measurements from certain surveyor's stakes in the neighborhood, agreed that there was an encroachment, and Price moved his garage in accordance with their findings. There was testimony that a lath fence attached to this garage further marked the property line of the parties. In referring to a stucco business building erected by defendants in 1922, there was testimony that there was "a space of about four or five inches between that [the building] and the little fence. Q. Do you refer to the little fence—is that the agreed line between you and Mr. Price? A. Yes." From the entire record some doubt might have existed relative to the date of the erection of the fence, but this was a question of fact for determination by the trial court. The structure erected by defendants in 1922 consisted of undertaking parlors, built at the rear of their property, with garage accommodations for four ambulances. Subsequently, in 1923 they erected a brick building on the front of the property, extending back seventy-five feet, and some six or seven feet beyond the east end of the private garage on the property formerly owned by Price. It is in connection with one of the walls of this brick building that the encroachment is claimed. In constructing the building, the contractor measured from surveyor's stakes, the agreed boundary line and the line of the stucco structure in the rear. According to his measurements, the brick building was erected clearly within the confines of defendants' property. The plaintiffs herein testified that they purchased their prop-

erty in 1937; the present action was filed in 1938. Between such times they tore down the old fence, obliterated the post holes and erected a fence in accordance with their ideas as to the property line.

The court found that "the [Schneider] property referred to as lot ten (10) is a residence lot improved with a five-room cottage and garage, and that the [Pascoe] property referred to as lot eight (8) is a business lot improved with two business structures, one a public garage 75 feet deep and extending across the width of the lot, and the other a portion of a one-story building used as funeral parlors, and that the structure which plaintiffs refer to as an encroachment consists of a portion of the southern wall of said public garage, and that said wall is of high grade brick construction and represents a valuable improvement and a heavy investment".

[2, 3] It was stipulated that the civil engineer who testified for plaintiffs was a competent witness. Respondents, however, contend that in making his survey he did not go to the original monuments or resort to the original maps. There was some evidence of the obliteration of the original monuments, but also some evidence of their re-establishment. Further, there was evidence that a map prepared and used by him was a copy of a map in the city engineer's office "which purports to be a copy of the record map". In determining the boundaries of land, the original and record survey, unless shown to be inaccurate, should, if possible, be followed. Churchill Co. v. Beal, 99 Cal. App. 482, 278 P. 894; Wilmon v. Aros, 191 Cal. 80, 214 P. 962; People v. Covell, 17 Cal.App.2d 627, 62 P.2d 602; Hoffman v. Van Duzee, 19 Cal.App.2d 517, 65 P. 2d 1330. In this case the sufficiency of the surveyor's testimony is of secondary importance—the boundary line had been fixed by agreement and subsequent acquiescence long prior to the present action.

[4] Where there is a disagreement by contiguous owners relative to property lines, and a parol agreement is in good faith entered into between them fixing the dividing line by marked designations, such as a fence or structure which plainly marks it, and the parties continue to acquiesce in such agreed location for a period equal to the statute of limitations, the line becomes the fixed boundary against the protests of either party or a successor in interest, irrespective of the fact that subsequently it may appear that the line agreed upon is not the true line as delineated or referred to in deeds. Loustalot v. McKeel, 157 Cal. 634, 108 P. 707; Todd v. Wallace, 25 Cal.App.2d 459, 77 P.2d 877; Young v. Blakeman, 153 Cal. 477, 95 P. 888. Wilder v. Nicolaus, 50 Cal.App. 776, 195 P. 1068, is not in point. In that case a fence was built, but there was no agreement that it designated the dividing line. The legal basis of the rule is reinforced when the parties erect structures, not as barriers, but in the form of substantial buildings. Roberts v. Brae, 5 Cal.2d 356, 54 P.2d 698; Price v. DeReyes, 161 Cal. 484, 119 P. 893.

[5] Appellants contend that there was never in fact any dispute or uncertainty between Price and Pascoe relative to the boundary line. There was at least sufficient dispute to result in the measurement by use of the surveyor's stakes, and the moving of the Price garage about a foot from its original position to the agreed boundary line. Dispute in this connection consists of the uncertainty in the minds of the contracting parties as to the location of the boundary line. The same contention, under somewhat similar facts, was raised and disallowed in Swartzbaugh v. Sargent, 30 Cal.App.2d 467, 86 P.2d 895. See, also, Clapp v. Churchill, 164 Cal. 741, 130 P. 1061; Roberts v. Brae, supra; Price v. DeReyes, supra. The case of Agmar v. Solomon, 87 Cal.App. 127, 261 P. 1029, cited by appellants, is not in point. In that case a building was erected in disregard of, or as a mistake in, survey, and there was no acquiescence nor claim of "acquiescence" therein for a period equal to the statutory period of limitations.

[6] The evidence is sufficient to establish that each of the respective owners was uncertain as to the true boundary line; that in good faith they agreed upon and designated one, marked it and subsequently, nearly twenty years ago, erected buildings in accordance therewith the removal of which would result in substantial loss.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

47 Cal.App.2d 646

DIEDERICHSEN et al. v. SUTCH et al.

Civ. 2743.

District Court of Appeal, Fourth District, California.

Nov. 7, 1941.

1. Municipal corporations ⇐122(3)

In action for a mandatory injunction against violation of building restrictions in deed by erection of two dwelling houses on a single lot, trial court's action in overruling defendants' objection to admission in evidence of zoning ordinance offered without laying any foundation for its admission was error.

2. Injunction ⇐127

In action for mandatory injunction against construction of two dwelling houses on same lot, admission in evidence of zoning ordinance over defendants' objection was error where permit for construction of second house was issued before adoption of the ordinance.

3. Injunction ⇐1

The propriety of affording equitable relief by injunction rests in trial court's sound discretion to be exercised according to the circumstances and exigencies of each particular case.

4. Injunction ⇐1

The trial court's discretion to issue injunctions is not an arbitrary one, but must be exercised in accordance with fixed principles and precedents of equity jurisprudence.

5. Injunction ⇐62(1)

Equitable relief against violations of deed restrictions should be withheld where changes in conditions occurring since restrictions were created make enforcement thereof unjust and inequitable.

6. Injunction ⇐62(1)

Where there has been no uniform observance of restrictions in deeds and substantially all landowners have so conducted themselves as to indicate abandonment of the right, which is in the nature of an "easement" to have neighborhood kept to the standard established by original plan, and enforcement will not tend materially to restore district to its original character and the infraction complained of does not diminish value of other estates, it would be inequitable and oppressive to compel, at great loss, a compliance with the restrictions.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement".

7. Injunction ⇐109

A person who has violated restrictions in his own deed cannot enjoin violations by others, even though covenant violated by plaintiff is entirely different from that disregarded by defendant.

8. Injunction ⇐127

In action to enjoin erection of two dwellings on same lot, in violation of building restriction in deed, evidence that plaintiffs had themselves violated another restriction as to valuation of improvements and that other property owners had also violated restrictions was admissible in evidence.

9. Appeal and error ⇐843(1)

Questions involved in an appeal may become "moot" by reason of acts of the legislature, of the parties, or by lapse of time.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot".

10. Appeal and error ⇐1107

An injunction decree, by its very nature, acts on the rights of the parties in the future, and whatever may be the law applicable to appeals generally, on appeals involving injunction decrees the law in effect and applicable when appellate court renders its opinion must be applied.

11. Appeal and error ⇐1107

Where construction of second dwelling on same lot in violation of building restrictions which terminated on January 1, 1940, was commenced in 1937, and permit therefor was obtained before city ordinance was enacted prohibiting more than one single dwelling on a lot, the appellate court would not sustain a mandatory injunction on an appeal heard and determined in 1941, question having become "moot".

12. Covenants ⇐124

In action for violation of building restrictions in deed by erecting two dwellings on the same lot, any damages sustained by plaintiffs would be limited to the time of the construction of the second building until expiration of the restrictions.

Appeal from Superior Court, Los Angeles County; J. W. Vickers, Judge.

Action by L. E. Diederichsen and others against John Sutch and another for a mandatory injunction and damages for violating building restrictions in a deed. Judgment for plaintiffs, and defendants appeal.

Reversed.

James B. Ogg, of Alhambra, for appellants.

Courtney Lacey, of Los Angeles, for respondents.

GRIFFIN, Justice.

The facts, so far as material to this appeal, are as follows: John Sutch and Rosa Sutch, defendants and appellants, are the owners of a lot in tract 4948 in Alhambra. This lot, purchased January 26, 1934, faces on a public street known as Waverly drive. The rear of the lot abuts upon a public alley. The property across the alley is classified as business property. At the time appellants purchased the lot it was improved with a dwelling house that cost $4,250. Respondents notified appellants that they were violating the restrictions in their deed when in July, 1937, they commenced the erection of another house on the rear of the lot facing on the alley. The lot is on a hillside. The foundation of the first house is upon a higher level than the roof of the second house. About the time the second house was ready for plastering respondents L. E. Diederichsen and his wife Margaret M. Diederichsen filed in the superior court a complaint seeking a mandatory injunction and asking for damages. The complaint alleged in substance that two deed restrictions had been violated, first, the erection of a house that cost and was reasonably worth less than $5,000, and second, the erection of two houses upon the same lot. Plaintiffs therein petitioned the court for leave to file an amended complaint and in such amended complaint a number of additional parties plaintiff were listed and the allegations as to the violation of the $5,000 building restriction were eliminated. The amended complaint, in addition to the claimed breach because of the erection of two homes upon the same lot, also set forth provisions of a zoning ordinance of the city of Alhambra which they claim became effective after the date of the filing of the original complaint. Upon motion duly made the allegations in regard to the zoning ordinance were stricken. Appellants did not deny that the deed conveying their property to them contained a provision that the lot should be improved only with a single family residence. They denied other allegations and set forth as an affirmative defense that there had been many violations of the conditions and restrictions in the protected area and within 400 feet of the property of the plaintiffs. They set forth a number of such claimed violations and alleged that plaintiffs have acquiesced in such violations and therefore have waived any right that they may have had to enforce the restrictions against these appellants. The conditions of the respective deeds were imposed for the benefit of owners of lots within 400 feet from appellants' lot with the right of enforcement of these conditions by any owner within that area.

The court found that each of the lots in the tract, with certain exceptions, were restricted by deed to a private family residence and that any residence building thereon "shall cost and be fairly worth for labor and material not less than $5,000". It also found that each of these conditions and restrictions "shall in all respects terminate and end and be of no further effect, either legal or equitable, after January 1, 1940", which latter finding is in accordance with the provisions of each and all of the deeds involved. In addition, the court also found that the restrictions placed upon the property had been uniformly kept and complied with by other owners in the tract excepting appellants. It is recited in the findings that subsequent to the filing of the complaint the city of Alhambra adopted an ordinance effective September 10, 1937; that each and every lot in tract 4948 is subject to certain restrictions and conditions covered by the ordinance, which recites among its provisions that "no building * * * shall be used * * * or * * * erected * * * in zone R-1, which is * * * intended to be occupied or used for any purpose other than the following: Use. * * * A single family residence, * * *."

It appears from the complaint and findings that the cause of action and judgment entered were based solely on a breach of a condition or restriction set forth in the deed, which restriction terminated January 1, 1940. Any claimed cause of action based upon the ordinance above described was stricken from the complaint on motion. Respondents have not presented any objections or perfected any appeal from that order.

[1, 2] Respondents offered the ordinance in evidence without laying any foundation for its admission. Appellants strenuously objected thereto. The court overruled the objection. This was clearly error. Marysville Woolen Mills v. Smith, 178 Cal. 786, 175 P. 13; 10 Cal.Jur. 705, § 31. It should also be pointed out that a permit for the construction of the house on the alley was issued by the city of Alhambra prior to the adoption of the ordinance. Upon the findings above related no damages were awarded but the court on January 27, 1938, restrained appellants from violating any restrictions in the deed and ordered them to remove forthwith the dwelling house erected and completed upon the rear portion of their lot.

[3, 4] The propriety of affording equitable relief by injunction rests in the sound discretion of the trial court to be exercised according to the circumstances and exigencies of each particular case. This discretion is not an arbitrary one, but must be exercised in accordance with the fixed principles and precedents of equity jurisprudence.

[5, 6] In Downs v. Kroeger, 200 Cal. 743, 254 P. 1101, the Supreme Court sustained the trial court in withholding equitable relief against violations of deed restrictions upon the ground that changes in conditions occurring since the restrictions were created made the enforcement of such restrictions unjust and inequitable. In Bryant v. Whitney, 178 Cal. 640, 174 P. 32, 33, the court laid down this rule:

"'Where there has been no uniform observance of the restrictions, and substantially all the landowners have so conducted themselves as to indicate an abandonment of the right, which is in the nature of an easement, to have the neighborhood kept to the standard established by the original plan, and where the enforcement * * * will not tend materially to restore to the district the character impressed upon it by the scheme, and the infraction complained of does not diminish the value of other estates, then it would be inequitable and oppressive to compel at great loss a compliance with the restrictions.'"

[7] In 4 Pomeroy's Equity Jurisprudence, 4th Ed., page 3973, section 1702, is found this statement: "And where a party has violated the restrictions in his own deed, he cannot enjoin violations by others, even though the covenant violated by the plaintiff is entirely different from that disregarded by the defendant."

[8] Respondents introduced in evidence the permit for the erection of the Diederichsen house and it was for the sum of $4,000. One witness testified that the Diederichsen house was financed by him for $3,500. The tract manager testified that the owners of lots within 400 feet of appellants' property consistenly violated the $5,000 house and reasonable value restrictions. Whether all of the plaintiffs in appellants' property consistently violated this particular restriction is not definite from the record.

The trial court foreclosed the appellants from producing certain evidence tending to establish this fact. Under the rules above stated some of the evidence offered was admissible. However, it now appears from the record that the restriction which would not allow the second building to be constructed on the property has been removed. So far as the record before us is concerned, there is now no restriction in the deed which would prevent appellant from building two residences on this same lot.

[9] Questions involved in an appeal may become moot by reason of the acts of the legislature, of the parties, or by lapse of time. It has been held that an appeal from an order dissolving an injunction against the issuance of municipal improvement bonds presents only a moot question if the bonds are issued pending the appeal. Bernard v. Weaber, 23 Cal.App. 532, 138 P. 941.

[10, 11] In Horton v. City of Los Angeles, 119 Cal. 602, 51 P. 956, a dismissal of the appeal from a judgment was ordered enjoining defendant from proceeding under a special statute after the repeal of such statute. See, also, Tulare Irrigation District et al. v. Lindsay-Strathmore Irrigation District, 3 Cal.2d 489, 526, 45 P.2d 972, wherein it was held that an injunction decree by its very nature acts on the rights of the parties in the future, and, whatever may be the law applicable to appeals generally, on appeals involving injunction decrees the law in effect and applicable when the appellate court renders its opinion must be applied. It would therefore seem to work an injustice, now, on appeal, to sustain a mandatory injunction compelling appellants to remove the second building when they now appear to

be legally entitled to have the two buildings remain upon the property.

[12] Under the authorities cited we must therefore hold that the question has become moot. Any possible damages sustainable by plaintiffs would be limited from the time of the construction of the second building until January 1, 1940, the time of the expiration of the restriction.

Judgment reversed.

BARNARD, P. J., and MARKS, J., concurred.



47 Cal.App.2d 749

STONE et al. v. BOARD OF DIRECTORS OF CITY OF PASADENA et al.

Civ. 12593.

District Court of Appeal, Second District, Division 1, California.

Nov. 14, 1941.

Rehearing Denied Dec. 8, 1941.

Hearing Denied Jan. 13, 1942.

1. Mandamus ⇐83

A petition for mandamus by members of Negro race to compel city officials to admit petitioners to facilities of municipal plunge when such facilities were open to the public, which petition alleged that petitioners were of clean and moral habits, suffered from no contagious or infectious diseases and had no physical or mental defects or disabilities so as to make admission to plunge detrimental to health of other persons, stated cause of action, and if facts alleged were true, mandamus was proper remedy to secure relief sought. Civ.Code, § 51; Code Civ.Proc. § 1085; Const.Cal. art. 1, § 21; U.S.C.A.Const. Amend. 14, § 1.

2. Mandamus ⇐187(10)

The appellate court could not order writ of mandate to issue to compel city officials to admit members of Negro race to privileges and facilities of a municipal plunge at time when such facilities were open to the public where there were certain controverted issues which should have been determined by trial court. Civ.Code, § 51; Code Civ. Proc. § 1085; Const.Cal. art. 1, § 21; U.S.C.A.Const. Amend. 14, § 1.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Mandamus petition by Charles Stone and others, to compel the Board of Directors of the City of Pasadena and others to admit petitioners to the privileges and facilities of a municipal plunge. From an adverse judgment, petitioners appeal.

Reversed and remanded.

Thomas L. Griffith, Jr., of Los Angeles, for appellants.

Harold P. Huls, City Atty., and Thomas W. Le Sage, Deputy City Atty., both of Pasadena, for respondents.

YORK, Presiding Justice.

Appellants, who are members of the Negro race, citizens, residents and qualified electors of the city of Pasadena (two of them being taxpayers of said city), sought by a petition in mandamus to compel the board of directors thereof, the city manager, the superintendent of parks and his employees, to admit appellants to the privileges and facilities of the municipal bath houses and swimming pool, commonly known as Brookside Park Plunge, at all times when said facilities are open to the public. It was alleged in the first amended petition for the writ of mandate that respondents "are charged by Article 14, section 1 of the Constitution of the United States, and Article 1, section 21 of the Constitution of the State of California, and section 51 of the Civil Code of said state, with the duty to afford equal accommodations, advantages and privileges to citizens within the jurisdiction of the State", but that respondents have "and do now deny petitioner equal accommodations, advantages and privileges, and to the equal protection of the law in the use and enjoyment of said bath houses and swimming pool at the Brookside Park Plunge at all times when the same is open to the public".

It was also alleged that "petitioners are of clean and moral habits; none of them is suffering from contagious or infectious disease or has any physical or mental defect or disability such as to make his admission to and use of said bath houses and swimming pool inimical, harmful or detrimental to the health, welfare or safety of other users thereof, or do said petitioners have any disability at all".

General and special demurrers to said first amended complaint were interposed by

the superintendent of parks and the board of directors of said city. The demurrer of the board of directors was sustained; the demurrer of the superintendent of parks was overruled, and he was given ten days within which to answer. Judgment of dismissal as to the board of directors was thereafter entered, and the cause was set for trial "on the issues raised by the first amended petition for writ of mandamus and the answers and return thereto of respondents W. H. Nicholas, Superintendent of Parks of the City of Pasadena, C. W. Koiner, City Manager of Pasadena, and Frank Hale and H. B. Rankin", the two last named being supervisor and cashier of the Brookside Park Plunge, respectively.

Before the first witness was sworn, respondents objected to the introduction of any evidence on the grounds that the first amended petition did not state a cause of action and that mandamus was not the proper remedy. Ruling on said objections was reserved by the court, and, subject thereto, evidence was introduced. Thereafter, on January 4, 1940, the court sustained respondents' objections to the introduction of evidence on the grounds advanced; granted respondents' motion to exclude evidence upon the same grounds, and ordered judgment in favor of "respondents W. H. Nicholas, Superintendent of Parks of the City of Pasadena, C. W. Koiner, City Manager of the City of Pasadena, Frank Hale and H. B. Rankin, sued herein as John Doe, and that petitioners take nothing in said cause".

Petitioners prosecute this appeal from said judgment urging that their amended petition which sets forth in substance, that their exclusion on account of their race and color from the municipal plunge in Brookside Park at all times when it is open to the public, except on one day of each week, sufficiently alleges a cause of action.

Respondents argue that "petitioners are demanding primarily equal social privileges, which are the subject of reasonable local regulation", in support of which they cite the case of State ex rel. Weaver v. Board of Trustees of Ohio State University, 1933, 126 Ohio St. 290, 185 N.E. 196.

The cited case involved an alleged discrimination against a colored student at a state university to which both white and colored students were admitted. The particular student was the only colored student with the necessary qualifications who wished to take a course in home economics. Said course was given in a "home management house", wherein the students resided together on terms of social equality, with two in a room, and common bathroom and toilet facilities, managing such building as their home where they received their friends, and receiving credit therefor as a necessary course for a degree in home economics. It was there held that equal educational facilities had been furnished when such colored pupil was offered quarters, and an opportunity to pursue her labors and service, in another apartment of the building furnished and equipped in a manner equivalent to that used by the white students where, under the direction of a supervisor, she might perform the necessary laboratory work, dwell and entertain her friends and associates in a similar manner and under like circumstances as were permitted to the white students enrolled in the same course, and obtain the necessary credits for her degree. In denying the writ of mandamus, the court said at page 198 of 185 N.E.: "The relator has been denied no educational advantages or privileges that are not similarly used and enjoyed by other students; nor has she been denied the privilege of taking her degree, should she consent to occupy available space in the Home Economics' house. She has only been denied the social privilege of residing with white girl students and partaking in their family or communal life; of rooming, dining and sharing their common bathroom and toilet facilities." In the cited case, *it was admitted that the acts sought to be compelled of respondents were not enjoined by statute,* and that the school regulations, furnishing similar facilities and educational advantages to both white and colored students did not abridge the constitutional rights of either race. (Emphasis added.)

Obviously, the cited case is of little value in the instant situation, for the reason that the acts here complained of are expressly enjoined by the provisions of section 51 of the Civil Code, to-wit:

"All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating-houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, *bath houses,* theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established

by law, and applicable alike to all citizens." (Emphasis added.)

Commenting upon said section 51 and also section 52 which permits an action for damages for a violation of the terms of section 51, supra, it was stated by the court in Piluso v. Spencer, 36 Cal.App. 416, at page 419, 172 P. 412, at page 413, as follows: "The general intent and significance of the foregoing provisions are clear enough. The purpose, of course, is to compel a recognition of the equality of citizens in the right to the peculiar service afforded by these agencies for the accommodation and entertainment of the public. There is no doubt of the constitutionality of the provisions and of the sound public policy of such legislation. Greenberg v. Western Turf Ass'n, 140 Cal. [357], 363, 73 P. 1050."

Appellants cite the case of Kern v. Commissioners of City of Newton, 1938, 147 Kan. 471, 77 P.2d 954, as one similar in point of fact to the instant case. There the plaintiff, a private citizen of African descent and color, sought by a petition in mandamus to compel the governing officials of the city of Newton to admit him to the privileges of a swimming pool constructed with funds procured by a sale of municipal bonds voted by the electors of said city in 1934. The application for the writ alleged that the bonds so voted were a charge on all the taxable property of the city, that petitioner was a taxpayer and that no arrangements had been made by the city commissioners to furnish swimming facilities or privileges for petitioner and that neither he nor other citizens of African descent were admitted to the municipal swimming pool at any time. In holding in favor of petitioner, the court there said (at page 960 of 77 P.2d): "He is deprived of the privileges of the swimming pool. He is a taxpayer, and as such he and his property are bound to pay the bonds issued to raise the money which built the swimming pool. He has as good a right to its privileges as any other citizen. Deprivation of the privileges of access to municipal recreation grounds established or maintained at the general taxpayers' expense, on account of race or color, is legally and traditionally offensive to the history of this state; and, although this court has repeatedly upheld statutes which sanction reasonable segregation of the racial stocks of this state, white and colored, we have steadfastly held to our oft-repeated rule that the Legislature alone can authorize such segregation, as in the many school cases cited above."

Under the provisions of section 1085 of the Code of Civil Procedure, the writ of mandamus "may be issued by any court * * * to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or *to compel the admission of a party to the use and enjoyment of a right* or office to which he is entitled, and *from which he is unlawfully precluded* by such inferior tribunal, corporation, board or person." (Emphasis added.)

A proceeding in mandamus was successfully employed in Piper v. Big Pine School District, 193 Cal. 664, 226 P. 926, to compel the trustees of a school district and its teacher to admit an Indian child as a pupil. In the early case of Ward v. Flood, 1874, 48 Cal. 36, 47, 17 Am.Rep. 405, in which the writ of mandate was denied, it was stated: "The writ of mandamus is issued to compel the admission of a party to the enjoyment of a substantial right, from which he is unlawfully precluded." In said case it was held (48 Cal. at page 56, 17 Am. Rep. 405) that "the exclusion of colored children from schools where white children attend as pupils, cannot be supported * * * except where separate schools are actually maintained for the education of colored children; and that, unless such separate schools be in fact maintained, all children of the school district, whether white or colored, have an equal right to become pupils at any common school organized under the laws of the State * * *".

"Mandamus is a proper remedy for unlawful discrimination of the state in refusing to admit negro students to a law school maintained by the state. (University of Maryland v. Murray [Pearson v. Murray], 1936, 169 Md. 478, 182 A. 590, 103 A.L.R. 706.)" 10 Am.Jur. 919, 1941 supplement.

[1, 2] For the reasons stated, the first amended petition stated a cause of action against respondents, and, if the facts there alleged are all true, mandamus is the proper remedy to secure the relief sought. There are certain controverted issues which should be determined by the trial court, therefore, this court is without power to order the writ of mandate to issue. The judgment is reversed and the cause remanded.

DORAN and WHITE, JJ., concurred.

47 Cal.App.2d 623

McNABB v. McNABB.

Civ. 13383.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1941.

Hearing Denied Dec. 31, 1941.

1. Divorce ⇐310

A divorced wife was not in contempt of court in taking her minor child, whose custody was awarded to her by divorce decree, outside state without authorization by court, in absence of order forbidding her to do so, and did not forfeit her right to collect amounts which decree ordered child's father to pay for child's support by thus depriving him of opportunity for companionship with child. Code Civ.Proc. § 685.

2. Divorce ⇐310

While the law is solicitous of parental rights and will appropriately safeguard and enforce divorced husband's right to reasonable visitation of his minor child under divorce decree awarding child's custody to mother, such right is not superior to that of child to necessary maintenance, security of adequate home, and mother's daily companionship, especially during child's tender pre-school years.

3. Divorce ⇐311

Where affidavit, filed by divorced wife in support of proceedings for issuance of execution to collect amounts which divorce decree ordered husband to pay for support of parties' minor child, set forth that wife could not locate any property of husband because she was out of state and lacked sufficient funds, trial court did not abuse his discretion in regarding such excuse for delay in securing execution as sufficient and ordering issuance of execution. Code Civ. Proc. § 685.

4. Divorce ⇐311

The discretion referred to in statute, providing that failure to set forth in affidavit reasons sufficient in court's discretion to excuse divorced wife's delay in securing execution to collect amounts ordered by divorce decree to be paid by husband for support of parties' minor child shall be ground for denial of motion for execution, is not a capricious or arbitrary discretion, but impartial discretion, guided and controlled in its exercise by fixed legal principles and intended to subserve, not to impede or defeat, ends of substantial justice. Code Civ.Proc. § 685.

5. Divorce ⇐312

On appeal from order for issuance of execution to collect amounts ordered by divorce decree to be paid by husband for support of parties' minor child, if it be doubtful whether excuse offered by wife for delay in securing execution is sufficient, order will not be disturbed, and trial court's decision will not be reversed except for clear abuse of discretion. Code Civ.Proc. § 685.

6. Divorce ⇐308

It was not necessary for trial court's original judgment, granting wife divorce, awarding her custody of parties' minor child, and ordering payment of monthly sums by husband for child's support, to include provision for interest on such amounts as they accrued, though it might properly have done so. Code Civ.Proc. § 682.

7. Divorce ⇐308

The inclusion of interest on judgment, ordering divorced husband to pay specified monthly sums for support of his minor child, was a "ministerial act" to be performed by clerk of superior court. Code Civ.Proc. §§ 682, 1033.

See Words and Phrases, Permanent Edition, for all other definitions of "Ministerial Act".

8. Divorce ⇐308

It was not necessary for clerk of superior court to include provision for interest in terms of divorce judgment, ordering husband to pay wife stated sums monthly for support of their minor child, as clerk knew that wife had right to enforce judgment by execution and contempt proceedings: and would not know whether there were any unpaid amounts, on which interest should be calculated, until institution of proceeding to enforce judgment. Code Civ.Proc. §§ 682, 685, 1033.

9. Divorce ⇐311

It was sufficient and proper for superior court to include interest on accrued amounts, ordered by divorce decree to be paid wife by husband for support of their minor child, at time of order for issuance of execution to collect unpaid amounts. Code Civ.Proc. §§ 682, 685, 1033.

10. Divorce ⇐312

Where counsel for parties to divorced wife's proceeding for execution to collect

amounts due from husband under divorce decree for support of parties' minor child and order temporarily restraining him from disposing of his property stipulated in open court that his bank account should be released from restraining order, but that such order otherwise should remain in full force and effect, his protest that restraining order should not have been made in such proceeding and was too general need not be considered on his appeal from order for issuance of execution and restraining order. Code Civ.Proc. § 685.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action for divorce by Kathryn McNabb against James McNabb. From an order for issuance of execution to collect unpaid amounts awarded by divorce decree for support of the parties' minor child and an order temporarily restraining defendant from disposing of his property, he appeals.

Affirmed.

A. W. Brunton, of Los Angeles, for appellant.

Robert J. Donovan, of Santa Monica, for respondent.

SCOTT, Justice pro tem.

Defendant appeals from an order for the issuance of an execution to collect unpaid amounts which had been ordered for the support of a minor child, together with interest thereon, and from a further order temporarily restraining him from disposing of his property.

The parties to this action were formerly husband and wife, and at the time of the divorce in 1935 their daughter was less than two years old. The custody of the child was awarded to plaintiff, the mother, with right of reasonable visitation to defendant. He was ordered to pay for the support of the child the sum of $40 per month for the first three months and $50 per month thereafter. Plaintiff at that time apparently thought that she should give her attention to the child rather than to attempt to secure employment, and since the payments by defendant were intended to be and were sufficient only for the child it seemed necessary for plaintiff to take the child and return to her parents' home in Spokane, Washington, which she proceeded to do shortly after securing the divorce. For over five years plaintiff thus lived outside of California. Defendant visited the child three times during this period but failed to respond to a letter from plaintiff suggesting that the child pay him an extended visit. Feeling aggrieved or indifferent because the child was no longer close at hand, he stopped making the payments for the child which had been ordered by the court, but made no application to have the payments discontinued or reduced.

In November, 1940, plaintiff returned to California. She filed an affidavit and, after a court hearing, secured the issuance of an execution under Code of Civil Procedure, section 685, covering arrearages for the last five years only, which the court later extended to include amounts accruing before the five year period. Still later the court amended the order nunc pro tunc by adding interest on the amounts theretofore accrued. Defendant was restrained from disposing of his property so as to make effectual the levy thereon when execution was issued.

[1, 2] Defendant first questions the propriety of the trial court's order for the issuance of an execution. He urges that plaintiff was in contempt of court in taking the child outside of this jurisdiction even though no order forbidding her to do so was ever made, and further suggests that by depriving him of the opportunity for companionship with his child plaintiff had forfeited any right to collect the payments ordered. It is not claimed that defendant has not at all times been able to make the payments as ordered, and it is evident from the record before us that it was and is his duty to support the minor child of the parties. The order was made for the benefit of the child, not of the plaintiff. If defendant had made timely application, the court might have inquired into the necessity for keeping the child out of this jurisdiction, and if it appeared that defendant needlessly was being deprived of the right to see his child it might have given consideration to steps to induce plaintiff to return the child to this jurisdiction. The conduct of plaintiff in removing the child to her parents' home, where both she and the child could receive adequate care and where plaintiff could provide the undivided attention so essential to the child's welfare, does not appear to have been induced by a wilful indifference to defendant's paternal love or by a desire to estrange the child from him.

It doubtless would have been wiser for the plaintiff to have sought authorization of the court before removing the child from this jurisdiction, thus enabling defendant to offer additional support to plaintiff or to make such showing as he might deem proper in opposition to her plan to seek temporary residence elsewhere. Her failure to seek such authorization was not in violation of any order of the court. While the law is solicitous of parental rights and will appropriately safeguard and enforce even that pathetic remnant of a once happy relationship which is called "the right of reasonable visitation", no case has been brought to our attention which places that right of a deprived parent above the right of the child to have necessary maintenance, the security of an adequate home and where possible, especially during the tender pre-school years, the daily companionship of a mother. In the case of MacPherson v. MacPherson, 13 Cal.2d 271, 89 P.2d 382, cited by appellant, it is true that the court denounced contemptuous conduct and denied relief to an offending party, but it must be borne in mind that in that case the court was considering only an appeal from provisions of an order relating to attorney's fees and costs, and based on a different set of facts, and does not authorize an inference that plaintiff in this case is in contempt of court or that her conduct should deprive the child of the maintenance which the court had ordered. Since both plaintiff and the child were within the jurisdiction of the court when this order which is now appealed from was made, defendant was not precluded from applying for such modification of the order as he deemed requisite either to safeguard his right of further visitation or to adjust the payments for the support of the child to conditions as they now exist.

[3-5] When we consider defendant's objection that the affidavit which was filed in support of these proceedings did not sufficiently excuse the delay in securing the execution, as required by section 685 of the Code of Civil Procedure, we find that the affidavit sets forth that plaintiff could not locate any property of defendant to enforce payment because she was out of the state and lacked sufficient funds. We cannot say that it was an improper exercise of the trial court's discretion under the circumstances of this case to regard this excuse as sufficient. Section 685 of the Code of Civil Procedure provides in part: "The failure to set forth such reasons as shall, in the discretion of the court, be sufficient [to excuse the delay], shall be ground for the denial of the motion." The discretion referred to in this section is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles and intended to subserve and not to impede or defeat the ends of substantial justice. If, on appeal, it be doubtful whether the excuse offered is sufficient or not the judgment of the trial court will not be disturbed, and its decision will not be reversed except for a clear abuse of discretion. McClelland v. Shaw, 23 Cal.App. 2d 107, 72 P.2d 225. The allegations in the affidavit were ample to support the ruling of the lower court.

[6-9] The amendment nunc pro tunc of the order for issuance of execution so as to include interest on the amounts accrued as provided by section 682 of the Code of Civil Procedure was merely to correct the court's calculation of the amount due under the judgment and was not a change in the judgment itself. It was not necessary for the original judgment of the trial court, made at the time of the divorce action, to include provision for interest on the amounts as they accrued, although it might properly have done so. Huellmantel v. Huellmantel, 124 Cal. 583, 57 P. 582. The inclusion of interest on the judgment was a ministerial act to be performed by the clerk. San Joaquin L. & W. Co. v. West, 99 Cal. 345, 33 P. 928; Code Civ.Proc., sec. 1033. It was not necessary for him to include provision for interest in the terms of a judgment such as this where he knew that plaintiff had a right to enforce it not only by issuance of an execution but also by contempt proceedings and where he would not know whether there were any amounts unpaid on which interest should be calculated until some proceeding such as this was instituted to enforce the judgment. In this case it was sufficient and proper for the court to include interest at the time of the order for issuance of execution.

[10] As to defendant's protest concerning the restraining order which he claims should not have been made in connection with a proceeding under Code of Civil Procedure, section 685, and which he asserts is too general in its terms, we note that in the order dated February 6, 1941, the following record appears: "and it hav-

ing been stipulated in open court by the respective counsel that the bank account of defendant be released from the restraining order theretofore made, but that said restraining order otherwise was to remain in full force and effect, and the court having so ordered * * *." Since defendant has thus voluntarily acquiesced in that part of the restraining order which remains in effect, it appears that a discussion of the matter is unnecessary.

Orders affirmed.

WOOD, Acting P. J., and McCOMB, J., concurred.



HOPKINS v. PACIFIC ELECTRIC RY. CO. et al.

JOHNSON v. SAME.

Civ. 2500.

District Court of Appeal, Fourth District, California.

Nov. 12, 1941.

Rehearing Granted Dec. 1, 1941.

Dismissed Dec. 18, 1941.

1. Appeal and error ⇐999(3)

In actions for damages resulting from collision between automobile in which plaintiffs were riding and an electric motorcar at crossing in closely built up district of city, whether speed at which motorcar was being driven was negligent was a "question of fact" for the jury and not a "question of law" for the reviewing court.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

2. Railroads ⇐350(7)

In actions for damages resulting from collision between automobile in which plaintiffs were riding and an electric motorcar at crossing in closely built up district of city, whether bell was rung and whistle blown in accordance with requirements of statute was for the jury. Civ.Code, § 486.

3. Railroads ⇐327(7)

A motorist or a pedestrian does not have an absolute duty to stop, as well as to look and listen, before proceeding onto railway tracks at a crossing in a closely built up district of a city.

4. Railroads ⇐350(18)

The negligence of a motorist or a pedestrian in failing to stop before proceeding onto railway tracks at a crossing in a closely built up district of a city is generally a "question of fact" for the jury and not a "question of law" for the court.

5. Railroads ⇐350(18)

Motorist's contributory negligence, if any, in failing to stop automobile and to ascertain whether a train was approaching railway crossing in a closely built up district of city before driving automobile across tracks was a fact question for the jury.

6. Negligence ⇐93(1)

Negligence, if any, of motorist in failing to stop automobile and ascertain whether a train was approaching street railway crossing in a closely built up district of city was not imputable to automobile guest where motorist was in no way subject to guest's control and was not under his supervision concerning manner in which he operated automobile.

7. Railroads ⇐350(21)

In actions by motorist and his guest for damages resulting from collision between automobile and electric motorcar at crossing in closely built up district of city, whether guest was contributorily negligent was a fact question for the jury.

8. Railroads ⇐309

A railroad company is not an "insurer" of the safety of motorists crossing its tracks, and it is not absolutely required to avoid injuring a traveler on or approaching the tracks, but is required only to use reasonable care and caution in attempting to avoid such injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurer".

9. Railroads ⇐351(11, 22)
Trial ⇐253(4)

Plaintiffs' given instruction that if motorman could have avoided collision between automobile in which plaintiffs were riding and electric motorcar at crossing by applying brakes and slowing or stopping train, but negligently failed to do so, motorman and defendants were negligent was an incorrect attempt to state the doctrine of last clear

chance, and if it was not such an attempt, it was erroneous as placing an undue burden of extreme care on motorman and as failing to take into consideration parties' reciprocal duties.

10. Railroads ⇐351(7)

In actions for damages resulting from collision between automobile in which plaintiffs were riding and electric motorcar at crossing in closely built up district of city, plaintiffs' given instruction on the due care required of a street railway company at public crossings including statement that reasonable care at a crossing within a city or where travel is great would require a flagman constantly at the crossing or gates or bars so as to prevent injury was erroneous.

11. Trial ⇐194(17)

In actions for damages resulting from collision between automobile in which plaintiffs were riding and electric motorcar at street crossing in closely built up district of city, plaintiffs' given instruction containing statement that if a careful and prudent motorman would have operated train at a slower speed, provided a flagman, or given other notice which was not furnished, jury would find that any such negligence contributed proximately to plaintiffs' injuries was erroneous as taking the question of proximate cause from the jury.

12. Appeal and error ⇐1170(9)

The reviewing court in considering whether errors in instructions given at request of motorist and his guest required reversal of judgments for motorist and guest in actions for damages resulting from collision between automobile and electric motorcar was required to consider each action separately so far as contributory negligence, if any, of motorist and his guest, who had no right of control over motorist, was concerned. Const. art. 6, § 4½.

13. Appeal and error ⇐1170(9)

Where there was substantial evidence in record, if accepted as true, pointing to negligence of defendants in regard to a collision between an automobile and an electric motorcar owned and operated by defendants, but the question of contributory negligence on part of motorist was very close, and a finding against him on that question would have had evidentiary support, errors in given instructions including instruction taking from jury the question of proximate cause required reversal of judgment in favor of motorist. Const. art. 6, § 4½.

14. Appeal and error ⇐994(2), 1002

Conflicts in evidence and credibility of witnesses are matters for the jury and not for an appellate court.

15. Appeal and error ⇐1170(9)

The giving of instructions which are contradictory in essential elements warrants the reversal of a judgment where it is impossible to determine which instruction controlled the determination of the jury. Const. art. 6, § 4½.

16. Appeal and error ⇐1170(9)

Where verdicts for motorist and his guest in actions for damages resulting from collision between automobile and electric motorcar may have been based on acts or omissions of the defendants which were erroneously defined in instructions given as negligent as a matter of law, and no intelligent conclusion concerning basis of verdicts could be reached, errors in instructions required reversal of judgments for motorist and for guest. Const. art. 6, § 4½.

17. Appeal and error ⇐1170(9)

Even if a motorist and particularly his guest were in good morals entitled to recover for damages resulting from a collision between automobile and electric motorcar, defendants were entitled to a "fair trial" which required reversal of judgments for motorist and for guest because of errors in instructions on due care and proximate cause, so that each party's reciprocal duties could be properly defined and the jury could be permitted to determine defendants' liability, if any, under proper and established applicable rules. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Fair Trial".

Appeal from Superior Court, Orange County; Harry C. Westover, Judge.

Two actions by William Hopkins and by Hayward C. Johnson against the Pacific Electric Railway Company and others, to recover damages resulting from a collision between an automobile and an electric motorcar. From judgments for plaintiffs, defendants appeal.

Reversed.

Frank Karr, C. W. Cornell, and O. O. Collins, all of Los Angeles, for appellants.

Blodget, Kutchel & Tobias, of Santa Ana, for respondents.

MARKS, Justice.

Defendants have appealed from two judgments rendered against them for damages resulting from a collision between an automobile driven by Hayward C. Johnson in which William Hopkins was riding as a guest and an electric motor car owned and operated by defendant. The cases of the two plaintiffs were consolidated for trial and are consolidated here on appeal.

The accident occurred at about six o'clock on the morning of August 8, 1939, in the city of Huntington Beach at the intersection of Indianapolis street with the tracks of defendant Pacific Electric Railway Company. The morning was clear and the roadway was dry.

Indianapolis street runs east and west. It has a hard surface twenty-two feet wide in its center with dirt shoulders nineteen feet wide on each side of the paving.

The tracks of the Pacific Electric Railway Company cross Indianapolis street at right angles west of the center of the block bounded by Alabama avenue on the east and Lane avenue on the west. The tracks, at least between intersecting streets if not over them, are on a forty-foot private right of way owned by the Pacific Electric Railway Company. The tracks are straight for some considerable distance on both sides of Indianapolis street.

The portion of the block on the north side of Indianapolis street from the right of way east to Alabama avenue is closely built up with houses so that the view of the tracks to the north is obstructed to a driver approaching from the east, until he passes a point about twenty-four feet east of the east rail. The view of the tracks to the south is unobstructed.

Defendant railway company's tracks were not regularly used. There is evidence that on occasions one electric train a day passed each way over them and that sometimes as much as a week elapsed between trains. There was the usual cross-arm warning sign on the east side of the right of way, which was the only warning of the railroad crossing. Both plaintiffs were familiar with the crossing, having driven over it many times prior to the accident.

Johnson was seated on the left side of the front seat, driving his automobile at the time of the accident. The front of the car extended about eight feet in front of him. William Hopkins, the other plaintiff, was seated on the front seat at Johnson's right.

Johnson testified that he was traveling west on Indianapolis street at the time of the accident. He was traveling between fifteen and twenty miles an hour when he crossed Alabama avenue and reduced his speed to between twelve and fifteen miles an hour as he approached and attempted to cross the tracks. As he approached the tracks he looked to the south where his view was unobstructed and saw that there was no train approaching from that direction. He listened and heard no bell or whistle nor the noise of an approaching electric train. He also looked to his right but of course could see nothing until he had cleared the view-obstructing houses. He first saw the electric train about seventy-five feet from the intersection bearing down on him from the north at a speed of between forty and forty-five miles an hour when the front of his car was about six feet east of the east rail. Realizing that he could not stop his car in time to avoid a collision he endeavored to get across the tracks before the electric engine hit his car. He was unsuccessful in this attempt and the front of the electric engine hit the automobile at about the middle of the right rear door. The automobile was thrown down the right of way about fifty-two feet, where it stopped against a substantial fence along the west side of the right of way. The impact set the brakes on the electric train and with the wheels locked it proceeded down the tracks a distance of 390 feet before coming to rest. The train consisted of an electric engine and a loaded tank car, the two having a total weight of 234,574 pounds.

William Hopkins, the guest, corroborated Johnson's testimony as to the speed of the automobile when it was approaching and crossing the railroad tracks. He testified that he listened for approaching street cars and heard no bell nor whistle nor the noise of an approaching train. He did not look. Having no warning of approaching danger he could do nothing to warn Johnson of it.

R. H. Rothrock was the motorman in charge of the electric train. He testified that the track in question was a "yard track" of the electric railway system. He

crossed the intersection going north at about 5:30 o'clock on the morning of the accident. He picked up the tank car and proceeded south to the crossing. He gave two long and two short blasts on the whistle, starting at a whistling post which he estimated was between 1,000 and 1,400 feet north of the intersection. He testified that at about the whistling post he turned on the device that automatically rang the car bell and that it continued to ring up to the point of impact. He further testified that he was seated in the electric engine about six or seven feet from its front; that he was looking south along the right of way as he approached the intersection; that he did not see the Johnson automobile until the front of the train was about five feet north of Indianapolis street; that the center of the automobile then was about five feet east of the east rail; that when he first saw the automobile, the front of the electric car was about five feet north of the north edge of the pavement; that the electric train was traveling about twenty miles an hour; that on seeing the automobile "I immediately applied my brake into the emergency; I reached down and grabbed ahold of the handle and shoved it as far as I could into the emergency, but it had no effect"; that the collision occurred at about the time the brakes were applied.

An engineer produced as a witness for defendants testified that considering the weight of the train and the distance traveled after the collision the speed at the time of collision could be computed; that the speed was approximately twenty-seven miles per hour.

A number of witnesses for both plaintiffs and defendants testified on the question of the whistle having been blown and the bell having been rung before the accident. A study of this evidence leaves the impression that a preponderance of this conflicting evidence would support the conclusion, if made by the jury, that the bell was never rung and that the whistle was not blown after the train passed the whistling post.

[1] Defendants first urge that the judgments against them must be reversed because, as a matter of law, no negligence on their part was proved. This contention is without merit.

The Supreme Court considered the question of negligence in the speed of an electric train when crossing Hill street in the city of Los Angeles in Tousley v. Pacific Electric Ry. Co., 166 Cal. 457, 137 P. 31, 32. It said:

"As we have said, the jury was warranted in concluding that the train was going at the rate of 40 miles an hour, or about 60 feet a second.

"We do not think that it can fairly be held, as a matter of law, that the defendant was not guilty of negligence in view of the circumstances stated. It is said that the only negligence asserted is the excessive speed of the train, and that a rate of speed of 35 or 40 miles an hour for an interurban train at and near the point where the accident occurred is not so excessive as to constitute negligence. As was said in Bilton v. Southern Pacific Co., 148 Cal. 443, 447, 83 P. 440, 442: 'There can be no doubt that the question as to whether or not a rate of speed at a crossing is so dangerous or excessive as to constitute negligence must depend upon the particular circumstances there existing, and if the circumstances are such that reasonable and impartial men may well differ as to whether the speed maintained at the particular place showed a want of reasonable care, the question as to whether the railroad company was guilty of negligence in maintaining such speed is one for the jury.'" See, also, Young v. Pacific Electric Ry. Co., 208 Cal. 568, 283 P. 61. Under this rule and the circumstances here presented we believe that the question of whether or not the speed at which the electric train was being driven was negligence was a question of fact addressed to the jury and not one of law addressed to this court.

[2] Also, the evidence on the question of the bell being rung as required by section 486 of the Civil Code was in sharp conflict. If the jury concluded that the bell was not so rung and no other suitable warning was given of the approach of the train it would have been justified in predicating a finding of negligence on those facts.

It is next urged that Johnson, the driver, was guilty of contributory negligence as a matter of law in failing to stop his car and actually ascertaining whether or not a train was approaching the crossing before driving the automobile into a place of danger.

The "stop, look and listen" rule has been considered and applied to the varying facts in a multitude of cases in California. The instances in which the rule has been applied

with considerable strictness are numerous and it should not be necessary to review the many cases dealing with this subject relied upon by defendants. The question to be considered here is the applicability of the strict construction of the rule generally found in those cases where the accident occurred at an obstructed crossing of a public road over a railroad right of way in a sparsely settled country district, to the facts of this case in which the collision occurred in a railway crossing over a city street in a closely built up district of the city.

Here the railroad traversed a closely built up residential district of the city of Huntington Beach. Its tracks crossed a paved street of that city on the grade of the street. Few trains ran over those tracks and intervals of a week between trains sometimes occurred. Can it be said that every time a motor vehicle driver approaches this crossing from the east on Indianapolis street he must stop his car at the edge of the right of way, walk clear of the view-obstructing house and determine if one of the infrequent trains using the tracks is approaching the crossing? If such is the law it would be virtually impossible for motor vehicles to use a busy street which crosses electric railway tracks at a place where a motorist's view of the tracks is obstructed.

What was said in Amendt v. Pacific Electric Ry. Co., 46 Cal.App.2d 248, 115 P.2d 588, 593, should be applicable here: "The rule of stop, look and listen, invoked by respondent, originated at a time when the only dangerous vehicles to be encountered were the locomotives which crossed highways, country lanes and by-paths. In the interest of economy the burden was cast upon the traveler who intended to cross railroad tracks to make certain that the time was opportune for his safety before attempting the crossing. But this rule cannot be applied to crossings of street-car tracks on the streets of the modern municipality."

Billig v. Southern Pacific Co., 192 Cal. 357, 219 P. 992, 994, involved the collision of a motor truck and a street car propelled by a gasoline motor at a point in the country outside city limits where a country road crossed the right of way of the defendant railroad. The Supreme Court there held that it was the duty of the truck driver not only to look and listen but to stop, if necessary, to avoid danger. In so holding it was also remarked that it was the duty of a motor vehicle driver to stop, when necessary when "approaching the crossing of a suburban railroad being *operated outside of the limits of cities*". (Italics ours.)

The case of Loftus v. Pacific Electric Ry. Co., 166 Cal. 464, 137 P. 34 (facts stated in Tousley v. Pacific Electric Railway Co., supra), is very similar factually to the case before us. There the accident happened at the crossing of Hill street in the city of Los Angeles over the Pacific Electric Railway Company's tracks. Loftus's view of the tracks was obstructed. He looked and listened for approaching cars, but did not stop before proceeding onto the tracks. He did slow down. See Tousley v. Pacific Electric Railway Co., supra, 166 Cal. page 459, 137 P. 31. It was urged that Loftus was guilty of contributory negligence as a matter of law in failing to stop before driving into a place of danger. The Supreme Court rejected this argument and said [166 Cal. 464, 137 P. 35]: "We think the present case is not one in which it can be said that the uncontradicted evidence forces the conclusion that the plaintiff approached the track without exercising the care which an ordinarily prudent man, situated as he was, would have exercised."

[3-5] The cases of Swigert v. Pacific Electric Ry. Co., 7 Cal.App.2d 661, 47 P.2d 353, Cooper v. Southern Pacific Co., 43 Cal.App.2d 693, 111 P.2d 689, Amendt v. Pacific Electric Railway Co., supra, and Will v. Southern Pacific Co., 18 Cal.2d 468, 116 P.2d 44, all support the conclusion that there is no absolute duty imposed on a motorist or a pedestrian to stop, as well as to look and listen, before proceeding onto the tracks of a railway company situated at a crossing of a city street in a closely built up district; that under such circumstances the question of a plaintiff's negligence in failing to so stop generally is one of fact for a jury and not one of law for the court. Under the authority of these cases we must hold that the question of the contributory negligence of Johnson, if any, was one of fact and not one of law.

[6] Defendants also urge that Hopkins was guilty of contributory negligence as a matter of law. This argument finds little evidentiary support. Hopkins was the guest of Johnson and the negligence of Johnson, if any, was not imputable to him. Tousley v. Pacific Electric Railway Co., supra. Johnson was in no way subject to

the control of Hopkins nor under his supervision or direction as to the manner in which he operated the automobile. What was said in Fujise v. Los Angeles Ry. Co., 12 Cal.App. 207, 107 P. 317, 320, a guest case, is applicable here.

"It cannot be said in this case, as a matter of law that the failure of the deceased to look to ascertain the position of the car 'before turning across the track,' as found in answer to special interrogatory No. 14, was contributory negligence. As said by the Washington court in the case of Wilson v. Puget Sound Co., 52 Wash. 522, 101 P. [50] 53, [132 Am.St.Rep. 1044], in relation to the driver of an automobile: 'The deceased [the guest] had a right to assume that the driver was competent, that he knew the capacity of his machine, and that he would not put it in a perilous position.'"

[7] It follows that we cannot conclude that Hopkins was guilty of contributory negligence as a matter of law. That question was one of fact for the jury.

We will now turn to the really difficult phase of the case, namely, the instructions proposed by the plaintiffs and given to the jury. Some of them are novel to the jurisprudence of California. Also, some of the instructions proposed by defendants and given to the jury are more favorable to defendants than the circumstances here appearing ordinarily permit.

Plaintiffs' instruction number six reads as follows:

"Even where a person is seen approaching the crossing the company owes him the same duty only that it owes to the general public—that is, reasonable diligence and care to avoid injury. In such a case the engineer is not bound to stop the train; he may act on the supposition that the traveler will stop before reaching the track; but he must not rest upon this supposition so long as to allow his engine to reach the point where it will become impossible for him to control his train, or give warning in time to prevent injury to the traveler, supposing the latter to continue his course. When it is apparent, or when in the exercise of reasonable diligence it should be apparent, to the company that a person on its track or about to get on its track is unaware of his danger or cannot get out of the way, it becomes the duty of the company to use such precautions by warning, applying brakes or otherwise as may be reasonably necessary to avoid injury to him."

[8] A railroad company is not an insurer of the safety of motorists crossing its tracks. It is not absolutely required to avoid injuring a traveler on or approaching its tracks. It is only required to use reasonable care and caution in attempting to avoid such injury. See Rasmussen v. Fresno Traction Co., 15 Cal.App.2d 356, 59 P.2d 617.

[9] Plaintiffs' instruction number ten reads as follows:

"You are instructed that it is as much the duty of the defendants to avoid the accident as it was the duty of the plaintiff Johnson, and if you believe that the defendant motorman, in the exercise of ordinary care could have seen the automobile approaching and realized, or in the exercise of ordinary care should have realized, that the plaintiffs were about to drive onto the track, and that they were unaware of the danger and could not get out of the way, and the motorman could have avoided the accident by applying his brakes, and slowing or stopping the train, but negligently failed to do so, then I instruct you that the motorman and the defendants were guilty of negligence."

Defendants maintain that this instruction was a very incorrect attempt to state the doctrine of the last clear chance. If it was such an attempt the instruction was erroneous and omitted essential elements of that rule. See New York Lubricating, etc., Co. v. United Railroads, 191 Cal. 96, 215 P. 72; Rasmussen v. Fresno Traction Co., supra; Lasch v. Edgar, 46 Cal.App.2d 726, 116 P.2d 949.

In replying to the criticisms on this instruction plaintiffs admit that the doctrine of the last clear chance has no application to the facts of this case and maintain that they did not attempt to state that doctrine in the instruction but merely stated a rule of due care that should govern the conduct of the motorman.

The instruction seems to us to be an incorrect attempt to state the doctrine of the last clear chance. If it was not such an attempt it placed an undue burden of extreme care on the motorman. In either situation the instruction was erroneous. It fails to take into consideration the reciprocal duties which the automobile driver and the motorman owed to each other and which to some extent at least must govern the answer to the question: What was due care on the part of either under the circumstances?

[10] Plaintiffs' instruction number eighteen is particularly erroneous. We have added our emphasis to portions of it. It is as follows:

"A railroad company is bound to take such reasonable precautions for the safety of travelers at public crossings as ordinary prudence would indicate. The duty of the company is usually expressed by the term 'ordinary and reasonable care'. What constitutes ordinary and reasonable care must, however, be determined in the light of all the surrounding facts and circumstances so that the care required to prevent the infliction of injury is always proportioned to the danger and chances of injury. In some localities in thickly settled communities, closer vigilance and more safeguards are required on the part of the railroad company than would be necessary in other localities. What would be due care in one locality might be negligence in another. Greater caution and circumspection is required under some circumstances, as for instance where the view of the track is obstructed.

"At ordinary crossings it is the duty of the railroad company to keep a lookout, to run at a reasonable rate of speed, and to give timely warning of the approach of engines or trains. The lookout answers one purpose, the warning another, and the control of the speed yet another, and it often happens that the observance of either without the observance of all will not afford the required, or indeed, any protection.

"The lookout is primarily to enable the trainmen to control the movement of the train when they discover danger, while the warning is to give the traveler notice to keep out of the way and the control of the speed is designed to make both the lookout and the warning more effective.

"At a crossing within a city or where the travel is great, reasonable care would require a flagman constantly at the crossing, or gates or bars, so as to prevent injury, but such care would not be required at a crossing in the country where but few persons passed each day.

"If a railroad crossing is especially dangerous to travelers on account of its locality or mode of construction, or because the view is obstructed, the railroad company must exercise such care and take such precautions as the dangerous nature of the crossing requires, and failing in this, is guilty of negligence.

"In other words, if a railroad company, in the management of its business, causes unusual peril to travelers, it must meet such peril with unusual precautions, and failing in this is guilty of negligence. This rule is particularly applicable where the traveler's view of approaching trains at a crossing is so obstructed that they cannot be seen until close to the track. In such a case it becomes the duty of the railroad company to use extra caution to avoid collision, as by a less amount of speed, or by increased warnings, or otherwise; or if an unslackened speed is desirable, by keeping a watchman on duty, or some other sufficient means of warning travelers."

Plaintiffs cite the case of Grand Trunk Ry. of Canada v. Ives, 144 U.S. 408, 12 S. Ct. 679, 36 L.Ed. 485, as supporting the last quoted instruction. It is true that some of the expressions found in the instruction are paraphrases of language there used. It is also true that the emphasized portion of the instruction is almost an exact copy of an instruction quoted in that opinion from Central Passenger Railway Co. v. Kuhn, 86 Ky. 578, 6 S.W. 441, 9 Am.St.Rep. 309.

The emphasized portion of the instruction places the burden on the defendant railway company of placing a flagman (or gates or bars) at a crossing (any crossing) within a city where the travel is great. While this may be the law in Kentucky, we have been cited to no case holding that it is the law in California, and know of no such rule in force here, where the necessity for a crossing guard is generally committed to the jurisdiction of the railroad commission. That this instruction was seriously erroneous cannot be doubted.

[11] Instruction nineteen, given at plaintiffs' request, reads as follows:

"You are further instructed that the question as to whether or not the defendants were guilty of any negligence in the operation of their trains which proximately caused the injuries to the plaintiffs or either of them, involves the query as to whether or not reasonable prudence and care on the part of the railroad company, or the defendants, required it to have slowed down, or operated at a slower speed, or required it to have maintained or provided a flagman, or provided some other method or means of notifying the public of the approach of a train at this intersection. In determining this question you will consider whether or not under similar conditions the

reasonably careful and prudent operator of a train would have provided a flagman or other means to give notice of the immediate approach of the train, or would have operated the train at a slower speed. If you find that a careful and prudent train oprator would have operated the train at a slower speed, provided such flagman, or given such other notice which was not furnished by the defendants in this case, *then you will find that any such negligence contributed proximately to the injuries of plaintiffs, or either of them,* and in addition that either of such plaintiffs was not guilty of any negligence contributing proximately to their own injuries, then the defendants would be liable in damages to such plaintiff who was not negligent." (Emphasis ours.)

Besides other defects common to other instructions we have discussed, the emphasized portion of the instruction takes the question of the proximate cause away from the jury, in so far as defendants are concerned. That this was error should need neither argument nor citation of authorities.

Defendants complain of several other instructions given the jury at the request of plaintiffs. While several of those instructions were improper and should not be used as future models, we need not quote them here in this already too extended opinion. The errors in those other instructions are not as serious as the errors in those quoted and some of the mistakes in some of them were cured by other proper instructions.

[12] As there are serious errors in some of the instructions it remains for us to consider the effect of section 4½ of article VI of the Constitution on this case. As Johnson was the driver of the automobile and Hopkins was his guest without the right of control over the driver, we must consider each of their cases separately under this phase of the case as far as the contributory negligence, if any, of each plaintiff is concerned. Of course the rules governing the negligence, if any, of the defendants are the same in both cases.

As we have already observed, there is substantial evidence in the record, if accepted as true, pointing to negligence on the part of defendants. What seems to us to be a preponderance of the evidence supports the conclusion that the electric train crew gave no proper warning with the bell when approaching the crossing which of course amounted to negligence. § 486, Civ. Code. Further, under the evidence the jury might well have concluded that the speed at which the train was operated showed a lack of due care under the circumstances of this case.

[13] On the other hand the question of contributory negligence on the part of Johnson is very close. Had the jury found against him on this question such a finding would have had evidentiary support. Under such circumstances we believe that his case should have been submitted to the jury under proper instructions and not under instructions containing the defects appearing in those we have quoted. The emphasized portion of plaintiffs' instruction number nineteen virtually took the question of proximate cause of the accident away from the jury. Under it the jury may have agreed upon its verdict with the belief that the negligence of defendants having been determined, the question of whether the negligence of Johnson proximately caused or contributed to the collision need not have been considered. With the many errors appearing in the instructions we cannot support the judgment in favor of Johnson.

The case of Hopkins differs from that of Johnson in the important particular that the contributory negligence of Johnson, if any, could not have been imputed to Hopkins. The implied finding of the jury that Hopkins was free from contributory negligence seems to us to be supported by the preponderance of the evidence as is the fact, if it be a fact, that the bell of the electric train was not rung as required by section 486 of the Civil Code, which in itself constitutes negligence. Ordinarily such evidence would be sufficient to support a judgment in favor of Hopkins and to invoke the provisions of section 4½ of article VI of the Constitution.

[14] Here, however, it is utterly impossible to determine upon what act or acts of negligence or supposed negligence of defendants the jury based its verdicts. That body might have based them on the negligence of the train crew in failing to ring the bell, if such was found as a fact to be true. However, we cannot overlook the conflicting evidence on this question. We must also remember that conflicts in the evidence and the credibility of witnesses are questions addressed to and to be settled by the jury and not an appellate court.

There is evidence which, if accepted as true, shows that the bell had been properly rung. We are not at liberty here to usurp the functions of the jury and weigh the evidence to this effect and judge the credibility of the witnesses testifying on this question. The jury might have concluded that the bell was rung and still have based its verdicts on the failure to maintain a flagman at the crossing under the erroneous instruction numbered eighteen which we have quoted. It might have found that the bell was rung and disregarded the instruction that a flagman or other crossing guard was necessary and still have found defendants negligent in not so operating the train that the trainmen could have avoided the accident under the quoted erroneous instruction number six.

To illustrate the impossibility of arriving at any intelligent conclusion as to the basis of the verdicts, we need only to point to defendants' instruction number twelve, which told the jury that it was the duty of Johnson not only to look and listen but to stop before driving onto the tracks if he could not otherwise be sure that a train was not dangerously near; that the failure to so stop was negligence. This instruction, together with instructions on contributory negligence, virtually amounted to peremptory instructions to find for defendants in the Johnson case, at least, as it is admitted that Johnson did not stop. These instructions were in sharp conflict with other instructions given to the effect that Johnson was not required as a matter of law to stop. The jury refused to follow those defendants' instructions.

[15] The rule to be applied here is stated in Soda v. Marriott, 118 Cal.App. 635, 5 P.2d 675, 678, as follows:

"The giving of instructions which are contradictory in essential elements may warrant the reversal of a judgment, for the reason that it is impossible to determine which charge controlled the determination of the jury. Chidester v. Consolidated People's Ditch Co., 53 Cal. 56; Buttrick v. Pacific Elec. Ry. Co., 86 Cal.App. 136, 260 P. 588; Gaster v. Hinkley, 85 Cal.App. 55, 258 P. 988; Noce v. United Railroads, 53 Cal.App. 512, 200 P. 819." See, also, Akers v. Cowan, 26 Cal.App.2d 694, 80 P.2d 143; Ferguson v. Nakahara, 43 Cal.App.2d 435, 110 P.2d 1091; Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 P. 700; Starr v. Los Angeles Railway Corp., 187 Cal. 270, 201 P. 599.

[16] As the verdicts may well have been based on acts or omissions of defendants which were erroneously defined in the instructions as negligent as a matter of law, we cannot form the opinion that the patent errors in the instructions did not result in a miscarriage of justice.

Were it necessary to do so, we might be constrained to rely upon the decision of the Supreme Court of the United States in Stromberg v. People of State of California, 283 U.S. 359, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484. There that court, in invoking the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, said:

"The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon an examination of the original record filed with this Court, that the State's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld. * * *The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside."

[17] While it may be true that the plaintiffs, particularly Hopkins, in good morals might be entitled to recover, still the defendants should be entitled to a fair trial. This should require a reversal of both judgments so that the reciprocal duties of due care resting on each party be properly defined and the jury be permitted

to determine the liability of defendants, if any, under proper and established rules governing cases of this nature.

The judgments are reversed.

BARNARD, P. J., and WEST, J. pro tem., concurred.



47 Cal.App.2d 651

SHANNON et al. v. GENERAL PETROLEUM CORPORATION OF CALIFORNIA et al.

Civ. 2781.

District Court of Appeal, Fourth District, California.

Nov. 7, 1941.

As Modified Nov. 12, 1941.

Hearing Denied Dec. 31, 1941.

1. Judgment ⇐714(1)

Under doctrine of "res judicata", a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of such fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Judgment ⇐720

Under doctrine of "res judicata", a matter of fact once adjudicated by a court of competent jurisdiction, concurrent or exclusive, may be relied upon as an "estoppel" in any subsequent collateral suit in the same or any other court, at law, in chancery, in probate, or in admiralty, where either party or the privies of either party alleges anything inconsistent with such adjudicated fact regardless of whether subsequent suit is upon the same or a different cause of action.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

3. Judgment ⇐683

In action to establish a trust in oil royalties, under doctrine of "res judicata", an adjudication in prior suit against plaintiffs' assignors that royalties assigned to such assignors by holder of prospecting permit from United States were held in trust by such assignors for person to whom permit holder had promised a share of oil in return for assistance in procuring permit, and that plaintiffs' assignors had acquired no royalty interest which could be assigned by them, was conclusive of such fact issue as against plaintiffs who could therefore base no claim to royalty interest on assignment from assignees of permit holder.

4. Mines and minerals ⇐79(1)

Where a judgment that a prior assignment by holder of oil prospecting permit left him no interest in oil royalties that could be assigned to plaintiffs' assignors was affirmed on appeal, plaintiffs acquired no interest in royalties by such assignment or by agreement entered into between their assignors and administratrix of estate of deceased permit holder while appeal from judgment was pending which settled their conflicting claims and bound estate to convey proportionate share of subject matter in case judgment was affirmed but did not bind estate to convey anything to plaintiffs' assignors, or by an agreement between administratrix and the prior assignee which settled their differences but which gave plaintiffs' assignors no interest in the subject matter that they did not then possess.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Suit by Michael F. Shannon and others against General Petroleum Corporation of California, to recover money received as oil royalties, for a decree that certain oil royalties were held in trust for plaintiffs, and to require certain defendants to convey such royalties to plaintiffs. From two judgments, entered after two separate demurrers to amended complaint had been sustained, plaintiffs appeal.

Judgments affirmed.

Cruickshank, Brooke & Dunlap, of Pasadena, and Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellants.

Sullivan, Roche & Johnson, of San Francisco, for respondents F. C. Dougherty,

James Farraher, Webster F. Clark, Theodore J. Roche, as trustee for the copartnership of Sullivan, Roche & Johnson, Theodore J. Roche, as trustee for the copartnership of Sullivan, Roche, Johnson & Barry, Old St. Mary's Church, Old St. Mary's Church, as trustee for Paulist Fathers, and Elsie Dougherty.

Edwin S. Pillsbury and McCutchen, Olney, Mannon & Greene, all of San Francisco, for respondent Hilda Carling Ochsner, as administratrix of estate of Washington H. Ochsner, deceased.

MARKS, Justice.

This is an appeal from two judgments entered after two separate demurrers had been sustained to plaintiffs' amended complaint. Plaintiffs sought judgment for large sums of money received as oil royalties, for a decree that certain oil royalties were held in trust for them, and that certain defendants convey those royalties to them.

This case is an outgrowth of the dealings of Washington H. Ochsner with oil interests under a prospecting permit which he obtained from the United States on April 16, 1921, permitting him to prospect for oil on government land in the Kettleman Hills, in Kings county, which permit ripened into oil leases.

The factual background for this litigation is spread on the books at considerable length. See Dougherty v. California Kettleman Oil Royalties, Inc., 9 Cal.2d 58, 69 P.2d 155; Dougherty v. California Kettleman Oil Royalties, Inc., 13 Cal.2d 174, 88 P. 2d 690; Morrow v. Coast Land Co., 29 Cal. App.2d 92, 84 P.2d 301; Arnold v. Universal Oil Land Co., 45 Cal.App.2d 522, 114 P.2d 408; Medallion Oil Co. v. Hinckley, 9 Cir., 92 F.2d 155. We will not again repeat those facts at length, but will endeavor to confine ourselves to as brief a summary of such of them as is necessary to an understanding of the issues presented.

Ochsner had difficulty in obtaining his prospecting permit and employed F. C. Dougherty to assist him in securing it, promising Dougherty a 10 per cent interest in the permit when obtained. By agreement this was subsequently reduced to a 5 per cent interest.

On August 17, 1923, Ochsner assigned the permit to the Coast Land Company, reserving to himself 7½ per cent of the oil and gas produced from the discovery area and 2½ per cent of the oil and gas produced from the balance of the property. On October 8, 1923, the Coast Land Company assigned its interest in the permit to the General Petroleum Corporation, predecessor of the General Petroleum Corporation of California, which on January 8, 1930, brought into large production the first well successfully drilled on the property. On July 23, 1930, the United States issued a lease on 640 acres of the permit land, hereafter called A Class property, to the General Petroleum Corporation of California and on July 9, 1931, a second lease on 1898.24 acres, hereafter called B Class property, to the same corporation. In 1931, the Kettleman North Dome Association was formed, which subsequently conducted the oil operations on this and much adjacent property.

Ochsner, R. H. Arnold, and Richard Young organized the Universal Oil Land Company in which they were the sole officers and directors. About August 17, 1923, Ochsner assigned a 6½ per cent royalty in the A Class lands and 2 per cent royalty in the B Class lands to the Universal Oil Land Company, thus reserving 1 per cent in the former and ½ per cent in the latter to himself. About August 20, 1923, he assigned these reserved royalties to the same corporation, probably in trust for himself.

Ochsner died in 1927, and Hilda Carling Hinckley was appointed and qualified as administratrix of his estate.

In December, 1928, the California Kettleman Oil Royalties, Inc., was incorporated and in January, 1929, the Universal Oil Land Company assigned to it the royalties it had received from Ochsner.

Plaintiffs claim by reason of an assignment from Universal Oil Land Company and California Kettleman Oil Royalties of those corporations' interest in the Ochsner royalties derived from the permit property. Plaintiffs, with others, were attorneys for either or both of the corporations in all but one of the cases we have cited.

The primary problem to be decided is what interest, if any, either or both of these assignors had in the Ochsner royalties to assign to plaintiffs, for if the corporations had no interest in the royalties they could transfer none to plaintiffs and the demurrers were properly sustained.

On November 21, 1924, Dougherty filed suit in the superior court of San Francisco against Ochsner, Coast Land Company, General Petroleum Corporation and Universal Oil Land Company, to establish his

interest in the royalties in the permit property. The case took a long and devious course through the trial court. The California Kettleman Oil Royalties, Inc., finally appeared as the sole defendant. On June 25, 1935, the superior court rendered judgment in favor of Dougherty for a 5 per cent royalty in all of the oil and gas produced and saved from the lands covered by the Ochsner permit, holding that a trust existed in his favor. The trial court found that this 5 per cent was more than the 7½ per cent from the A Class land and the 2½ per cent from the B Class land which Ochsner had reserved to himself and assigned to the Universal Oil Land Company, which assigned to California Kettleman Oil Royalties, Inc. It follows that after that judgment became final and was enforced and the trust executed, neither of those corporations had any interest in the royalties to assign to plaintiffs. Plaintiffs virtually admit the correctness of this conclusion but maintain that the corporations or one of them acquired an interest in the royalties, independent of the Ochsner assignments, through certain contracts executed in 1936.

The California Kettleman Oil Royalties, Inc., appealed from the judgment against it in favor of Dougherty. This judgment was affirmed on May 27, 1937, and the Supreme Court denied a rehearing. Dougherty v. California Kettleman Oil Royalties, Inc., 9 Cal.2d 58, 69 P.2d 155, 167. In speaking of the effect of the Ochsner-Dougherty contract, that court said:

"Under Dougherty's contract with Ochsner, the latter had the right to assign the permit except that he was bound to reserve and protect the percentage already assigned to Dougherty. The court has found, and such finding is supported by the record, as well as by reason and the law, that when Ochsner assigned the permit to the Coast Land Company reserving a percentage that is mathematically less than the percentage he had already assigned to Dougherty, the percentage reserved was the property of Dougherty. This is the clear holding in Merritt Oil Corp. v. Young [10 Cir.] 43 F.2d 27."

In considering the question of the statute of limitations, it was contended that the case could not affect the Universal Oil Land Company because the action had been dismissed as to it and California Kettleman Oil Royalties, Inc., had not been substituted in its place. The Supreme Court considered this question on pages 84 and 85 of the opinion. Dougherty v. California Kettleman Oil Royalties, Inc., 9 Cal.2d 58, 69 P.2d 155, 168, 169. See, also, Dougherty v. California Kettleman Oil Royalties, Inc., 13 Cal.2d 174, 88 P.2d 690.

Three conclusions are obvious from these decisions: First, Universal Oil Land Company parted with all interest in the Ochsner royalties when it assigned them to the California Kettleman Oil Royalties, Inc., in January, 1929. Second, the fact of the trust by Ochsner and his successors was thoroughly litigated and decided and is binding on the parties and those in privity with them, which include the plaintiffs. Third, that the royalties assigned to Dougherty and held in trust for him by Ochsner and his successors exceeded the royalties reserved by Ochsner, so that he had no reserved royalties to assign to either corporation which claims under him.

[1, 2] In Estate of Clark, 190 Cal. 354, at page 360, 212 P. 622, at page 625, the Supreme Court said: "That judgment is binding, not only in proceedings upon the same, but also upon a different cause of action in so far as it settles and determines questions of fact. 23 Cyc. 1288–1290. It is well settled that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court. Freeman on Judgments, §§ 249 and 253; Lamb v. Wahlenmaier, 144 Cal. 91, 77 P. 765, 103 Am.St.Rep. 66; Reed v. Cross, 116 Cal. 473, 484, 48 P. 491; Atchison, T. & S. F. Ry. v. Nelson [9 Cir.], 220 F. 53, 135 C.C.A. 621. That is to say, 'a matter of fact once adjudicated by a court of competent jurisdiction, concurrent or exclusive, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court, at law, in chancery, in probate or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it, and this too whether the subsequent suit is upon the same or a different cause of action. The facts decided in the first suit cannot be disputed.' Bigelow on Estoppel, pp. 110, 111, 112; Rauer v. Rynd, 27 Cal.App. 556, 150 P. 780." Supporting this rule are: Southern California Ry. Co. v. Workman, 146 Cal. 80, 79 P. 586, 82 P. 79, 2 Ann.Cas. 583; Fox v. Workman, 155 Cal. 201, 100 P. 246; Bing-

ham v. Kearney, 136 Cal. 175, 68 P. 597; Horton v. Goodenough, 184 Cal. 451, 194 P. 34; Martin v. Holm, 197 Cal. 733, 242 P. 718; Price v. Sixth Dist. Agricultural Ass'n, 201 Cal. 502, 258 P. 387; Todhunter v. Smith, 219 Cal. 690, 28 P.2d 916; White v. Lantz, 126 Cal.App. 693, 14 P.2d 1041; Olney v. Cavell, 138 Cal.App. 233, 32 P.2d 181; Hardy v. Rosenthal, 2 Cal.App.2d 442, 38 P. 2d 412; Bacon v. Kessel, 31 Cal.App.2d 245, 87 P.2d 857; and Murdock v. Eddy, 38 Cal. App.2d 551, 101 P.2d 722.

[3] Following the judgment in Dougherty v. California Kettleman Oil Royalties, Inc., 9 Cal.2d 58, 69 P.2d 155, we must conclude that the judgment in favor of Dougherty left no part of the oil royalties in plaintiffs' assignors that could be assigned to them. To escape the effect of this obviously correct conclusion plaintiffs rely on paragraphs of two contracts executed by the Estate of Washington H. Ochsner, deceased, and approved by the probate court in which that estate was pending.

After the decision of the superior court in favor of Dougherty in his action to declare a trust in his favor in the oil royalties, and while that case was on appeal, the administratrix of the estate of Washington H. Ochsner began negotiations in an endeavor to save some of those royalties for the estate, all of which would go to Dougherty if the judgment should be affirmed on appeal. These negotiations resulted in two contracts under which plaintiffs claim.

The first contract bears date of August 14, 1936, and was made by Hilda Carling Hinckley, as administratrix of the estate of Washington H. Ochsner, deceased, as first party, Universal Oil Land Company, as second party, and California Kettleman Oil Royalties, Inc., as third party. It purported to settle the conflicting claims of the parties to the oil royalties in question here and large sums of money accrued on those royalties, to 100 shares of stock owned by the estate in Universal Oil Land Company which owned 85 per cent of the stock in California Kettleman Oil Royalties, Inc., to a $50,000 loan by the latter corporation to the former, to the obligation to repay an $800,000 loan made by the General Petroleum Corporation of California to California Kettleman Oil Royalties, Inc., and other matters not necessary to specify here. The contract settled the questions as nearly as it was possible to do so without the consent of Dougherty, who was not a party to it. The net result important here is that the estate and California Kettleman Oil Royalties, Inc., determined the interest of each in the royalties and money accrued from them, and apportioned the indebtedness to the General Petroleum Corporation of California. We will hereafter refer to this as the first contract.

Having settled the controversies with the Universal Oil Land Company and California Kettleman Oil Royalties, Inc., the administratrix proceeded to settle with Dougherty. By a contract dated December 5, 1936, and while the appeal in Dougherty v. California Kettleman Oil Royalties, Inc., 9 Cal. 2d 58, 69 P.2d 155, was still pending, Hilda Carling Hinckley, as administratrix of the estate of Washington H. Ochsner, deceased, as first party, entered into a contract with F. C. Dougherty, as second party, which settled their differences and which divided between them the oil royalties and money accumulated from them. We will refer to this as the second contract.

Paragraph six of the first contract reads as follows: "In a certain action commenced in the Superior Court of the State of California in and for the City and County of San Francisco, entitled 'F. C. Dougherty, Plaintiff, v. California Kettleman Oil Royalties, Inc., Defendant,' and numbered therein 152,210, plaintiff therein recovered a judgment against Third Party on or about the 25th day of June, 1935. Said judgment has been appealed by Third Party to the Supreme Court of the State of California. If it shall be finally held, as a result of said appeal or as a result of any further proceedings in said action, that F. C. Dougherty is entitled to a certain percentage of the 'A' and 'B' royalties hereinabove referred to, then First Party agrees that she will execute appropriate conveyances or assignments to said F. C. Dougherty of such percentage of the 'A' and 'B' royalties that he shall be so entitled to receive as the percentage of such royalties owned separately and apart by First Party, as herein provided, bears to the whole of said royalties; for example, if said F. C. Dougherty should be finally adjudged in said action to be entitled to receive 10% of said 'A' and 'B' royalties, First Party will convey 10% of 40.697536% of the 'A' royalties and 10% of 45.259264% of the 'B' royalties to him; provided, however, that First Party reserves the right to contest the application of any such holding or judgment to that portion of said 'A' and 'B' royalties which are and have been owned by First Party as provided in paragraph 1 of this agreement, and if she shall elect to make

such contest she shall not be obliged to make such conveyance of any portion of said royalties owned by First Party as provided in said paragraph 1 but she shall not be entitled to withhold such conveyance unless she shall agree, by written agreement satisfactory in form to Third Party, to save Third Party harmless from any liability to said plaintiff by reason of the withholding of a conveyance of said portion of said royalties."

Paragraph two of the second contract contains the following: "Second party (Dougherty) further agrees to indemnify and hold first party (Estate of Ochsner) harmless against all liability or obligation to Universal Oil Land Company and California Kettleman Oil Royalties, Inc., which first party assumed in and by the provisions of paragraph 6 of said agreement dated August 14, 1936, attached hereto as Exhibit 'A'."

Plaintiffs claim under their assignments and the two paragraphs of the two contracts just quoted. In this connection it should be observed that paragraph four of the second contract reads as follows: "Neither this agreement nor any covenant herein, shall have any effect upon any litigation now pending between F. C. Dougherty, as plaintiff, and California Kettleman Oil Royalties, Inc., defendant."

We fail to comprehend how the plaintiffs or their assignors could hope to benefit by the two contracts from which we have quoted. After the judgment in the Dougherty case, the administratrix found herself confronted by a situation in which the estate would lose all interest in the oil royalties unless that judgment should be modified or reversed on appeal. She proceeded to extricate the estate from this situation by two moves. She first proceeded to settle with Universal Oil Land Company and California Kettleman Oil Royalties, Inc., so that the interest of the estate in the oil royalties and the money derived from them were settled and defined. In case of a reversal of the Dougherty judgment she would have had a definite interest in the subject matter of the litigation to defend. She next settled with Dougherty so that if his judgment was affirmed the estate would have a defined interest in the subject matter of the litigation and would not suffer a total defeat.

There is nothing in the first contract requiring the estate to convey anything to either Universal Oil Land Company or to California Kettleman Oil Royalties, Inc., in case Dougherty was either wholly or partly successful in his litigation. Paragraph six merely bound the estate to convey to Dougherty the estate's proportionate share of the subject-matter of the litigation in case Dougherty should finally prevail. This was merely a covenant on the part of the estate to carry out its obligations, whatever they might prove to be, under any judgment that Dougherty might obtain. Neither of the two corporations were to receive anything under this paragraph of the first contract. It follows that their assignees could not benefit from it.

It is equally clear that neither the two corporations nor the plaintiffs as their assignees gained any interest in the royalties under the quoted paragraphs of the second contract. The first quoted paragraph from that contract was merely a covenant of indemnity. It did not create any primary obligation on the part of either the estate or Dougherty to either Universal Oil Land Company or California Kettleman Oil Royalties, Inc. It did not give to either corporation any interest in the subject matter of the litigation that it did not then possess. As neither corporation had any interest in that property (Dougherty v. California Kettleman Oil Royalties, Inc., 9 Cal.2d 58, 69 P.2d 155), the contracts gave them none. As plaintiffs' assignors had no interest in the royalties or the money accumulated from them, the assignments conveyed no interest in them to plaintiffs and they cannot recover in this action.

As the Dougherty judgment was finally affirmed, any interest in the royalties which the Ochsner estate now has comes under the contract with Dougherty and not from anything reserved by Ochsner or obtained from the two corporations which were parties to the first contract and which were plaintiffs' assignors.

A similar question in a very different form was argued in Dougherty v. Kettleman Oil Royalties, Inc., 13 Cal.2d 174, 88 P.2d 690, where the two contracts we have been considering were before the court. Shortly after the remittitur went down following the affirmance of the judgment (9 Cal.2d 58, 69 P.2d 155) the defendant moved for a satisfaction of the judgment against it based on the second contract, urging that the action was ex delicto and that payment by one tort feasor released the others. The Supreme Court rejected this theory holding that the action sounded in contract between Ochsner and Dougherty; that "the transfer of the trust property to Universal and by it

to appellant constituted clear breaches of the contractual duty owed Dougherty, and the assignees took subject to the terms of that contract." Dougherty v. California Kettleman Oil Royalties, Inc., 13 Cal.2d 174 88 P.2d 690, 694.

[4] As plaintiffs' assignors had no interest in the subject matter of the litigation to assign to them, plaintiffs took nothing under those assignments. They cannot recover here so the demurrer to their amended complaint was properly sustained.

Judgments affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.



47 Cal.App.2d 628

PEOPLE v. GRECO et al.

Cr. 3495.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1941.

Hearing Denied Dec. 4, 1941.

1. Criminal law ⇐338(2)

The prosecutor in his endeavor to show by circumstantial evidence that defendant was occupying an establishment for recording wagers on horse races was not limited to proof of defendant's conduct on the day of his arrest, but he could show any conduct of defendant which tended to establish that he was in fact at the time of arrest conducting the premises for the illegal purpose charged. Penal Code, § 337a, subds. 1, 2.

2. Criminal law ⇐1170½(1)

In prosecution for occupying an establishment for the purpose of recording wagers on horse races, though the prosecutor went too far in coupling with his question concerning one defendant's taking of bets seven months before his arrest a suggestion of defendant's previous arrest, the conduct did not require reversal of convictions where it could not be reasonably argued that a different verdict would have been rendered had the reference to a previous arrest not been included in the question. Penal Code, § 337a, subds. 1, 2.

3. Criminal law ⇐1172(1)

In prosecution for pool-selling and book-making on the result of horse races and for occupying an establishment for recording wagers on horse races in violation of two subdivisions of a statute, giving of instruction that defendants were charged with violating subdivision making it unlawful to have papers and paraphernalia for recording and registering bets constituted reversible error because of omission of principal element of offense described in subdivision making it a penal offense to keep or occupy premises for recording bets. Penal Code, § 337a, subds. 1, 2.

4. Criminal law ⇐1159(2)

The verdict of a jury which has been approved by the trial court cannot be set aside on appeal on ground of insufficiency of evidence unless it is made clearly to appear that on no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.

5. Gaming ⇐98(3)

Evidence was sufficient to sustain conviction of two defendants on the count of an information charging that they engaged in pool-selling and book-making on the result of horse races in violation of statute. Penal Code, § 337a, subd. 1.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Donald H. Greco and another were convicted of violating subdivisions 1 and 2 of section 337a of the Penal Code on a charge of occupying an establishment for the purpose of recording wagers on horse races, and they appeal from the judgments and from an order denying a new trial.

Judgments and order affirmed in part and reversed in part.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

Russell E. Parsons, of Los Angeles, F. Walter French, of Santa Monica, and Philip W. Erbsen, of Los Angeles, for appellant Wyre.

WOOD, Justice.

Defendants were charged in count I of the information with the violation of subdivision 2 of section 337a of the Penal Code and in count II they were charged

with the violation of subdivision 1 of the same section. Having been found guilty on both charges at a jury trial, they have appealed from the judgments and from the order denying a new trial.

At about 2 o'clock in the afternoon of March 20, 1941, two police officers entered the confectionery and cigar store at 1009 Federal boulevard in Sawtelle. This establishment, which had living quarters in the rear, was then being operated by defendant Wyre, who had operated it for about four years. As the officers entered Wyre was standing back of a show case and looking at a scratch sheet bearing date of that day but when he saw the officers he dropped a pencil which "was posed like he was about to make a notation on it". Several other scratch sheets were found on the counter bearing the dates March 20th and March 19th. In a waste basket behind the counter the officers found several torn betting markers which were identified as book making paraphernalia. These sheets contained recorded bets on races run at various race tracks.

Defendant Greco was sitting at a table in the living quarters at the rear of the store when the officers entered. He had before him a sheet of paper identified as a pay-off, or collection, sheet which was shown to be part of the paraphernalia used by bookmakers. Greco was in the act of writing on a pad of paper. In response to an inquiry by one of the officers Greco stated that he did not have a car and that he intended to take a bus home but the officers found a key on his person which fitted an automobile in front of the premises. In the dashboard compartment of this automobile the officer found a number of betting markers and a number of papers showing the initials of various persons from whom certain sums were to be collected or to whom sums were to be paid. Greco admitted to the officer that he was collecting bets for someone else and asked the officer if he might be permitted to make a copy of the sheet that was on the table at the time of his arrest else he might "get fired". He stated that the man for whom he was collecting bets was known to him only as "Vick". He further stated that he was regularly employed by one of the newspapers but that in addition to his work he was collecting bets for the party known as "Vick". Greco testified concerning the various individuals whose initials appeared on the betting markers and from whom he was supposed to make collections. Concerning his relations with his employer and some of the "customers" he testified in part:

"Q. By the way, as to Vick, what is Vick's last name? Do you know his last name? A. I don't know it.

"Q. Did Vick give you the money, you say, to pay him? A. If there was a lot of pay-outs he would give me money to pay.

"Q. Would he give you money enough to pay all of these? A. Yes.

"Q. Here is another sheet with the name Izzy on it. You were supposed to collect $17.00 on that one? A. Yes.

"Q. Here is one for 'J. M.' Who is J. M.? A. That was another customer of his.

"Q. I know, and I took it from your testimony that he was one of the customers. Let's have his name, if you don't mind. A. I just know him by the initials.

"Q. Where did you meet J. M.? A. I used to meet him in front of the Elks.

"Q. What time would you usually meet him there? A. I would go there at about 11:00 o'clock to meet him.

"Q. Every day? A. Well, sometimes I would pay him.

"Q. Did you collect $68.80, is that correct? A. Yes sir.

"Q. He had a pretty bad day, I take it. Here is J. M. again. That was to collect $85.25, is that correct? A. Yes sir."

It is claimed that the district attorney was guilty of misconduct in his cross examination of defendant Wyre. In the transcript the following appears:

"Q. Now, Mr. Wyre, you said you were asked the question by your counsel were you taking bets there, and the answer was 'No.'

"Q. I beg your pardon? A. No sir.

"Q. Why, weren't you arrested in this city in August, 1940, and you admitted taking bets in that location?" The court sustained an objection to this question by the defense and remarked, "we are trying the defendants on this charge here".

[1, 2] It is argued that it was improper to question the witness concerning the taking of bets seven months prior to the time of the arrest and that the suggestion of the previous arrest of defendant should not have been made. Defendants were on trial

on the charge of occupying an establishment for the purpose of recording wagers on horse races. It was shown in evidence that Wyre had in fact occupied the establishment in question for several years. In his endeavor to show by circumstantial evidence that Wyre was occupying the premises for the purpose of recording wagers the prosecutor was not limited to proof of the conduct of Wyre on the day of his arrest but he could show any conduct of Wyre which tended to establish that he was in fact at the time of the arrest conducting the premises for the illegal purpose charged. It would not have been an abuse of discretion if the trial court had permitted the prosecution to prove that Wyre had admitted taking bets at the same premises within seven months of the time of his arrest. Although the prosecutor went too far in coupling with his question a suggestion of Wyre's previous arrest, it cannot be reasonably argued that a different verdict would have been rendered if the reference to a previous arrest of Wyre had not been included in the question. The error is not of such nature as to call for a reversal of the judgments.

[3] Defendants properly complain of the error of the trial court in giving instructions to the jury on the offense charged in count I of the information. The court gave to the jury the following instruction: "Defendants are charged in count I of the information with a violation of section 337a, subdivision 2, of the Penal Code of California, which makes it unlawful for any person to either for gain, hire, reward, gratuitously and otherwise, have in their possession book and books, paper and papers, apparatus, device and paraphernalia for the purpose of recording and registering any bet and bets, and any purported bet or bets, and wager and wagers, and any purported wager and wagers, and of selling pools and purported pools upon the result and purported result of any trial and purported trial and contest and purported contest of skill, speed and power of endurance between beasts, to-wit horses." This instruction is clearly erroneous for it omits the principal element of the offense described in subdivision 2 of section 337a. This subdivision makes it a penal offense to keep or occupy certain premises therein designated for the purpose of recording bets. Under the instruction as given by the court defendants could have been convicted by mere proof that they had in their possession papers for the purpose of recording bets. The erroneous instruction calls for a reversal of the judgments as to count I of the information.

[4, 5] It is also contended by defendants that the evidence is insufficient to justify their conviction on count II, wherein it is charged that they engaged in "pool-selling" and "book-making" upon the result of horse races. Defendants in their briefs refer to a number of decisions by the District Court of Appeal in which reversals were ordered where the convictions were had upon circumstantial evidence and now assert that the circumstantial evidence in the present case is no more convincing than was the evidence in each of the cases cited. But they refrain from referring to the late case of People v. Newland, 15 Cal.2d 678, 104 P.2d 778, 781, in which, referring to cases now cited by defendants, the court said: "Anything stated in those cases which is inconsistent with the views herein expressed is disapproved." In the Newland case, where the defendant was convicted upon circumstantial evidence of the violation of subdivision 2 of section 337a, the court made an extensive review of the authorities and held that before the verdict of a jury which had been approved by the trial court can be set aside on appeal on the ground of the insufficiency of the evidence "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below".

An application of the rule of the Newland case to the case now under review compels the conclusion that the evidence is sufficient to sustain the convictions on count II of the information. The jury could reasonably have inferred that the party referred to as "Vick" and the two defendants were engaged in what is commonly called the "business" of book-making or pool-selling; that Wyre conducted the premises on Federal boulevard for the purpose of recording bets on horse races and did in fact take bets at that location; that Wyre was one of several "customers" who accepted bets on horse races for Greco's employer, "Vick"; that Greco was the collector or "pay-off" man who went from "bookie" to "Bookie" in his spare time striking a balance with them for bets made; and that at the time of his arrest Greco had stopped at Wyre's establishment to strike a balance with Wyre on the "bookie business" which had been there done. These inferences are

sufficient to sustain the convictions either on the theory that Wyre and Greco were aiding and abetting Vick in his book-making activities or on the theory that all three conspired together to engage in book-making or pool-selling.

The judgments and the order denying a new trial as to count II of the information are affirmed. The judgments and the order denying a new trial as to count I are reversed.

MOORE, P. J., and McCOMB, J., concurred.



47 Cal.App.2d 721

DR. MILES CALIFORNIA CO. v. BRONSTONE.

Civ. 2830.

District Court of Appeal, Fourth District, California.

Nov. 12, 1941.

1. Appeal and error ⇐607(1)

Where an appellant does not wait for notice of denial of his motion for new trial but proceeds to file his request for a transcript, appellant is subject to usual rules and to control of trial court with respect to manner in which he completes the proceedings which he has commenced. Code Civ. Proc. § 953a.

2. Appeal and error ⇐607(1)

Where an appellant has complied with jurisdictional requirement of statute by filing notice of appeal and a request for reporter's transcript, and respondent claims that there has been unreasonable delay in procuring transcript, respondent's only remedy is by way of motion in trial court to terminate the proceedings for preparation of transcript. Code Civ.Proc. § 953a.

3. Appeal and error ⇐619

Ordinarily, the duty rests upon an appellant, after filing a request for a reporter's transcript pursuant to statute, to take necessary steps to secure the filing of such transcript. Code Civ.Proc. § 953a.

4. Appeal and error ⇐607(1)

If appellant, after filing a request for a reporter's transcript pursuant to statute, fails to use proper diligence in taking necessary steps to secure filing of such transcript, it is within power of trial court to terminate the proceedings. Code Civ.Proc. § 953a.

5. Appeal and error ⇐985

Whether an appellant, after filing a request for a reporter's transcript pursuant to statute, has exercised proper diligence in securing the filing of such transcript is a question that rests largely in discretion of trial court, and trial court's determination of such question will not be disturbed on appeal unless it clearly appears that such discretion has been abused. Code Civ.Proc. § 953a.

6. Appeal and error ⇐607(1)

The trial court did not abuse its discretion in granting motion to terminate proceedings for preparation of reporter's transcript on ground that appellant had not proceeded with due diligence, where appellant, after initiating proceedings for preparation of transcript, delayed some eight months before attempting to make personal arrangements with reporter for his compensation as required by statute, and no valid excuse was given for such delay. Code Civ.Proc. §§ 953a, 953b, 953d.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Suit by the Dr. Miles California Company against Abe Bronstone, etc. From an order granting a motion to terminate proceedings for the preparation and certification of a reporter's transcript, the defendant appeals.

Affirmed.

Chase, Barnes & Chase, of Los Angeles, and Luce, Forward, Lee & Kunzel, of San Diego, for appellant.

Landels, Weigel & Crocker and Stanley A. Weigel, all of San Francisco, and Gray, Cary, Ames & Driscoll, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order granting a motion to terminate proceedings for the preparation and certification of a reporter's transcript.

On September 2, 1939, a judgment was entered against the defendant. On November 4, 1939, a motion for a new trial

was denied. On November 9, 1939, a notice of entry of the judgment of September 2, 1939, was served on the defendant. No notice of the ruling on the motion for a new trial was ever served on the defendant, and there was no waiver thereof as provided for in section 953d. All references to code sections herein are to the Code of Civil Procedure. On September 10, 1939, the defendant filed both a notice of appeal from the judgment and a request for a reporter's transcript pursuant to section 953a.

At the time this request for a transcript was filed no undertaking was filed in accordance with section 953b, and the defendant had made no personal arrangement with the stenographic reporter for his compensation. Nothing was done by the defendant in furtherance of the appeal until shortly after July 1, 1940, when one of his attorneys requested the reporter to prepare the transcript and to keep secret the fact that the same had been ordered and was being prepared. The transcript was prepared and filed by the reporter with the clerk on July 24, 1940. Before the date fixed for the settlement of said transcript the plaintiff served and filed notice of a motion for an order terminating the proceedings for the preparation of a transcript on the ground that the defendant had not proceeded with due diligence. After a hearing, this motion was granted and an order entered terminating the proceedings. This appeal followed.

The only question here involved is whether the trial court erred in granting this motion under these circumstances. The appellant disavows any intention of relying upon diligence on his part. He relies solely on the fact that no notice of the denial of the motion for a new trial was served upon him, and contends that under sections 953a and 953d, the failure to serve such a notice prevented the running of any time limits against him and deprived the court of any power to terminate the proceedings.

The appellant relies on Kling v. Kimball Pump Co., Inc., 115 Cal.App. 517, 1 P.2d 998; Rainey v. Crowder, 131 Cal.App. 562, 21 P.2d 593; Benson v. Gardner, 14 Cal. 2d 526, 95 P.2d 136, and Savage v. Superior Court, 36 Cal.App.2d 521, 97 P.2d 990. These were cases where no request for a transcript had been filed, and in such cases it has been uniformly held that the time within which a transcript may be requested does not expire in the absence of a notice of the ruling upon a motion for a new trial, or of a waiver thereof as provided for in section 953d.

The appellant also relies upon the following cases, in which a request for a transcript had been filed by the appealing party. Anstead v. Pacific Gas & Elec. Co., 201 Cal. 198, 256 P. 209; Preo v. Roed, 99 Cal.App. 372, 278 P. 928; Best v. Smith, 22 Cal.App.2d 363, 71 P.2d 78; Dreyer v. Cole, 210 Cal. 339, 292 P. 123; Baum v. Vanatta, 2 Cal.App.2d 395, 37 P. 2d 863; Jackson v. Thompson, 43 Cal.App. 2d 150, 110 P.2d 470. In all of these cases the issue presented and decided was whether a request for a transcript had been filed within the time allowed and none of them involved the question of diligence in thereafter proceeding with the preparation of that transcript.

At the oral argument the appellant cited Wrynn v. Superior Court, 197 Cal. 591, 241 P. 849. In that case, a request for a transcript was filed earlier than it need have been. The court held that this fact should not operate to impair or shorten the statutory time for the preparation of the transcript after the termination of the new trial proceedings. One of the main questions presented was the matter of the appellant's diligence in having a transcript prepared after requesting the same, and the court held that she could not be charged with lack of diligence under the circumstances there appearing. There is nothing in the opinion in that case which in any way holds that an appellant is excused from exercising diligence in the preparation of a transcript after he files a request for the same, or that the question of his diligence in that regard cannot be raised on a proper motion to terminate the proceedings.

[1, 2] All of the other cases relied upon by the appellant go to the question of whether or not a request for a transcript may yet be filed or has been filed within the time allowed, and none of them cover the further question of diligence in the preparation of a transcript, after timely request therefor, and the court's right and power of control in that connection. While the authorities above cited hold that an appellant cannot be held in default in connection with the filing of a request for a transcript unless the proper notice of the entry of a judgment or of a disposition of a motion for a new trial has been served, this is far from holding that an

appellant who has started proceedings for the preparation of a transcript by requesting the same, without waiting for such a notice, is not bound by other rules requiring him to carry on with reasonable diligence the proceedings which he has himself initiated. Section 953a provides that a request for a transcript must be filed within ten days after the notice referred to, but nothing therein provides that such a request may not be filed at an earlier date or before such a notice is given. Where an appellant does not wait for the notice but proceeds to file his request for a transcript it would be carrying technicalities to an extreme to hold that he is not subject to the usual rules and to the control of the court with respect to the manner in which he completes the proceedings which he has commenced. In Hohnemann v. Pacific Gas & Electric Co., 31 Cal. App.2d 692, 88 P.2d 748, 749, the court said:

"As to the law governing a proceeding of this kind, it is well settled that when, as here, an appellant has complied with the jurisdictional requirement of said section 953a by filing the notice and request mentioned therein, and it is claimed by the respondent that on account of lack of diligence on the part of the appellant or the court officers, or for any other cause, there has been unreasonable delay in procuring the transcript, the respondent's only remedy is by way of motion in the trial court to terminate the proceedings for the preparation of the transcript; * * *."

[3-5] It is well settled, at least in the ordinary case, that the duty rests upon an appellant, after filing a request for a transcript, to take the necessary steps to secure the filing of such transcript; that if he fails to use proper diligence in this regard it is within the power of the trial court to terminate the proceedings; that the question of whether such diligence has been exercised is one that necessarily rests largely in the discretion of the trial court; and that its determination of this question will not be disturbed on appeal unless it clearly appears that such discretion has been abused. Walker v. Etcheverry, 38 Cal.App.2d 611, 101 P.2d 709; Shutz v. Western Wholesale Liquor Dist., 24 Cal. App.2d 659, 76 P.2d 135; Batchelder v. Mackay, 28 Cal.App.2d 139, 82 P.2d 73; Wood v. Peterson Farms Co., 131 Cal.App. 312, 21 P.2d 468.

[6] We see no reason why these general rules are not here applicable. Having voluntarily complied with one of the requirements of section 953a, by filing a notice and request for a transcript, the appellant subjected himself to the requirement contained in section 953b that at the same time he file an undertaking or make personal arrangement with the reporter for his compensation. Having thus initiated the proceeding for the preparation of a transcript his position is exactly similar to that of an appellant in the ordinary case and the question of his diligence becomes material. The time which here elapsed between the filing of the request for a transcript and the making of arrangements with the reporter, which was some eight months, is considerably more than that involved in some of the cases cited. No valid excuse for this delay appears and no attempt is made to claim diligence on the appellant's part. Under the rules we have held to be controlling it follows that no abuse of discretion appears.

The order appealed from is affirmed.

MARKS, J., and WEST, Justice pro tem., concurred.



47 Cal.App.2d 639

SILVER v. BANK OF AMERICA N. T. & S. A. et al.

Civ. 6563.

District Court of Appeal, Third District, California.

Nov. 7, 1941.

Hearing Denied Dec. 31, 1941.

1. Appeal and error ⇐554(3)

Where plaintiff's appeal was on the judgment roll alone, because plaintiff had no record prepared either by way of bill of exceptions or reporter's transcript and a motion to consolidate plaintiff's and defendants' appeals was denied, and there was no error apparent in the judgment roll as to first count of complaint, the judgment for defendants on that count was required to be affirmed.

2. New trial ⇐39

Where lease required lessee to surrender possession of leased ranch within 60 days after receiving notice that lessor made "bona fide sale" of ranch, and lessor's action for possession, following lessee's refusal to surrender, was nonsuited, and in lessee's suit for damages on ground that action was malicious, jury found for lessor, lessee was not entitled to new trial on ground that instruction failed to advise jury that good faith was a required element of sale, it appearing that jury in other instructions were fully advised what a bona fide sale and actual sale meant and in instruction objected to, words "bona fide sale" were followed by words "said sale" which referred to a bona fide sale.

The words "bona fide" mean in good faith, and word "sale" means a bona fide sale and in general may even mean only an intention to sell.

See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide Sale", "Said Sale", "Sale" and "Bona Fide".

3. Landlord and tenant ⇐48(1)

A verdict of over $1,800 for lessor's alleged breach of lease in failing to construct sanitary barn forcing lessee to sell milk at a loss was not sustained by evidence which showed that total loss varied from considerably less than $1,000 to considerably over that amount but did not approach anywhere near the amount of over $1,800.

4. Landlord and tenant ⇐48(1)

A lessee of ranch could not recover damages for lessor's alleged breach of lease and modification agreement in failing to construct a sanitary barn forcing lessee to sell milk at a loss where there was no proof of compliance by lessee with terms of lease and modification agreement on his part to be performed.

5. Contracts ⇐278(1)

One who himself breaches a contract cannot recover for a subsequent breach by the other party.

6. Landlord and tenant ⇐48(1)

A lessee could not recover damages for alleged breach of agreement by lessor in failing to construct a sanitary barn forcing lessee to sell milk at a loss where there was no definite evidence that cracked plaster in milk room which caused state inspector to revoke a prior decision which had passed the barn as sanitary was a factor in inability of lessee to market his milk.

Appeals from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by Louis L. Silver against the Bank of America National Trust & Savings Association, and another, to recover compensatory and exemplary damages for fraud and malice. From a judgment for defendants notwithstanding the verdict on the first count of the complaint, the plaintiff appeals, and from an order granting plaintiff's motion for new trial as to the second count, and from a judgment for plaintiff on the third count of the complaint, defendants appeal.

Judgment for defendants on first count affirmed, order granting new trial on second count reversed and judgment for plaintiff on third count reversed and cause remanded for new trial.

See, also, 43 Cal.App.2d 835, 111 P.2d 666.

Burke & Rawles, of Ukiah, for plaintiff, respondent and appellant.

Preston & Gibson, of Ukiah, for defendants, appellants and respondents.

ROSS, Justice pro tem.

Bank of America National Trust and Savings Association, a corporation, is referred to herein as Bank of America or as "the bank", and California Lands, Inc., a corporation, as Calif. Lands.

Defendant Calif. Lands was vendee under an agreement with Bank of America of numerous parcels of land owned by the bank, by the terms of which agreement the bank retained title and Calif. Lands sought other purchasers, and when sales were made title passed directly from the bank to the individual purchaser. Calif. Lands also had the right to lease or rent said lands.

In November, 1937, Calif. Lands leased the parcel of land involved herein, a ranch, to plaintiff for three years. One of the terms of the written lease was:

"If the lessor makes a bona fide sale of said premises or any part thereof prior to the 31st day of October, 1940, this lease on said part so sold shall thereupon terminate at the option of the lessor, and the lessee, within sixty days after receiving notice of such sale, shall surrender possession of the premises to the lessor."

On April 27, 1939, by writing, the lease was modified to extend the term to October 31, 1941, and to add this paragraph:

"Lessor agrees to construct on the premises, a 12-cow sanitary walk-thru barn and milk house, properly lighted and piped for water, at a total cost not to exceed the sum of $1300.00, and further agrees to install on the premises a 1½ H.P. electric motor and small centrifugal pump for domestic water service."

Calif. Lands then proceeded to have such a barn built. It was finished June 25, 1939. In July the inspector for the State Department of Agriculture required certain changes, which were made, and on August 3, 1939, the same inspector accepted the building as complete and sanitary. However, some time later the plaster in the milk room cracked badly with the result that the milk room became "unsanitary". The motor and pressure system required by the modification agreement were installed by Calif. Lands. Certain sanitary equipment which the state inspector required Silver to obtain before he could have a permit to sell milk was not, however, acquired by him.

In September, 1939, one Lagomarsino began negotiating with Calif. Lands for purchase of this ranch. He paid $250 to a realtor who handled deals for Calif. Lands as down payment with an offer to purchase for $13,000, but this offer was not accepted. The realtor was asked to try to get a higher bid from him, and he contacted Lagomarsino and tried to get him to offer $15,000. Lagomarsino orally offered $14,000, and the realtor submitted this to Calif. Lands. The pricing committee passed favorably on this and the realtor telephoned to Lagomarsino and stated that his offer was accepted, and Lagomarsino expressed satisfaction. This was on September 11, 1939. On September 12th, Calif. Lands gave plaintiff written notice that the ranch had been sold and he was required to surrender possession within sixty days.

After the expiration of sixty days a three-day notice to vacate was served on plaintiff and then an action was filed for possession of the premises. In February, 1940, this action came on for trial, and a nonsuit was granted, apparently because there had been no sale actually made to Lagomarsino on September 12, 1939, the day the sixty-day notice was given. The evidence in the instant case shows, however, that a deed, deed of trust, note, escrow instructions, etc., for the $14,000 deal between Calif. Lands, Bank of America, and Lagomarsino were all prepared soon after September 11th, and Lagomarsino testified that he had at all times been ready to go ahead with the deal and that plaintiff's withholding of possession had been the only drawback.

In April, 1940, the present action was commenced in three counts. In the first plaintiff alleged fraudulent misrepresentation by defendants of the fact of a sale to Lagomarsino when there was as yet no actual sale made, and asked $250 actual damages for the expense he had incurred in looking for another ranch to move to and $5,000 exemplary damages. In Count II plaintiff alleged the action for possession of the premises, which had resulted in a nonsuit, had been malicious and without probable cause, and asked for $1,850 actual damages and $5,000 exemplary damages. In Count III plaintiff alleged a breach of the modification agreement in that the barn constructed was not sanitary and that he had therefore been unable to use it to produce market milk, but had been forced to sell his milk and cream for butter fat or cheese only, to his damage in the sum of $1,881.60.

On the trial special interrogatories were answered by the jury as follows:

"1. Was the Bank of America National Trust and Savings Association, a corporation, guilty of fraud as alleged in Count I of the complaint? Yes.

"2. Was California Lands, Inc., guilty of fraud as alleged in Count I of the complaint? Yes.

"3. Was Bank of America National Trust and Savings Association guilty of malice as alleged in Count II of the complaint? No.

"4. Was Calif. Lands, Inc., guilty of malice as alleged in Count II of the complaint? No."

A general verdict was rendered for plaintiff for $250 compensatory damages on Count I, for the defendants on Count II and for plaintiff for $1,881.60 damages on Count III.

A motion for judgment notwithstanding the verdict was granted to both defendants on Count I but denied as to Count III.

Thereafter, by a different judge than the one who tried the case, a new trial was denied to plaintiff as to Count I, but was

granted as to Count II, and a new trial was denied to defendants as to Count III.

[1, 2] Defendants appealed from this judgment as to Count III and from the order granting a new trial as to Count II. A reporter's transcript was duly obtained and brought up on these appeals. Plaintiff appealed from the judgment as to Count I but had no record prepared, either by way of bill of exceptions or reporter's transcript. His appeal is on the judgment roll alone, therefore, as a motion to consolidate the appeals was denied by this court. 43 Cal. App.2d 835, 111 P.2d 666. However, all the appeals are apparently considered to be before the court at this time, and are all embodied in the instant case file of this court.

There being no error whatever apparent in the judgment roll as to Count I, the judgment for defendants on that count must be affirmed. The new trial as to Count II was granted solely because of the giving of Instruction 18, the judge feeling that the jury should have been advised that good faith was a required element of the sale.

This instruction was as follows:

"I instruct the jury that the words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning; unless used by the parties in a technical sense or unless a special meaning is given to them by usage, in which case the latter may be followed. I instruct you, therefore, that if you find that under the terms of the lease between California Lands, Inc., a Corporation, and Louis L. Silver, which lease was introduced into evidence here, that it was provided that said lease should terminate in the event that said California Lands, Inc., makes a bona fide sale of said premises to a third party during the term thereof, then I instruct you that the language relative to the making of said sale by said California Lands, Inc., is to be considered by you in their ordinary and popular sense rather than according to their strict legal meaning."

The new trial was not granted because of any insufficiency of the evidence, and a consideration of the whole record discloses no ground upon which it should have been granted. The jury, in other instructions, were fully advised what a bona fide sale and an actual sale meant. In said Instruction 18 the words "bona fide sale" were used and followed by the words, "said sale", which plainly refers to a bona fide sale. The words "bona fide" mean "in good faith".

The word sale means a bona fide sale, not a fraudulent one. Davis v. Schweihert, 130 Cal. 143, 147, 62 P. 411; Ogle v. Hubbel, 1 Cal.App. 357, 82 P. 217. "Sale" in general may even mean only an intention to sell (Estate of Goetz, 13 Cal.App. 198, 109 P. 145) or an agreement to sell. Glenn v. Inouye, 62 Cal.App. 259, 216 P. 418.

It appears that the jury was correctly instructed and the motion for a new trial on Count II should not have been granted.

[3] As to Count III the jury found for the plaintiff for the full amount prayed for in the complaint. Viewed in any possible light the evidence will not support a finding for the full amount. Depending upon what testimony is used the figures for the total loss of plaintiff by reason of having to sell his milk for other than market milk purposes varies from considerably less than $1,000 to considerably over that amount, but does not approach anywhere near the amount of $1,881.60 which was awarded in the verdict.

[4, 5] The evidence on Count III is also insufficient to support the verdict in that there is no proof whatever of compliance by plaintiff with the several terms of the lease and modification agreement on his part to be performed. One who himself breaches a contract cannot recover for a subsequent breach by the other party.

[6] The alleged breach in this case is not satisfactorily proved nor the causal connection with the damage suffered definitely established. The barn was actually built by Calif. Lands and was passed by the state inspector. The plaintff was not given a permit to sell market milk because he himself did not obtain the required sanitary equipment. The inspector did testify that when the cracks developed in the milk room plaster, as he observed several months after he had passed the building as sanitary, he no longer would consider it passable. However, there is no definite evidence that this cracked plaster was the main or any factor in the inability of plaintiff to market his milk.

It is questionable whether the complaint as to Count III supports any verdict for failure to allege due performance by plaintiff of the matters required of him under the lease. This may possibly be reframed on a new trial, however.

The judgment on Count I is affirmed, and the order granting a new trial on Count II is reversed; the judgment on Count III is reversed and the action as to that count is remanded for a new trial or for such other proceedings as the trial court may take with regard to the pleadings or issues. Defendants to recover costs of appeal.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.



47 Cal.App.2d 725

MURILLO v. TOOLE et al.

Civ. 2950.

District Court of Appeal, Fourth District, California.

Nov. 12, 1941.

1. Appeal and error ⇐113(1)

An order denying a motion to vacate and set aside a previous order is not an "appealable order". Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

2. Appeal and error ⇐71(2)

Generally, an order increasing the amount of an undertaking on attachment is not an "appealable order". Code Civ.Proc. § 963.

3. Attachment ⇐137

The trial court has inherent power, as an incident to provisional remedy of attachment, to require an increase in the amount of an undertaking. Code Civ.Proc. § 539.

4. Attachment ⇐126

The demand or claim of plaintiff where an attachment is sought is determined by the statement in the affidavit, and not by prayer of the complaint. Code Civ.Proc. § 539.

5. Attachment ⇐137

Under statute, trial court's order increasing amount of undertaking on attachment to an amount in excess of that claimed by plaintiff in affidavit for attachment was erroneous. Code Civ.Proc. § 539.

6. Attachment ⇐105

The rule that the same particularity of statement is not required in an affidavit for attachment that is required in a pleading does not extend to the matter of the indebtedness. Code Civ.Proc. § 539.

7. Attachment ⇐107

The amount of the indebtedness to plaintiff is the principal and all important element in affidavit for attachment. Code Civ. Proc. § 539.

8. Attachment ⇐137

Where affidavit for attachment set forth the indebtedness at the same sum as set forth in prayer of complaint, with nothing said about interest or costs, an order requiring filing of an undertaking in excess of plaintiff's claim set forth in affidavit could not be justified under statute on ground that with accrual of interest and costs plaintiff's claim was enlarged so that undertaking was not in excess of the claim. Code Civ.Proc. § 539.

9. Attachment ⇐126

An indebtedness not covered by affidavit for attachment cannot be included in that for which the writ issues. Code Civ.Proc. § 539.

10. Attachment ⇐229

Where affidavit for attachment recited that defendants were indebted to plaintiff in sum of $14,697, and a writ of attachment was procured for $14,697 besides interest and costs of suit, in absence of a timely amendment either of the writ or the affidavit to make the two conform, a discharge of the attachment was necessary under statute. Code Civ.Proc. § 558.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by John Murillo against Fred J. Toole and another to recover amount alleged to be due from defendants for work, labor, materials and equipment furnished defendants in connection with leveling of a tract of land and for the foreclosure of a mechanic's lien on the land. From certain orders entered, the plaintiff appeals.

Order dissolving attachment affirmed, and attempted appeals from other orders dismissed.

William H. Brawner, of Los Angeles, for appellant.

Chase, Barnes & Chase and Laurence A. Peters, all of Los Angeles, and Sarau & Thompson, of Riverside, for respondents.

WEST, Justice pro tem.

This action was instituted on October 12, 1940, by plaintiff and appellant in two causes of action, the first for the recovery of $14,697, together with interest at 7 per cent from April 8, 1940, and costs alleged to be due from defendants and respondents for work, labor, materials and equipment furnished respondents in connection with the leveling of a tract of land in Riverside county; and the second, for the foreclosure of a mechanic's lien on said land.

With the complaint plaintiff filed his affidavit for attachment which recited "that defendants herein are indebted to me in the sum of $14,697 lawful money of the United States", and was in the usual form of such affidavits. A writ of attachment was procured for $14,697, besides interest and costs of suit. The undertaking for attachment filed by plaintiff to obtain the writ was in the sum of $200. Defendants appeared and moved the court for an order discharging the attachment or in lieu thereof increasing the undertaking to $14,697. This motion was supported by an affidavit made by one of the defendants, which affidavit recited that the damages sustained by reason of the attachment might exceed $15,000. The motion was granted in the alternative as follows:

"It is ordered that the defendants' motion to discharge attachment or to increase the undertaking on attachment herein be granted as follows:

"Within ten days from the date hereof, plaintiff shall increase the amount of his bond to the sum of $15,000.00 and upon the failure to file a good and sufficient bond, in said sum, within said time, the attachment herein will be discharged."

Prior to the termination of the ten-day period plaintiff served and filed a motion to vacate the alternative order and upon the same coming on for hearing the court denied plaintiff's motion to vacate, and the ten-day period having elapsed and plaintiff not having filed his increased undertaking, an order was made discharging the attachment. This appeal followed and was taken (1) from the order increasing the amount of the undertaking or in the alternative discharging the attachment; (2) from the order denying plaintiff's motion to vacate the alternative order; and (3) from the order discharging the attachment upon failure to file the increased undertaking.

[1-4] An order denying a motion to vacate and set aside a previous order is not one of the appealable orders designated by section 963 of the Code of Civil Procedure, nor generally is an order increasing the amount of an undertaking on attachment appealable. Tiffany Productions, Inc. v. Superior Court, 131 Cal.App. 729, 22 P. 2d 275. The court has the inherent power, as an incident to the provisional remedy of attachment, to require an increase in the amount of an undertaking. Francis v. Superior Court, 58 Cal.App. 618, 209 P. 80; Greene v. Superior Court, 133 Cal.App. 35, 23 P.2d 785; Tiffany Productions, Inc. v. Superior Court, supra. But the question whether an order of the court increasing the amount of such undertaking to an amount in excess of that claimed by plaintiff is void as in excess of the jurisdiction of the court requires further consideration. So far as pertinent here, section 539 of the Code of Civil Procedure provides that the clerk, judge, or justice of the court in which the action is pending cannot require an undertaking of less than $50 nor more than the amount claimed by plaintiff. It is respondents' contention that with the accrual of interest and costs, the claim of appellant was enlarged so that the court was justified in concluding that it was over the sum of $15,000, and that such order of increase was therefore proper. However, the demand or claim of plaintiff where an attachment is sought is determined not by the prayer of the complaint but by the statement in the affidavit. In the case of Baldwin v. Napa & Sonoma Wine Co., 137 Cal. 646, 70 P. 732, 733, the Supreme Court said: "The basis for the writ is the affidavit, and the clerk must look to that alone for the purpose of determining the amount for which the sheriff is to levy under the writ, as well as the amount for which an undertaking is to be given." To the same effect see Nail v. Superior Court, 11 Cal.App. 27, 103 P. 902.

[5] The affidavit for attachment here sets forth the indebtedness at the sum of $14,697, with nothing said about interest or costs. Neither the clerk in the first instance, nor the court upon a motion to increase the undertaking, may disregard the clear language of the statute as the same is construed in the two cases just cited. Therefore, it is our opinion that the court's

order was erroneous in so far as it purported to require the filing of an undertaking in an amount larger than the claim of indebtedness reflected by the affidavit for attachment.

However, the order discharging the writ was proper and must be upheld upon another ground. As hereinbefore stated, the claim of indebtedness of plaintiff as reflected by his affidavit for attachment was $14,697. The writ issued pursuant thereto, however, recites that the action was commenced to recover the sum of $14,697, besides interest at the rate of 7 per cent and costs of suit. In Finch v. McVean, 6 Cal. App. 272, 91 P. 1019, a motion to dissolve an attachment was made on the ground that the writ was issued for a greater amount than the indebtedness stated in the affidavit. The facts in that case were that an action was commenced on two promissory notes of $3,500 and $4,000, which respectively bore interest at 7 per cent and 10 per cent. The prayer of the complaint was for $7,500, the sum of the principal of the notes "with interest thereon according to the terms of said promissory notes, and costs of suit". In the affidavit for attachment the indebtedness was stated to be "in the sum of seven thousand five hundred dollars, besides interest". The writ of attachment recited that the action was commenced to recover $7,500 "besides interest at the rate of 10 per cent. per annum from the 19th day of March, A. D. 1904, on the sum of $4,000, and interest at the rate of 7 per cent. per annum from the 30th day of December, 1904, on the sum of $3,500, and costs of suit". The motion to dissolve was granted and the order appealed from was affirmed, the Supreme Court saying:

[6, 7] "In the case at bar, the amount of the plaintiff's demand is stated in the writ in strict conformity with the allegations of the complaint. In this statement the rates of interest and the dates from which it is to be computed are set out specifically, while neither rates nor time appear in the affidavit. There is nothing in the affidavit by which the amount of interest due can be determined, and the only indebtedness the amount of which is expressly set forth therein is the principal sum of $7,500. On the other hand, the sheriff is required by the writ to attach enough of defendant's property to satisfy a demand of $7,500, principal, and, as ascertained by computation, about $475 interest.

"While the same particularity of statement is not required in an affidavit for attachment that is required in a pleading, this rule does not extend to the matter of the indebtedness. The amount of the indebtedness to the plaintiff is the principal and all important element in the affidavit. Bank [of California] v. Boyd, 86 Cal. [386], 388, 25 P. 20. The amount stated therein determines how much of defendant's property the sheriff is to seize, and this, in turn, limits the amount for which an undertaking may be demanded by the sheriff to prevent or release the attachment. Baldwin v. Napa [Wine Co., 137 Cal. 646, 649, 70 P. 732]; section 540, Code Civ. Proc. Under the construction given to the statute by the case last cited, we do not think the interest can be treated as a mere incident to the principal. Nor can an attachment be sustained which requires the taking of more of a defendant's property than is requisite to secure the indebtedness stated in the affidavit." See, also, Tyson v. Reinecke, 25 Cal.App. 696, 145 P. 153; Rosenberg v. Bullard, 127 Cal.App. 315, 15 P.2d 870.

[8, 9] In the instant case the invalidity of the attachment is reflected even more clearly, for interest is not even referred to in the affidavit and yet the writ based thereon recites interest as a part of the claim of plaintiff. "No indebtedness not covered by the affidavit can be included in that for which the writ issues." Finch v. McVean, supra.

[10] We must conclude that the order of the court in discharging the writ was proper. In the absence of a timely amendment either of the writ or the affidavit, to make the two conform, the discharge was necessary under section 558 of the Code of Civil Procedure.

The order dissolving the attachment is affirmed. The attempted appeals from the other orders are dismissed.

BARNARD, P. J., and MARKS, J., concurred.

DARSIE v. DARSIE.

Civ. 13190.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1941.

Rehearing Denied Nov. 28, 1941.

Order Vacated, Rehearing Granted Dec. 5, 1941.

1. Divorce ⇐11

In divorce suit, unlike ordinary controversies, the state is a "quasi party".

See Words and Phrases, Permanent Edition, for all other definitions of "Quasi Party".

2. Divorce ⇐11

The state in its sovereign capacity is interested not only in maintaining the marriage unless good cause for its dissolution exists, but that there shall be a proper division of community property of the parties and provision for reasonable future support of spouse not at fault, so that burden therefor shall rest on husband, and not on the state. Civ.Code, § 139.

3. Divorce ⇐203, 236

The statute conferring upon court as representative of the state the duty in rendition of a divorce decree in favor of wife for fault of husband to compel him to make such suitable allowance to wife for her support as court may deem just conditions right of wife to a divorce and obligation of husband upon a divorce, and so neither party may by contract or pleading emasculate the statute. Civ.Code, § 139.

4. Divorce ⇐200

The authority of court in divorce action to decree in accord with statute conferring upon court as representative of state the duty in rendition of divorce decree in favor of wife for fault of husband to compel him to make such suitable allowance to wife for her support as court may deem just would be deemed to be within purview of parties to a divorce case, whether it be contested or uncontested. Civ.Code, § 139.

5. Divorce ⇐231

Alimony was awarded by ecclesiastical courts in decrees a mensa et thoro as an incident of the divorce and not upon an issue joined.

6. Divorce ⇐231

Wife's right to permanent alimony as an incident to divorce is codified as statutory support. Civ.Code, § 139.

7. Divorce ⇐200

When an award of permanent alimony is made to wife whether it is called "support" or "alimony", it is awarded as an incident of divorce, and not by virtue of any inherent right in the court but by virtue of the statute. Civ.Code, § 139.

8. Divorce ⇐88

Owing to interest of state and society in divorce actions, generally, the rules governing pleadings in such cases differ from those usually applicable in an ordinary civil suit.

9. Divorce ⇐6½

Since a rather complete divorce procedure is found as a part of the substantive law of divorce, procedure provisions applicable to other types of cases should not be deemed applicable unless needed, and particularly so where they may seriously cut down or even emasculate the divorce statutes. Civ. Code, § 139.

10. Divorce ⇐4

A suit for divorce is "sui generis", and interest of state is sufficient to make it one concerning which legislature is authorized to enact such laws of procedure as may rationally be held to protect that interest.

See Words and Phrases, Permanent Edition, for all other definitions of "Sui Generis".

11. Judgment ⇐252(2)

The statute providing that where no answer is filed by defendant the relief granted a plaintiff cannot exceed that which he shall have demanded in his complaint is merely a codification of well established principle that a defendant has the right to assume that any judgment rendered by court will be limited as against him to cause of action stated in the complaint, and having no defense to the action as stated, judgment would necessarily have to be rendered against him. Code Civ.Proc. § 580.

12. Judgment ⇐252(2)

The statute providing that where no answer is filed by defendant the relief granted a plaintiff cannot exceed that which he shall have demanded in his complaint is intended to deal with typical law or equity case where there is a default. Code Civ.Proc. § 580.

13. Divorce ⇐160

The decree entered in a divorce case without defendant's having appeared and answered is not a true "default", since all material facts stated in divorce complaint

must be established by proof and corroborated by one not a party to the action. Civ. Code, § 130.

See Words and Phrases, Permanent Edition, for all other definitions of "Default".

14. Divorce ⇐203

The statute providing that where no answer is filed by defendant the relief granted a plaintiff cannot exceed that which he shall have demanded in his complaint deals only with true defaults, and is not a controlling statute in a divorce action. Code Civ.Proc. § 580; Civ.Code, § 130.

15. Divorce ⇐108

In a divorce proceeding, issues may be broadened at trial to include questions not made an issue by the pleadings.

16. Divorce ⇐203, 236, 249(2)

In a divorce proceeding, the court as representative of public interest has the power, irrespective of a contract settlement or silence of the pleadings with reference thereto, to make a fair disposition of property rights in consonance with the law thereon, regardless of whether case is contested or uncontested.

17. Divorce ⇐203

Where husband answered original complaint in divorce action, but filed no answer to amended complaint upon which cause was heard as upon default, trial court did not exceed its jurisdiction in awarding permanent statutory support to wife without allegation or prayer therefor in amended complaint. Civ.Code, §§ 130, 139; Code Civ. Proc. § 580.

18. Divorce ⇐203

Where husband answered original complaint in divorce action, but filed no answer to amended complaint upon which cause was heard as upon a default, and at which time husband's counsel was actually present, but not for purpose of representing the husband but in connection with an entirely different case, right of trial court to award permanent statutory support to wife without allegation or prayer therefor in amended complaint would be viewed as if husband's counsel had not appeared. Civ.Code, §§ 130, 139; Code Civ.Proc. § 580.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Peirson Hall, Judge.

Action by Ruth B. P. Darsie against William Watters Darsie for a divorce. From that portion of an interlocutory decree which awarded to plaintiff statutory support at the rate of $5 per month, the defendant appeals.

Affirmed.

Joe Raycraft, of San Pedro, for appellant.

Louis Lombardi and G. L. Funai, both of Los Angeles, for respondent.

HANSON, Justice pro tem.

This is an appeal by the husband from that portion of an interlocutory decree of divorce which awarded to the wife statutory support at the rate of $5 per month.

The broad question here is whether the trial court in decreeing a divorce for the fault of the husband acted in excess of jurisdiction where it awarded permanent statutory support to the wife without allegation or prayer therefor in the amended complaint, in a case where the husband had defaulted although duly served with process. A narrower question is whether the rule is the same or different where, as here, the husband answered the original complaint but filed no answer to the amended complaint upon which the cause was heard, as upon a default, and at which time the husband's counsel was actually present, but not, however, for the purpose of representing the husband but in connection with an entirely different case.

The facts as disclosed by the judgment roll, upon which the appeal is taken, are these: The original complaint for divorce filed by the wife alleged, among other things, the nature and extent of the community property, the earnings of the husband, the basis of the wife's need for support and the amount thereof, and prayed that she be awarded the community property and support money in a stated amount. To this complaint the husband filed an answer and cross-complaint. Subsequently the parties executed a property settlement agreement and thereafter their counsel executed a stipulation that the wife would file an amended complaint, that the husband would not proceed to trial on his cross-complaint and that the case might be heard upon the amended complaint as a default matter. Thereafter the wife filed her amended complaint and pursuant to the stipulation the husband's default was entered and the case was heard as a default matter. At the

hearing the husband did not appear, but according to the recitals of the judgment the defendant was "present in court by his counsel [who] declined to offer any evidence". In that connection it should be noted that counsel upon the oral argument before us stipulated that while defendant's counsel was present in court on another case he specifically stated in response to an inquiry of the court that he was not in court representing defendant. In view of the stipulation we feel we should treat the case upon the basis that while counsel was present in court he was not there in behalf of the defendant. On the hearing counsel for the wife presented the property settlement agreement for inclusion in the decree. The court declined to incorporate it but, in lieu thereof, approved it in part only and ordered the husband to pay support money at the rate of $5 per month until the further order of the court. This order was incorporated into the interlocutory decree, and as heretofore stated it is from that particular provision of the judgment that this appeal is taken.

[1-4] In the setting of this background we approach a consideration of the ruling which the husband assigns as error. Initially it needs to be stated that in proceedings for divorce, unlike ordinary controversies, the state is a quasi-party. In its sovereign capacity the state is interested not only in maintaining the marriage unless good cause for its dissolution exists, but that there shall be a proper division of the community property of the parties and provision for reasonable future support of the spouse not at fault, so that the burden therefor shall rest on the husband, where it belongs, and not on the state. This policy of the state is enunciated in Civil Code section 139, which confers upon the court as the representative of the state the right and duty in the rendition of a decree of divorce in favor of the wife for the fault of the husband to "compel him to * * * make such suitable allowance to the wife for her support, during her life or for a shorter period as the court may deem just, having regard to the circumstances of the parties". If it be not strictly accurate to say that the statute is as much a part of the allegations of the wife's complaint as are other statutory allegations required to be set forth therein, nevertheless the statute conditions the right of the plaintiff to a divorce and the obligation of the husband upon a divorce, and so neither party may by contract or pleading emasculate the statute. The authority and power of the court to decree in accord with the statute must be deemed to be within the purview of the parties to a divorce case, be it contested or uncontested.

[5-7] The theory that permanent alimony may be awarded to the wife against the husband stems from the ecclesiastical courts, where it was awarded in decrees a mensa et thoro. Alimony was awarded by those courts as an incident of the divorce and not upon an issue joined. In Stanton v. Stanton, 113 Cal.App. 462, 466, 298 P. 524, 525, the court declares: "But it is to be borne in mind that an allowance of alimony or money for the support of the wife is an incident to a divorce action and the determination as to allowance of alimony is not the trial of an issue in the case." In this state the right to permanent alimony as an incident to divorce is codified in Civil Code section 139 as statutory support. So when an award is made by a court in this state, whether it be called "support" or "alimony", it is now awarded, as it was in the ecclesiastical courts, as an incident of divorce; and it is no longer awarded here by virtue of any inherent right in the court but only by virtue of the statute.

If, as has been shown, alimony or statutory support is but an incident to a suit for divorce and not an issue which needs to be set up in the complaint, it follows that alimony or statutory support may rightfully be decreed in any case, whether it be contested or uncontested. To say that it may not be decreed by the court by virtue of Civil Code section 139 unless there is averment and prayer is to give the parties the right to control the effect, and indeed to eliminate, if they choose, the salutary provisions of that section, in which the state is interested. If the parties alone were concerned this might be proper enough, but as the state is a party to be considered it may not be done. As was said by the Supreme Court in Grannis v. Superior Court, 146 Cal. 245, 252, 79 P. 891, 895, 106 Am.St.Rep. 23: "* * * such an action [divorce] is really a triangular proceeding in which the husband and wife and the state are parties. * * * in such cases there can be no effectual waiver by the parties of any restriction established by law for the benefit of the public * * *."

[8-10] We come now to the contention of the husband that as he did not file an answer to the amended complaint the court

could not decree alimony or statutory support, in view of section 580 of the Code of Civil Procedure, which provides that where no answer is filed by a defendant the relief granted a plaintiff "cannot exceed that which he shall have demanded in his complaint". We think there are several answers to this contention in addition to what we have already said on this general subject. First: "Owing to the interest of the state and of society in divorce actions, generally speaking the rules governing pleadings in such cases differ from those usually applicable * * * in an ordinary civil suit." 27 C.J.S., Divorce, § 104. To the same effect see Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020. Furthermore, in this state it should be observed that not only is the substantive law of divorce found in our Civil Code but the adjective law as well, rather than in the Code of Civil Procedure. In short, a rather complete divorce procedure being found as a part of the substantive law of divorce, procedure provisions applicable to other types of cases should not be deemed applicable unless needed, and particularly so where they may seriously cut down or even emasculate the divorce statutes such as Civil Code section 139. Grannis v. Superior Court, supra. In Deyoe v. Superior Court, 140 Cal. 476, 74 P. 28, 30, 98 Am.St.Rep. 73, in pointing out that the procedure for ordinary cases and divorce cases differs materially and that the former should not control, it was said: "It is evident that a proceeding to dissolve the marriage relation is, by reason of the interest of the state, intrinsically different from the ordinary action, and that the difference is such as not only to justify, but in many cases to necessitate, special rules of procedure. As has been said, a suit for divorce is sui generis. If the action were the ordinary action between two parties who alone were interested in the result, it might be difficult to give any good reason for a special rule * * *. But the interest of the state is sufficient to distinguish it from all other cases, and to make it one concerning which the Legislature is authorized to enact such laws of procedure as may rationally be held to protect that interest."

But a brief word needs to be said concerning Bennett v. Bennett, 50 Cal.App. 48, 194 P. 503, on which the husband relies and which holds that section 580 of the Code of Civil Procedure controls the award of alimony in a divorce case. The decision arrived at in that case is not so perplexing once its background is set out. In that case the parties had entered into a property settlement agreement which was not referred to in the complaint, nor did the complaint pray alimony. As appears from the transcript of the evidence, the parties were both employed, but what they were earning was not disclosed. Nevertheless, without any information on the subject the trial court announced at the end of the hearing that it would award the wife $25 per month as support. Thereupon counsel for the wife protested that she did not wish the award and that it contravened the property settlement agreement. The court, however, directed that the provision be included in the decree. Thereupon the husband took an appeal from the award of alimony and in his brief contended that section 580 of the Code of Civil Procedure controlled. Counsel for the wife wrote the clerk a letter, which is with the record in that case, stating that the wife would not file a brief and hence that the case was ready for submission on appellant's opening brief. Without having the benefit of any brief or argument showing the inapplicability of the section referred to, the court largely adopted the argument of the husband's counsel. So far as the opinion goes it assumes, without any reasoning, that section 580 of the Code of Civil Procedure was applicable.

[11-14] Code of Civil Procedure section 580 is merely a codification of a well established principle of law. The principle recognizes and proceeds on the theory that a defendant has the right to assume that any judgment rendered by the court will be limited as against him to the cause of action stated in the complaint, and having no defense to the action as stated, judgment would necessarily have to be rendered against him. 15 R.C.L., § 44. Our statute (Code Civ.Proc., § 580) deals with the typical law or equity case where there is a default. But in a divorce case the decree entered without defendant's having appeared and answered is not a true default, since all the material facts stated in the divorce complaint must be established by proof and corroborated by one not a party to the action. Civ.Code, § 130; 27 C.J.S., Divorce, § 165. This, therefore, is not a true default case. The statute prohibits its being tried as an ordinary default case for want of answer. Civ.Code, § 130. Nor is it technically and procedurally a contested

case. If we were to attempt a classification we would be inclined to say a divorce case heard without an answer filed belongs somewhere between a default and a contested case, having some of the characteristics of each. If we construe section 580 of the Code of Civil Procedure as being inapplicable to divorce suits, then full force and effect may be given to the language and legislative intent back of the various substantive and procedural statutes governing divorce, and particularly Civil Code section 139. To hold that Code of Civil Procedure section 580 must be deemed applicable in divorce proceedings is to enable a plaintiff, by a mere refusal to insert a claim for alimony, to tie the hands of the court and to prohibit it from exercising the discretion vested in it by Civil Code section 139. For this reason and the further reason that section 580 of the Code of Civil Procedure deals necessarily only with true defaults, we hold that that section is not a controlling statute in the case before us.

Another case relied upon by the husband is Lang v. Lang, 182 Cal. 765, 190 P. 181. That was not a divorce action but an action brought by the ex-wife against the ex-husband to partition a homestead property. The general language of the opinion in that case, upon which the husband here relies, must of course be read with reference to the issues before the court. So read, it is of no help to the husband in the instant case. The opinion discusses the need of an allegation as to property and a prayer therefor as contradistinguished from alimony—the point for consideration here. Moreover, it is to be noted that the court made no reference to Civil Code sections 146 and 147, and so we do not have in that opinion, nor in any opinion rendered since by the Supreme Court, any determination of the much disputed question whether the mandatory provisions of those code sections require the trial court to divide community property and assign homestead property as an incident to the divorce rather than as an issue made by the pleadings. We merely state the point but express no opinion upon it.

Another case upon which the husband relies is Parker v. Parker, 203 Cal. 787, 266 P. 283, 284. In that case a default interlocutory judgment for divorce awarded the wife the sum of $40 per month for her support and that of a minor child, predicated upon a complaint which merely alleged the weekly earnings of the husband, with a prayer that requested a dissolution of the bonds of matrimony, the awarding of the custody of the minor to the wife and "for such other and further relief as to the court may seem proper". Some thirteen years after the final decree of divorce was entered, embodying the award made in the interlocutory decree, the wife procured execution to issue on the judgment for support for the amount unpaid thereon in a sum in excess of $4,000. The trial court having denied a motion to recall the execution, the husband appealed and assigned as one of several errors the claim that the judgment was void on its face in that the award was in excess of jurisdiction for want of necessary allegation in the complaint. The Supreme Court held the attack was collateral and so could not succeed. In the course of its opinion it referred to the fact that cases, among them Bennett v. Bennett, 50 Cal.App. 48, 194 P. 503, had held that section 580 of the Code of Civil Procedure controlled in the rendition of judgment, but the court neither approved nor disapproved those holdings but reiterated its approval of Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 269, 11 Ann.Cas. 520. In the Cohen case there is this quotation from Gaston v. Gaston, 114 Cal. 542, 545, 46 P. 609, 55 Am.St.Rep. 86: "The provision for support in such cases is ordinarily an incident of the judgment of divorce; the jurisdiction of the court (which is the extent of our concern at present) to make such provision is not dependent upon averments in the complaint of the husband's resources any more than its power to dispose of the children depends upon an allegation of the relative fitness of the parents for their custody."

[15, 16] Among recent cases to which attention should be directed is Queen v. Queen, 44 Cal.App.2d 475, 112 P.2d 755, 757, where the court said: "In a divorce proceeding issues may be broadened at the trial to include questions not made an issue by the pleadings. The court as representative of the public interest has the power, irrespective of a contract settlement or the silence of the pleadings with reference thereto, to make a fair and just disposition of property rights in consonance with the law thereon." While the Queen case was a contested case, the court's language is not limited, and we feel it should be deemed applicable to uncontested cases.

[17, 18] In the Gaston case the defendant did not answer the complaint but he

appeared by attorney at the trial. The court did not discuss the effect of the appearance and we apprehend it did not do so because it considered the fact immaterial. Likewise we in this case think the appearance of counsel for the husband, in the manner hereinbefore set forth, added nothing to the right of the court to award alimony, and the case accordingly must be viewed as if the attorney had not appeared. Cf. Christerson v. French, 180 Cal. 523, 182 P. 27.

The judgment is in all respects affirmed.

WOOD, Acting P. J., concurred.

McCOMB, Justice (dissenting).

I dissent. See section 580, Code of Civil Procedure; also Bennett v. Bennett, 50 Cal.App. 48, at page 49, 194 P. 503, where Mr. Justice Shaw says:

"Clearly, the trial court erred in making the order, the effect of which was to grant relief in excess of that demanded in the complaint. Not only was there an absence of any prayer for alimony, but the complaint contains no allegations upon which to base such prayer. Section 580, Code Civ.Proc., provides that, where no answer is filed by defendant, the relief granted plaintiff 'cannot exceed that which he shall have demanded in his complaint.' As stated, the prayer was for a dissolution of the bonds of matrimony only, and the power of the court to grant such relief was not enlarged by the prayer for general relief against defendant, who had made default. Staacke v. Bell, 125 Cal. 309, 57 P. 1012. See, also, Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann.Cas. 520; Foley v. Foley, 120 Cal. [33], 42, 52 P. 122, 65 Am.St.Rep. 147; Benton v. Benton, 122 Cal. 395, 55 P. 152."

Bennett v. Bennett was decided by this court in 1920 and has been accepted by the profession as the correct rule since.

In Parker v. Parker, 203 Cal. 787, at page 792, 266 P. 283, at page 285, Mr. Justice Shenk, after citing Bennett v. Bennett, supra, says:

"None of the cases relied upon go to the length of holding that the granting of relief in excess of that demanded by the complaint renders the judgment void on its face. They do, however, uniformly hold that the granting of such excessive relief is erroneous, from which relief may be granted under section 473 of the Code of Civil Procedure or which may be corrected by appeal, either by a reversal or by a modification of the judgment, neither of which courses was pursued by the defendant in this case."

See, also, Wallace v. Wallace, 111 Cal. App. 500, at page 506, 295 P. 1061, where Bennett v. Bennett, supra, is cited and approved.

In view of the foregoing authorities in my opinion the judgment should be reversed.



47 Cal.App.2d 683

COHN v. COHN.

Civ. 2803.

District Court of Appeal, Fourth District, California.

Nov. 7, 1941.

Rehearing Denied Dec. 5, 1941.

Hearing Denied Dec. 31, 1941.

1. Divorce ⇐37(17)

Generally, a cause of action for divorce on the ground of desertion cannot accrue where there is an action for divorce or separate maintenance pending between the parties and they are living apart pursuant to a court order.

2. Divorce ⇐37(8)

Where husband unconditionally refused wife's request to return to her and to resume marital relations with her, wife could predicate "desertion" on that refusal as a basis for a divorce action without offering to dismiss her action for separate maintenance then pending. Civ.Code, §§ 101, 102.

See Words and Phrases, Permanent Edition, for all other definitions of "Desertion".

3. Divorce ⇐184(10)

Where there was substantial evidence supporting trial court's finding that wife's request asking husband to return to her and to resume marital relations with her was made in good faith and was rejected by husband and that husband's desertion commenced at that time and continued for more than one year thereafter, that finding became final on appeal. Civ.Code, §§ 101, 102.

4. Pleading ⇐279(4)

Generally, a supplemental complaint must relate to the cause of action set forth in the original complaint.

5. Pleading ⇐279(4)

A supplemental pleading is proper only in aid of the case made by the original complaint, and hence relief cannot be granted on a supplemental complaint where the proof shows that the plaintiff had no cause of action when his original complaint was filed.

6. Pleading ⇐279(4)

A party who has no cause of action at the time of the institution of his action cannot maintain it by filing a supplemental complaint founded on matters which have subsequently occurred.

7. Divorce ⇐104

Where wife's action for separate maintenance was filed on November 16, 1936, and on August 4, 1939, wife filed a supplemental complaint pursuant to a stipulation to conform to the proof asking a divorce on ground of desertion as of August, 1937, that complaint became a substituted pleading which "commenced" wife's action for divorce, as against contention that no cause of action for desertion had accrued when action was originally instituted.

See Words and Phrases, Permanent Edition, for all other definitions of "Commence".

8. Action ⇐64

Where a complaint is in itself a complete new pleading alleging all necessary facts, it is the true complaint in the cause, even though erroneously entitled a "supplemental complaint", and the action based on the new ground set up therein must be considered as being "commenced" when that complaint is filed, as regards relief to which plaintiff is entitled.

9. Divorce ⇐184(12)

Where wife's supplemental complaint, filed on August 4, 1939, seeking a divorce on ground of desertion and alleging that on or about August 15, 1937, and for more than one year preceding that date, husband willfully and without cause deserted and abandoned wife and continued to do so, was filed on stipulation to conform to proof, but proof showed that desertion occurred in August or September, 1937, and continued thereafter, use of word "preceding" at most created an uncertainty which in view of the evidence could not be regarded as prejudicial.

10. Stipulations ⇐14(11)

A stipulation that wife's divorce action on ground of desertion proceed to trial as a default case would be construed as a "waiver" of formal fact findings which are not required in default cases.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

11. Appeal and error ⇐949
Divorce ⇐184(5)
Stipulations ⇐13

A motion to relieve a party of a stipulation and to vacate an interlocutory divorce decree is ordinarily committed to the sound discretion of the trial judge, and his ruling will not be reversed except where there appears to be a clear abuse of that discretion. Code Civ.Proc. § 473.

12. Divorce ⇐165(5½)

Statement, in husband's affidavit in support of motion to relieve him of stipulation and to vacate interlocutory divorce decree awarded to wife on ground of desertion, that he did not desert or abandon wife, was a "conclusion of law", and balance of affidavit which related to the time of filing a complaint and amended complaint for separate maintenance before wife requested husband to return to her could not be construed as contradiction of wife's testimony that she in good faith asked husband to return to her and that he refused. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

13. Divorce ⇐245(1)

Where an interlocutory decree granting wife a divorce on ground of desertion included an award of $175 a month, subject to further order of the court, that award was subject to immediate modification in a proper proceeding and on sufficient showing made.

14. Divorce ⇐165(5½)

Statement, in husband's affidavit in support of motion to relieve him of stipulation and to vacate interlocutory divorce decree awarded to wife on ground of desertion, that he understood that monthly payments ordered to be made were to be for exclusive benefit of two children and not also for benefit of wife, could be given little weight, where it was stipulated that monthly payments were to be made for support of wife and children, and for more than two and one-half years husband had been paying wife

$150 per month for her and children's support. Code Civ.Proc. § 473.

15. Divorce ⇐165(5½)

Husband's affidavit, in support of his motion to relieve him of stipulation and to vacate interlocutory divorce decree awarded to wife on ground of desertion, was insufficient to show mistake, inadvertence, surprise, or excusable neglect on part of husband with respect to financial obligation imposed on him by the decree in accordance with terms of stipulation, and the trial judge did not abuse his discretion in denying motion. Code Civ.Proc. § 473.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action for divorce by Alice B. Cohn against Jack B. Cohn. From an interlocutory decree of divorce and from an order made after the decree was rendered, defendant appeals.

Affirmed.

Max Fink and Ray Sandler, both of Los Angeles, for appellant.

Jerry Giesler and Meyer M. Willner, both of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from an interlocutory decree of divorce and from an order made after that decree was rendered.

Plaintiff and defendant were married on July 6, 1930. There are two children the issue of that marriage. The parties separated about December 5, 1936.

On November 16, 1936, plaintiff filed an action for separate maintenance and custody of the children, alleging cruelty on the part of defendant. Defendant answered denying the acts of cruelty, admitting that plaintiff was a fit and proper person to have custody of the children and that she should be given custody of them subject to his right to have them at reasonable times, and alleging that he was earning $300 per month but had earned $400 per month during the first six months of 1936.

On June 4, 1937, plaintiff filed an amended complaint in which she more specifically alleged the acts of cruelty on the part of defendant. She also alleged that the residence of the parties and its furnishings were community property of the value of about $20,000.

On June 8, 1938, defendant filed a cross-complaint for divorce on the ground of cruelty, which was answered by plaintiff.

On December 4, 1936, the following minute order shows the proceedings then had:

"Order to show cause re alimony pendente lite, costs, attorney fees and custody comes on for hearing, plaintiff present with her attorney, Milton M. Cohen, Jr., and defendant with his attorney, W. I. Gilbert. Said matter is referred to Commissioner Doyle for finding of facts and the Court orders: By stipulation, custody of minor children awarded to the plaintiff subject to the right of reasonable visitation by defendant. Defendant is ordered to pay to the plaintiff $150.00 per month for support of plaintiff and children, commencing forthwith. Plaintiff is to have the occupancy of the home place and defendant is to move from the home place. Defendant is ordered to pay plaintiff $250.00 attorney fees payable forthwith; by stipulation, balance of attorney fees and costs, if any, to be fixed at time of trial."

The case came on for trial on July 28, 1939. The parties were in court represented by their counsel. The court and counsel conferred in chambers and returned to court with the following stipulation which was filed with the clerk:

"Stipulation

"It is stipulated:

"Defendant is to pay plaintiff for the support of herself and minor children the sum of $175.00 per month until the further order of the Court.

"The resident is to be separate property of the defendant, with the right of the plaintiff and children to reside therein for a minimum period of three years from this date, at which time such residence shall be subject to the further order of the court as to the residence of the plaintiff and children.

"The plaintiff shall be awarded all the household furniture and furnishings situated at 6500 Whitworth Drive, as her separate property.

"Insofar as property rights are concerned, this is a complete adjustment, and the court finds this to be her complete share of any property, either separate or community so far as the marriage is concerned."

When the trial was resumed it was stipulated in open court that plaintiff might file a second amended supplemental complaint to conform to the proof at the close of the evidence, asking a divorce on the ground of desertion; that the trial would proceed on the allegations of that pleading as though it had been filed. Defendant withdrew his cross-complaint.

Plaintiff testified that the parties separated about December 5, 1936; that during the later part of August, or early in September, 1937, she in good faith asked defendant to return to her, the two to resume relations as husband and wife; that he refused to do so. Her testimony was corroborated by that of her mother.

The second amended supplemental complaint to conform to the proof was filed on August 4, 1939, and the interlocutory decree of divorce was filed on the same day. It found that the allegations of the second amended supplemental complaint were true. It was decreed that plaintiff was entitled to a decree of divorce and followed the written stipulation as to the support to be paid by defendant and as to the disposition of the property. It followed an oral request made by counsel for defendant in open court, which was not opposed, as to the custody of the children, giving their custody to plaintiff subject to possession by defendant during August, 1940, and during July and August in the succeeding years. Each parent was given the right of reasonable visitation to the children during the time they were in the custody of the other.

After the entry of the interlocutory decree defendant changed his counsel. Defendant then filed a notice of motion for an order permitting him to withdraw and be relieved from the stipulation entered into on July 28, 1939, and all parts of it and to strike the second amended supplemental complaint. He also filed a motion for new trial and a demurrer and an answer to the second amended supplemental complaint. The motions to be relieved from the stipulation, to strike the pleadings and for new trial were denied. Defendant has appealed from the judgment and from the order made after the entry of the interlocutory decree, except the order denying the motion for new trial.

We will first consider the questions presented under the appeal from the judgment.

[1] Defendant first urges that a cause of action for divorce on the ground of desertion cannot accrue where there is an action for divorce or separate maintenance pending between the parties and they are living separate and apart pursuant to an order of court. As a general rule this is obviously true. Ewing v. Ewing, 16 Cal.2d 208, 105 P.2d 586. Like most general rules this one is subject to certain exceptions.

Section 101 of the Civil Code provides that "Consent to a separation is a revocable act, and if one of the parties afterwards, in good faith, seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion."

Section 102 of the same code dealing with the refusal of condonation by a party to a desertion contains the following: "If the other party refuse such offer and condonation, the refusal shall be deemed and treated as desertion by such party from the time of refusal."

[2] Plaintiff testified that during August or early in September, 1937, she asked defendant to return to her and to resume marital relations with her; that he refused to do so. Her mother corroborated this testimony in detail. Defendant did not deny it.

Defendant urges that this offer was incomplete and insufficient to predicate desertion upon it because plaintiff did not also offer to dismiss her action for separate maintenance then pending against him. It is true that her offer did not contain an offer to dismiss her action. However, defendant's refusal of the request to return to plaintiff was unconditional, positive and final. From that refusal it would appear that a further offer to dismiss the action would have met a like refusal. Where it appears that such an offer, if made, would have been rejected, making it would have been a useless act and would have been excused.

[3] The trial court was satisfied that the offer was made by plaintiff in good faith and was rejected and that defendant's desertion of plaintiff commenced at that time and continued for more than one year thereafter. There is substantial evidence supporting this finding which consequently becomes final here.

In Howard v. Howard, 134 Cal. 346, 66 P. 367, 368, it was said: "So long as the

parties were living apart by agreement, there was no desertion. When, however, a reconciliation and restoration were in good faith sought by plaintiff, and refused by defendant, such refusal became desertion. It was not necessary to allege such offer, nor was it necessary to find such fact. The ultimate fact alleged and found was willful desertion. The fact that plaintiff had sought reconciliation was a probative fact, tending to prove the desertion." See, also, Sargent v. Sargent, 106 Cal. 541, 39 P. 931; Borden v. Borden, 166 Cal. 469, 137 P. 27.

Plaintiff also points out that the action was commenced on November 16, 1936, and argues that if it be admitted that defendant deserted plaintiff in August, 1937, there was no cause of action accrued at the time the action was instituted.

[4-6] It is generally true that a supplemental complaint must relate to the cause of action set forth in the original complaint. As said in Imperial Land Co. v. Imperial Irrigation District, 173 Cal. 668, at page 673, 161 P. 116, at page 119: "Furthermore, since a supplemental pleading is proper only in aid of the case made by the original complaint, relief cannot be granted upon a supplemental complaint, where the proof shows that the plaintiff had no cause of action when his original complaint was filed. 'If a party has no cause of action at the time of the institution of his action, he cannot maintain it by filing a supplemental complaint founded on matters which have subsequently occurred.' Wittenbrock v. Bellmer, 57 Cal. 12; Gordon v. San Diego, 108 Cal. 264, 41 P. 301; Hill v. Den, 121 Cal. 42, 53 P. 642."

[7, 8] Here we have an unusual state of facts not appearing in the ordinary case. The parties stipulated that the second amended supplemental complaint be filed setting up a new cause of action which was for divorce. It was stipulated that its allegations be deemed denied. We must regard it as a pleading which, by stipulation of the parties on which the trial court acted, became a substituted pleading which commenced the plaintiff's action for divorce under the holding in Randall v. Randall, 203 Cal. 462, 264 P. 751, 752, where the Supreme Court said:

"The second complaint, although designated 'supplemental complaint,' was in reality a substituted pleading, complete in itself. It stated the same cause of action to wit, a cause of action for divorce, but, however, based upon a new ground of complaint, namely, desertion. It contained no reference to the allegations of the original complaint. As stated, it was complete in itself and alleged all necessary facts upon which to base jurisdiction of the court.

"Had said second complaint been in reality a supplemental pleading, supplying facts occurring after the filing of the original pleading, supplementing the allegations thereof, it is plain that service of a copy of the original complaint would have been required to give the court jurisdiction. But where, as here, the complaint, irrespective of its erroneous title is in itself a complete new pleading, alleging all necessary facts, it is the true complaint in the cause and the action as to the new ground set up therein must be considered as being commenced when said pleading is filed (Valensin v. Valensin, 73 Cal. 106, 109, 14 P. 397); hence, service of a copy thereof is all that is required under the statute. Service of a copy of the original complaint would be wasted effort, for that pleading is dead, being superseded in its entirety by the new complaint."

As the so-called supplemental pleading was complete in itself and alleged a desertion which occurred almost two years before it was filed, and was filed on a stipulation of the parties which was accepted and acted on by the court, the question now urged is without merit.

[9] The supplemental complaint alleged: "That on or about the 15th day of August, 1937, and for more than one year preceding said date, the said defendant and cross-complainant, disregarding the solemnity of his marriage vows, wilfully and without cause deserted and abandoned the plaintiff, and ever since has and still continues to so wilfully and without cause desert and abandon said plaintiff and cross-defendant, and to live separate and apart from her, without any sufficient cause and without any reason and against her will and without her consent."

The use of the word *preceding* in the foregoing allegation was clearly the result of a typographical error. The pleading was filed on stipulation to conform to the proof. The proof was that the desertion occurred in August or September, 1937, and continued thereafter. The balance of the allegations of the quoted paragraph clearly alleges that the desertion continued for

about two years after the refusal to resume the marital relations before the supplemental complaint was filed. The use of the word "preceding" in the allegation at the most created an uncertainty in the pleading which, in view of the evidence which cleared the uncertainty, cannot be regarded as prejudicial.

It is true that findings separate from those contained in the interlocutory decree were not prepared and served on counsel for defendant. The interlocutory decree recites that the case "therefore on stipulation proceeded to trial immediately as a default". This is recognized in the notice of motion filed by defendant wherein he sought to be relieved of the stipulation in which the following appears: "Whereby the matter was allowed to proceed to trial immediately as a default."

[10] Findings of fact were not waived but formal separate findings are not necessary in a default case. The stipulation that the case proceed to trial as a default case should be construed as a waiver of formal findings which are not required in default cases.

[11] Defendant urges that the trial judge should have granted his motion to relieve him of the stipulation and to vacate the interlocutory decree under the provisions of section 473 of the Code of Civil Procedure.

Such a motion is usually committed to the sound discretion of the trial judge and his ruling will not be reversed except where there was a clear abuse of that discretion which does not appear here.

[12] Defendant was represented at the time of the stipulation and trial by able counsel. He was present in court during all of the proceedings had on July 28, 1939. In his affidavit defendant failed to deny the testimony of plaintiff and her mother concerning the request that he return to plaintiff and resume marital relations with her and his refusal of this request. In making his motion he was content to rest on the following averments in his affidavit: "That affiant did not desert or abandon plaintiff and cross-defendant. * * * That at the time of the filing of said complaint and amended complaint for separate maintenance, plaintiff and cross-defendant did not desire and refused to reside and cohabit with defendant and cross-complainant. That at the said time and prior thereto and thereafter defendant and cross-complainant desired to and did and performed each and every act and thing within affiant's ability to do and perform for the purpose of reconciling the parties and with and for the purpose of continuing to live and cohabit with plaintiff and cross-defendant. That plaintiff and cross-defendant at all times hereinabove mentioned refused to live or cohabit with affiant and desired and performed each and every act for the purpose of living separate and apart from affiant."

The first statement that he did not desert or abandon plaintiff is clearly a conclusion of law. The balance of the quoted paragraph clearly relates to the times of filing the complaint and the amended complaint for separate maintenance, which were before plaintiff requested him to return to her. Thus this affidavit cannot be construed as contradiction of her testimony that she in good faith asked him to return to her and that he refused. In defendant's answer filed with his affidavit he merely denied the allegation of desertion generally.

That his real reason for desiring to reopen the case was the financial obligation imposed upon him by the interlocutory decree in accordance with and under the terms of his stipulation is clear from the following paragraph of his affidavit: "That affiant was present in court upon the said hearing. That the nature of the proceedings then taken was explained to affiant; however, affiant understood that the payments required were for the benefit of affiant's children only, and subject to immediate modification in the event the same be inequitable and disproportionate. That affiant was not told and did not realize that affiant was deprived of all of his separate property, and was in addition thereto burdened with expenditures with respect to said separate property."

[13, 14] This portion of the affidavit shows that defendant failed to understand the effect of the interlocutory decree. The award of $175 per month was made subject to further order of the court and was therefore "subject to immediate modification" in a proper proceeding and upon sufficient showing made. Defendant was not "deprived of all of his separate property". The home was awarded to him as his separate property subject to the right of plaintiff and the two children to live in it "for a minimum period of three (3) years" and thereafter "such residence shall be subject

to the further order of the court". Little weight can be given to the statement that defendant understood that the monthly payments were to be for the exclusive benefit of the two children and not also for the benefit of their mother in view of the stipulation that they were to be made for the support of the three and the further fact that for more than two and one-half years defendant had been paying plaintiff $150 per month for her support and that of the two children.

[15] We seriously question the sufficiency of the showing made of "mistake, inadvertence, surprise or excusable neglect" on the part of defendant to support an order relieving him from the stipulations and vacating the interlocutory decree had one been made. In any event, there was no breach of discretion in denying his motion.

The judgment and order appealed from are and each of them is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.



47 Cal.App.2d 661

DE LA CUESTA v. BAZZI et al.

Civ. No. 2793.

District Court of Appeal, Fourth District, California.

Nov. 7, 1941.

Hearing Denied Dec. 31, 1941.

1. Easements ⇐36(3)

Evidence supported trial court's finding that plaintiff acquired an easement by prescription to permit cattle to go onto defendants' lands to drink water from a creek on those lands.

2. Easements ⇐36(3)

Evidence was sufficient to show that use of plaintiff's claimed prescriptive easement to permit cattle to go onto defendants' lands to drink from a creek thereon was adverse and under a claim of right and that it was not merely permissive.

3. Easements ⇐37

Whether possession and use of a claimed easement is hostile and under a claimed right communicated to the landowner is a question for the court to determine as a fact in the light of the relations between the parties and the surrounding circumstances.

4. Appeal and error ⇐1011(1)

Where there is substantial evidence to show that possession and use of a claimed easement was hostile and under a claimed right communicated to the landowner, findings to that effect will not be disturbed by the reviewing court even though there is a conflict on the subject.

5. Appeal and error ⇐1011(1)

Whether defendants were bona fide purchasers for value and bought lands without notice, actual or constructive, of plaintiff's claimed right to an easement to permit cattle to go onto those lands to drink from a creek thereon was for the trial court under conflicting evidence.

6. Easements ⇐36(3)

Evidence was insufficient to show that use of plaintiff's claimed easement to permit cattle to go onto defendants' lands to drink from a creek thereon was so altered from the manner in which plaintiff had previously exercised her right that plaintiff was precluded from exercising the easement where bed of creek was changed only for a short distance within the enclosure of a fence which had been constructed to confine cattle within a definite area, and no new, greater, or different use or burden was imposed on defendants' lands.

7. Easements ⇐41

Plaintiff's prescriptive right to permit cattle to drink from a creek on defendants' lands was to use the water of the creek wherever it could be found at any place within the limits of an enclosure surrounded by a fence which had been constructed to confine the cattle within a definite area.

8. Waters and water courses ⇐145

A person entitled to water rights by prescription is not bound to use the water in exactly the same manner or to continue the same precise application of it as that exercised during the time when the right was being acquired, provided the altered use sought to be made does not impose an added burden on the servient tenements.

9. Easements ⇐31

Where there is no change in the character or use of an easement and no injury is inflicted on the owner of a servient tenement, the owner of the easement does not lose the right to the use thereof by a slight deviation.

10. Easements ⇐61(12)

Where owners of a certain lot at time of partition were entitled to one-fourth of all of the waters of a certain creek, and trial court found that plaintiff and other owners of that lot were entitled to take one-fourth of those waters, judgment reciting that plaintiff was entitled to take one-fourth of all the waters subject to whatever interests other owners might have in that one-fourth was intended to mean that all of the owners of the lot were entitled to one-fourth of the waters.

11. Easements ⇐61(12)

In action to enjoin defendants from interfering with plaintiff's use of easement to permit cattle to cross defendants' lands to drink from a creek thereon and from otherwise interfering with plaintiff's use and occupation of easement, pleadings, findings, and judgment when considered together gave defendants title and ownership to lands subject to plaintiff's easement, notwithstanding alleged variance between finding that plaintiff and other owners of a certain lot were entitled to take one-fourth of waters of creek and judgment reciting that plaintiff was entitled to take one-fourth of all waters subject to interest of other owners.

12. Easements ⇐41

An easement acquired by prescription is limited in its extent by the use to which the owner of the dominant tenement has put the property.

13. Easements ⇐61(10)

Defendants could not complain because the trial court in holding that plaintiff had an easement to permit cattle to cross defendants' lands to drink from a creek thereon did not limit the number of cattle that could enjoy the benefits of the easement, since any unusual or extraordinary use of easement by plaintiff which might injure defendants could later be controlled by the court.

14. Tenancy in common ⇐21

One tenant in common, in so far as he interferes with the joint property to the damage or injury of his cotenants, is a "trespasser" to that extent, and he cannot assume, because he has a certain interest in the common property, to deal with it or use it to the detriment of the other cotenants.

See Words and Phrases, Permanent Edition, for all other definitions of "Trespasser".

15. Tenancy in common ⇐38(2)

The use by a tenant in common of more than his share of the water of a stream may be enjoined by the other cotenants. Code Civ.Proc. § 384.

16. Appeal and error ⇐877(5)
Easements ⇐61(7)

Where plaintiff sought among other things a permanent injunction restraining defendants from taking possession of or interfering with use and occupation of a strip of land embraced within a claimed easement to permit cattle to cross defendants' lands to drink from a creek thereon, and did not seek to determine the respective interests of all of her cotenants in the waters of the creek, those cotenants were not "necessary parties", and defendants could not complain because plaintiff was found to be entitled to take one-fourth of the waters subject to cotenants' rights. Code Civ.Proc. §§ 384, 389.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party"

17. Appeal and error ⇐187(2)

Where defendants nowhere set up a nonjoinder or misjoinder of a party or alleged that other parties were necessary or proper to the action, they could not for the first time on appeal attack the validity of the findings or judgment in so far as they adjudicated the rights of the parties present in the action.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Virginia de la Cuesta against Abbondio Bazzi and others to enjoin defendants from interfering with plaintiff's use of an easement and from otherwise interfering with use and occupation of certain land, wherein defendants filed a cross-complaint for injunctive and other relief. From an adverse decree, defendants appeal.

Affirmed.

E. W. Squier, J. F. Goux, and William Olney, Jr., all of Santa Barbara, for appellants.

W. P. Butcher, of Santa Barbara, for respondent.

GRIFFIN, Justice.

The evidence produced, as reflected by the transcript, consumes over 1,300 pages. Voluminous briefs have been filed setting forth the points and authorities and arguments of respective counsel. The essential facts in the case may be thus summarized:

Respondent owns the westerly portion of lot 9 of the subdivision of Rancho de la Vega, situated in Santa Barbara county. The entire lot 9 contains 748.35 acres. The portion owned by respondent contains 234.25 acres. Appellants own a tract of land lying immediately west of and adjoining respondent's land, which tract is known as lot 7B of the Rancho de la Vega, and contains 226.09 acres. Appellants also own other lands known as lot 7C, lying immediately north of and adjoining respondent's property. Ramon de la Cuesta originally owned the entire Rancho de la Vega and upon his death this rancho was subdivided among his heirs into nine separate parcels. A map of the partition of that rancho was filed February 11, 1892. The commissioner who made this partition endorsed upon the map and made a part of the partition the following: "Lots 9, 7, 6 and 5 are entitled in equal portions to all the waters of the Nojoqui Creek which at the time of this partition were appurtenant to the entire Rancho de la Vega as represented on this map; and the owner of each of said lots is to be entitled to lay and maintain a pipe for the conveyance of its share of said water over each and all of the others of said four lots."

In the partition of the rancho by deed dated March 1, 1893, lot 9 was conveyed to Eduardo de la Cuesta and lot 8 to Gerardo S. de la Cuesta. By deed dated May 10, 1893, Eduardo de la Cuesta conveyed lot 9 to Gerardo S. de la Cuesta, and by deed dated May 10, 1893, Gerardo S. de la Cuesta conveyed lot 8 to Eduardo de la Cuesta. Subsequently, Gerardo S. de la Cuesta conveyed portions of lot 9 to others who are not parties to this action. Thereafter, by deed dated March 24, 1910, Gerardo S. de la Cuesta conveyed to his wife, Virginia P. de la Cuesta, respondent herein, the portion of lot 9 now owned by her and described in respondent's complaint. Joaquin de la Cuesta, who received lot 7, conveyed that lot to Eduardo de la Cuesta by deed dated June 21, 1897. Eduardo de la Cuesta executed a deed of trust, which included lot 7, on December 23, 1930, and lot 7 was subsequently sold by the trustee and the property was conveyed to the Security First National Bank of Los Angeles by deed dated February 16, 1934. After the partition of the rancho, lot 7 was divided into three parts, namely, lots 7A, 7B and 7C. Lot 7B and lot 7C were conveyed by said bank to the appellants by deed dated November 18, 1936. Lot 7B and lot 9 are subject to an easement of the state highway, which closely follows the boundary line between the two lots. The Nojoqui creek flows in a northerly direction over lot 7B approximately parallel with and just west of the highway and west of the westerly line of respondent's land.

There are two small ravines or gullies which cross the lands of respondent from east to west and extend westerly beyond respondent's land to Nojoqui creek. There was a cattle pass or culvert across each of these ravines, which passes were known as the north cattle pass and the south cattle pass respectively.

Respondent claims an easement over and upon a portion of lot 7B consisting of a strip of land approximately 130 feet wide and 700 feet long which was and has been enclosed, at least intermittently, by an old fence for over 40 years and which strip lies immediately west of the highway. Through the length of this strip of land flows, in a northerly direction, the Nojoqui creek. There is a curve and a narrow gorge in the creek which divides the claimed easement into two parts, designated as the north part and the south part. This claimed easement was fenced about the year 1892 by respondent's husband and has been made use of by the owners and occupants of all of lot 9, or the occupants of the westerly portion thereof, since that time, for the purpose of watering and resting cattle and stock which had been grazing on lot 9 or portions thereof. The evidence indicates that the use of this claimed easement was due to the fact that there was no water or not sufficient water on lot 9 for this purpose.

Respondent now claims to have an easement appurtenant to her land over and upon the portion of lot 7B bounded by the old fence line for the purpose of taking from the creek "one-fourth of all the waters thereof and to permit the cattle

and livestock grazing" on her lands to drink of the waters of that creek as the same flows over the lands of appellants by passing from her lands through or under these two cattle passes or culverts to the creek on the lands of appellants. She brought this action to perpetually enjoin and restrain appellants from interfering with her use of this easement, from placing any obstructions on this strip of land, from destroying the fences and closing the same or in any manner interfering with the use and occupation by the respondent of the said land for this purpose. This is the substance of respondent's claims as set out in her pleadings.

During the pendency of this action and prior to April 26, 1939, the location of the state highway, where the same passed along the easterly side of the creek, along, over, and near the line between the lands of respondent and appellants, was changed to some extent. The channel of the creek, at one point, was moved westerly approximately 35 feet, but is still within the portion of the claimed easement according to the old fence line. This change was made on the south half of appellants' land claimed to be subject to the easement, immediately west of the south cattle pass and extending northerly approximately 200 feet. Prior to the change made in the location of the state highway and the creek channel there was a steep bank varying in height along the westerly side of the creek bed, opposite the southerly cattle pass and extending northerly along the bed of the creek to the northern boundary line of the claimed easement. The fence on the west boundary of the claimed easement ran along the top and near the edge of this bank. A portion of the area west of the westerly outlet of the south cattle pass was filled in with soil, gravel and rocks and the new highway now runs along the top of this fill. A new cattle pass or culvert, but 84 feet in length, in the same location as the former one was built. It now extends westerly under the fill to the present bed of the Nojoqui creek. The old westerly fence which ran along the top of and near the edge of the old west bank was removed and a new fence was built by the state along the top of the bank as changed.

The highway, where the most northerly of the two cattle passes existed, was relocated so that the highway as it now exists runs over and along real property belonging to respondent approximately 30 feet easterly from the highway as it existed at the time of the commencement of this action and prior to the change in the location of the highway. The new northerly cattle pass was located at the same place as the former, but was increased in length. The west entrance thereof still terminated within the claimed easement as previously fenced.

Respondent, in 1922, installed at the south end of the claimed easement and within its enclosure, a pump house and pipe line by means of which water, for domestic purposes, was conveyed to respondent's premises on lot 9. By cross-complaint appellants sought to enjoin respondent from running cattle on the claimed easement; from maintaining fences thereon; and sought a decree adjudging appellants to be the owners thereof in fee and declaring that respondent had no right or easement upon the real property involved. The trial court found that "for more than five years continuously prior" to the commencement of the action, the easement described was fenced on its exterior boundaries and was accessible from respondent's property by means of the cattle passes described and was so used; that appellants and cross-complainants are now the owners in fee of the real property subject to the easement described; that respondent and the owners of the remaining portion of lot 9 were and are now the owners of the right to take one-fourth of the waters of the creek as described, as appurtenant to the real property; that the use of the easement, contrary to appellants' contention, was not permissive; that the use of the easement, cattle trail, and cattle passes, for more than five years preceeding the acquisition of lots 7B and 7C by appellants, was and now is adverse, open, continuous, hostile and under a claim of right of respondent and her predecessors in interest; that only a portion of the bed or channel of the river, within the boundaries of the claimed easement, has been changed; that appellants, at the time of and prior to the purchase of lots 7B and 7C "had actual and/or constructive knowledge and/or notice of the said easement and of the right to take by pipe line a portion of the waters of said Nojoqui Creek, and of the record ownership of one-fourth of the waters thereof"; that there has been no alteration in the character and use of the easement by the im-

provement and construction work carried out by the state; that respondent has not altered or changed the character and use of the easement and that no additional burden or damage has been imposed upon the appellants by the present use and enjoyment by respondent of the easement; that respondent is the owner of an easement within the boundaries of the old fence line for the use and purposes described and the owner of and entitled to one-fourth of all the waters of the creek subject to whatever right the remaining owners of lot 9 may have in said one-fourth of said water; that appellants be perpetually enjoined from taking possession of or interfering with respondent's use and enjoyment of said strip of land to the extent of the easement and from interfering with respondent's right to take water by means of a pipe as described in the partition agreement. By the judgment respondent was found to be the "owner of an easement in and to and entitled to the possession of all that certain real property" which was bounded by the old fence line "for the purpose of taking * * * one-fourth of all the waters thereof, subject to whatever right, title and interest the owners of the remaining portions of said lot 9 may have in and to said one-fourth of said waters, and to permit the cattle and livestock grazing upon the real property described * * * to drink of the waters flowing in said Nojoqui Creek by going * * * upon said easement * * * by means of two cattle passes" as described "together with the right to lay and maintain a pipe over and across said easement * * * to take one-fourth of the waters of Nojoqui Creek for the use and benefit of said owners of said lot 9". The decree also adjudged appellants to be the owners of the real property described, as being within the old fence line, subject and servient to said easement as described.

[1] Appellants first contend that respondent failed to prove any prescription or other right to have cattle or livestock from her land go onto the appellants' lands or drink from the creek thereon.

We will first discuss the sufficiency of the evidence to establish this right. Respondent testified that her husband, Gerardo, about six months after the partition of the rancho, built a fence around the claimed easement, and his cattle, 40 to 60 in number, came down off of the hills from lot 9, passed through the two cattle passes, watered from the creek, rested, meandered around over the extent of the claimed easement, and then returned to the hills; that this was their daily custom for many years, except in some of the winter months when there was sufficient water in the gulches on lot 9. This testimony was corroborated by several other witnesses.

There can be no question about the time element and the continued use of the claimed easement as to the south cattle pass and the southerly portion of the easement. The evidence as to the continual use of the north cattle pass and the north one-half of the easement is conflicting. There is ample evidence, however, supporting the court's finding in this respect and this finding cannot be disturbed on appeal. Chichester v. Seymour, 28 Cal. App.2d 696, 83 P.2d 301.

[2] As opposed to appellants' contention that the use of the claimed easement was only permissive, the evidence discloses that Eduardo de la Cuesta, original owner of lot 7, and a brother of respondent's husband Gerardo, had a conversation about 20 years ago; that at that time the fence around the claimed easement had been torn down; that respondent then heard a conversation between the brothers in which conversation her husband told Eduardo: "You know where the line is and I am going to fence that"; that Eduardo "got very mad and whipped his horse and off he went". She also testified that after she acquired the property from her husband, Eduardo came to her house and had lunch; that her husband became very angry and said to him: "Why didn't you fix everything as I wanted, so I could get over to the creek?" That Eduardo "got very mad and didn't finish the meal. He got up and went away"; that "he mentioned the creek"; that at that time the fence was down in the creek.

Respondent's daughter corroborated these conversations and claimed in addition that her father said: "That is my creek; that water is my water"; that "Ed argued back and forth and said 'No, no'"; that her father said, "Yes, it is my creek and just to show you I will fence the rest of it too"; that she went down with her father to repair the fences that had been torn down. This evidence, together with the other circumstances surrounding it, in-

dicates that the use was adverse and under a claim of right.

[3, 4] The question as to whether possession and use is hostile and under a claimed right communicated to the owner of the land is one for the court to determine as a fact in the light of the relations between the parties and the surrounding circumstances, and where the evidence is substantial although there is a conflict upon the subject, the findings will, of course, not be disturbed here. Wells v. Dias, 57 Cal.App. 670, 207 P. 913; Pacific Gas & Electric Co. v. Crockett Land & Cattle Co., 70 Cal.App. 283, 233 P. 370. The evidence supports the findings in this respect.

[5] It is next argued that appellants were bona fide purchasers for value and bought without notice, actual or constructive, of respondent's claimed rights to the easement. The evidence discloses that the appellants were, prior to the purchase of lot 7B, engaged as partners in the dairy business on property, the boundary line of which is partially contiguous to the water gap in question; that appellant Bazzi was frequently in the vicinity of the water gap and had seen the pump house and three of the fence lines; that the partners had been watering cattle in the creek just south of the water gap in question.

Appellant Mariani testified that he saw some of the fences and the pump house before he bought the property. Appellant Zocchi testified that before he bought lot 7B he and the other appellants went all over lot 7 as far as they could "around the line"; that he saw a man building a fence across the creek on "our property"; that he drove over the old highway between lots 7 and 9 at least once a week; that he had seen the pump house from the west side of the creek.

Respondent testified that appellant Zocchi called on her in November, 1936; that she pointed out the south cattle pass and all of the fences; that she asked him if he was buying lot 7B and that he replied that he thought so but that the lines were so mixed; that she showed him a map and said: "Here is our water gap" and that he saw it from the porch; that she told him of the north cattle pass and asked him to go see it as he went back. This evidence, although conflicting, was corroborated to some extent by respondent's daughter.

The force and effect of these conversations as proof that the appellants were put upon inquiry, were matters for the determination of the trial court. On this issue the trial court found in favor of the respondent. The evidence supports the finding. Rubio Canon Land & Water Ass'n v. Everett, 154 Cal. 29, 96 P. 811.

[6, 7] It is next claimed that the evidence conclusively proves the fact that changes were made upon the servient tenement which precluded respondent from thereafter exercising her claimed easement at the place or in the method, mode or manner in which she had theretofore exercised her claimed easement; that the changes involved necessarily would impose a new and greater and different easement and burden upon appellants' lands which were therefore wholly terminated and ended.

There is no question but that the old fence in the instant case was constructed for the sole purpose of confining the cattle within a definite area called a water gap so that the cattle upon emerging from either cattle pass could wander about within the enclosure, drink at will, and return to the grazing lands above. The evidence conclusively shows that the bed of the stream was not changed to any great extent and only for a short distance within the enclosure. It cannot be said that the use of the claimed easement has been altered or changed from the mode or manner in which respondent had theretofore exercised her claimed easement. No new, greater, or different use or burden was imposed upon appellants' lands. Until the lands are thus burdened appellants cannot be heard to complain. There was nothing definite or fixed about the location of the channel and the right of the respondent to the use of the water gap was not dependent upon any fixed location or stream bed. Her prescriptive right was and is to use the water wherever it could be found at any place within the limits of the old enclosure.

[8] In 67 Corpus Juris, p. 959, § 407, it is said: "The person entitled to rights by prescription is not bound to use the water in exactly the same manner or to continue the same precise application of it as that exercised during the time when the right was being acquired, p vided the altered use sought to be made does not impose an added burden on the servient tenements.

* * *" See, also, Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674; Willits Water, etc., Co. v. Landrum, 38 Cal.App. 164, 175 P. 697; Crane v. Stevinson, 5 Cal.2d 387, 54 P.2d 1100.

[9] It has been uniformly held that where there is no change in the character or use of the easement and no injury is inflicted upon the owner of a servient tenement, the owner of the easement does not lose the right to the use thereof. Burris v. People's Ditch Co., 104 Cal. 248, 37 P. 922; Noel v. Capobianco, 218 Cal. 481, 23 P.2d 511.

One of the latest expressions on this subject by our Supreme Court is Ward v. City of Monrovia, 16 Cal.2d 815, 108 P.2d 425, wherein it was held that the easement of a city to maintain a pipe line over privately owned land was not forfeited by changes of location during reconstruction where the deviations were unsubstantial, and were wholly within the limits of 10- and 20-foot strips of land which the city was entitled to use. We do not see how appellants can claim that the alterations above mentioned worked any substantial injury to or in any degree added any additional burden to appellants' property.

Lastly, appellants complain because the findings in the respects specified are not supported by the evidence, not responsive to the issues and do not support the judgment; that there is no finding or adjudication as to how much water respondent is entitled to take as appurtenant to her land; that the findings and judgment are fatally uncertain.

[10, 11] The trial court found that respondent and the other owners of lot 9 are entitled to take one-fourth of the waters of the Nojoqui creek. The judgment recites that respondent is entitled to take from the creek one-fourth of all the waters thereof, subject to whatever interest the owners of the remaining portions of lot 9 may have in said one-fourth. The owners of lot 9, at the time of the partition, according to the pleadings and evidence, were only entitled to one-fourth of all the waters of the Nojoqui creek "which at the time of this partition were appurtenant to the entire rancho". In the light of the issues, pleadings and remaining provisions of the judgment, this is plainly the construction intended by the decree and should be so construed and interpreted. Pacific Paving Co. v. Vizelich, 1 Cal.App. 281, 82 P. 82. Regardless of the claimed variance between the findings and the judgment we think the pleadings, findings and judgment, when considered together, very plainly give appellants title and ownership to the property subject to the easement of respondent above mentioned and described. Roger v. Struven, 44 Cal.App. 528, 186 P. 817; 14 Cal.Jur. 958, § 54.

[12, 13] Appellants complain because the court did not limit the number of cattle that may enjoy the benefit of the claimed easement. An easement acquired by prescription is limited in its extent by the use to which the owner of the dominant tenement has put the property. Southern California Investment Co. v. Wilshire, 144 Cal. 68, at 72, 77 P. 767. Any unusual or extraordinary use by the respondent of the water gap which may injure the appellants could be hereafter controlled by the court. Strong v. Baldwin, 154 Cal. 150, 97 P. 178, 129 Am.St.Rep. 149.

Appellants further complain that the trial court should have found what proportionate share respondent, as well as the other owners of lot 9, were entitled to take of the one-fourth of all the waters of the creek; that because the other owners were not joined in the action the court could not make an adjudication on the issue raised as between the respondent and the appellants.

[14] By this action respondent seeks, among other things, a permanent injunction against appellants from taking possession of or interfering with the use and occupation of the strip of land embraced within the claimed easement. Respondent does not seek, by her complaint, to determine the respective interests of all the cotenants in and to the waters of the creek. It has been held that one tenant in common, insofar as he interferes with the joint property to the damage or injury of his cotenant, is a trespasser to that extent. He cannot assume, because he has a certain interest in the common property, to deal with it or use it to the detriment of other co-owners, and every one of the parties in such a case has the right to protect his respective interest.

[15] It has also been held that the use by a tenant in common of more than his share of the water may be enjoined. Barton Land, etc., Co. v. Crafton Water Co., 171 Cal. 89, 152 P. 48.

Section 384 of the Code of Civil Procedure provides that all persons holding as

tenants in common or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such parties. Section 389 of the Code of Civil Procedure provides that the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. Himes v. Johnson, 61 Cal. 259.

[16] It cannot be contended here that the rights of other parties interested were not saved to them by the judgment. Appellants cannot be heard to complain because respondent was found to be entitled to take one-fourth of the waters of the creek subject to the rights of the owners of the remaining portions of lot 9. Those remaining owners were not necessary parties to the determination of the issues presented under the pleadings.

[17] It should also be noticed that nowhere did the appellants set up a nonjoinder or misjoinder of a party or allege that other parties were necessary or proper to the action. They cannot, for the first time on appeal, attack the validity of the findings and judgment insofar as they adjudicate the rights of the parties present in the action. Work v. Campbell, 164 Cal. 343, 128 P. 943, 43 L.R.A.,N.S., 581.

The judgment is affirmed.

BARNARD, P. J., and MARKS, J., concurred.



47 Cal.App.2d 634

WELLS v. CALIFORNIA TOMATO JUICE, Inc., et al.

Civ. 6357.

District Court of Appeal, Third District, California.

Nov. 7, 1941.

1. Bankruptcy ⇐215

Where property upon which mechanic's lien was claimed was in custody of bankruptcy court before notice of lien was recorded, the state court was without jurisdiction to enforce the lien until bankruptcy court granted leave to maintain suit in the state court. Code Civ.Proc. § 1190; Bankr. Act, § 2, 11 U.S.C.A. § 11.

2. Bankruptcy ⇐214

While the federal court in which a bankruptcy proceeding is pending may retain exclusive jurisdiction to determine and enforce liens against property in its custody, yet in proper cases it has discretion to permit the maintenance of an action for that purpose in a state court. Bankr.Act, § 2, 11 U.S.C.A. § 11.

3. Bankruptcy ⇐215

A bankruptcy court may properly authorize the maintenance of a suit under a local statute in the state court to enforce a mechanic's lien against property in custody of the bankruptcy court. Code Civ.Proc. § 1190; Bankr.Act, § 2, 11 U.S.C.A. § 11.

4. Limitation of actions ⇐110

Where it was necessary to procure permission of bankruptcy court to maintain action in state court to foreclose mechanic's lien against property in custody of bankruptcy court, the statutory limitation for commencing the action to foreclose the lien was tolled during period of time the lienor was necessarily delayed in procuring consent of the bankruptcy court to maintain the action in the state court. Code Civ.Proc. §§ 356, 1190; Bankr.Act, § 2, 11 U.S.C.A. § 11.

5. Limitation of actions ⇐110

The statute of limitations is deemed to run against a mechanic's lienholder only while he may with exercise of due diligence institute proceeding of his own volition, and when consent of bankruptcy court is a necessary prerequisite for maintenance of action in state court to foreclose the lien, statute should be tolled until consent can be procured after the appointment of bankruptcy trustee who becomes a "necessary party" to the application for permission to maintain action in state court. Bankr.Act, § 2, 11 U.S.C.A. § 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

6. Mechanics' liens ⇐260(4)

The mere application to bankruptcy court or the granting of leave to maintain action in state court for foreclosure of mechanic's lien against property in custody of bankruptcy court does not constitute the "commencement of proceedings" to enforce

the lien within statute providing that no mechanic's lien binds any property for longer period than 90 days after lien has been filed unless proceedings be commenced in a proper court within that time to enforce the lien, since application to bankruptcy court is merely preliminary to the commencement of the action in state court. Code Civ.Proc. § 1190; Bankr.Act, § 2, 11 U.S.C.A. § 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Commencement of Proceeding".

7. Mechanics' liens ⇐260(4)

The mere fact that permission of bankruptcy court was actually granted to maintain action in state court to foreclose mechanic's lien against property in custody of bankruptcy court within 90 days from filing of notice of lien would be insufficient compliance with the statute requiring action to foreclose mechanic's lien to be commenced within 90 days from date of filing of lien, provided there was no statutory prohibition which otherwise tolled the limitation period. Code Civ.Proc. §§ 356, 1190; Bankr.Act, § 2, 11 U.S.C.A. § 11.

8. Limitation of actions ⇐110

Where notice of mechanic's lien was recorded after property owner became a bankrupt and trustee in bankrutpcy who was a necessary party to lienor's application for leave to maintain action in state court to foreclose the lien against property in custody of bankruptcy court was not appointed until 43 days after recording of notice of lien, lienor was precluded by statute from prosecuting his action to foreclose lien for 43 days, and hence 90-day limitation statute was tolled for at least the 43 days under statute providing that when commencement of action is stayed by statutory prohibition the time of commencement of the prohibition is not counted in computing limitations. Code Civ.Proc. §§ 356, 1190; Bankr.Act, § 2, 11 U.S.C.A. § 11.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Suit by G. G. Wells against California Tomato Juice, Inc., and others, to foreclose a mechanic's lien. From a judgment for defendants, plaintiff appeals.

Reversed.

Stern & Grupp, of San Francisco, for appellant.

Torregano & Stark, of San Francisco, for respondents.

THOMPSON, Justice.

The plaintiff has appealed from a judgment which was rendered against him in a suit to foreclose a mechanic's lien, on the ground that the suit was not commenced within the time limited by section 1190 of the Code of Civil Procedure. The suit was not begun within ninety days after the notice of lien was filed. The appellant contends that the statute was tolled pending the appointment of a trustee in bankruptcy and until permission was granted plaintiff to maintain the action in a state court.

The record shows that plaintiff recorded his notice of mechanic's lien December 6, 1935. The respondent, California Tomato Juice, Inc., was adjudged a bankrupt on November 27, 1935. A trustee in bankruptcy was not appointed until January 18, 1936. Upon application therefor, the appellant was granted leave by the United States District Court, on March 2, 1936, to maintain his action in the state court to foreclose the mechanic's lien. This suit was then commenced March 6, 1936, which was ninety-one days after the filing of the lien.

If it is necessary as a prerequisite to the maintenance of an action to foreclose a mechanic's lien in a state court, to first procure leave to do so from the United States court, after the appointment of a trustee in a pending bankrupt estate, then, we may assume, the statutory limitation for commencing the action in the present case was tolled by the provisions of section 356 of the Code of Civil Procedure, during the period of time the plaintiff was necessarily delayed in procuring consent of the District Court to maintain the action.

[1] Since the property upon which the appellant claims a mechanic's lien was in the custody of the United States District Court before the notice of lien was recorded, the state court was without jurisdiction to enforce the lien in this action until the federal court granted leave to maintain the suit in that court. Straton v. New, 283 U.S. 318, 51 S.Ct. 465, 466, 75 L. Ed. 1060; 5 Remington on Bankruptcy, 4th Ed., 571, sec. 2370; 11 U.S.C.A. § 11, p. 74, note 34. Regarding the exclusive control of the federal court in which a bank-

ruptcy proceeding is pending, over proceedings to establish or enforce liens against property in the custody of the bankrupt court, it is said in the Straton case, supra:

"The purpose of the Bankruptcy Act * * * is to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. This jurisdiction is exclusive within the field defined by the law, and is so far *in rem* that *the estate is regarded as in custodia legis from the filing of the petition.* Acme Harvester Co. v. Beekman Lumber Co., 222 U.S. 300, 32 S. Ct. 96, 56 L.Ed. 208. *It follows that liens cannot thereafter be obtained nor proceedings be had in other courts* to reach the property, the district court having acquired the exclusive right to administer all property in the bankrupt's possession. [Citing numerous authorities.] * * *

"Though a lien be not discharged by bankruptcy, its owner may not, without the bankruptcy court's permission, institute proceedings in a state court to enforce it, since his so doing might interfere with the orderly administration of the estate."

[2] While it is true that the federal court in which a bankruptcy proceeding is pending may retain the exclusive jurisdiction to determine and enforce liens against property in its custody, yet, in proper cases, under certain circumstances, it has the discretion to permit the maintenance of an action for that purpose in a state court. 11 U.S.C.A. § 11, p. 76, note 35. In 4 Remington on Bankruptcy, 4th Ed., page 536, section 1612, it is said in that regard:

"The bankruptcy court might permit the creditors, for the benefit of all, to institute litigation, or to continue litigation already instituted, in the State court, retaining, itself, the custody of the res. * * *

"But, of course, it is not bound to do so, and it may refuse to permit such controversy over property in its own custody to be carried on elsewhere."

[3] It has been held that the federal court may properly authorize the maintenance of a suit to enforce a mechanic's lien under a local statute in a state court. In 5 Remington on Bankruptcy, 4th Ed. 571, section 2370, the author says:

"The bankruptcy court has permitted controversies in some cases over property in its possession to be carried on elsewhere, and to this end has authorized suits to be instituted, or, if already instituted, to be maintained in the United States District Court, or in a state court.

"The cases where the bankrupt court has thus permitted litigation over property in its possession to be instituted in other courts, or if pending, to be maintained there, can be divided into classes: * *.

"Second, where, as in regard to mechanic's liens in some states, a suit must be brought in a particular court within a prescribed time."

[4] Since it was necessary in the present case to procure permission of the United States District Court in which the bankruptcy proceeding was pending when the notice of lien was filed, as a prerequisite to the conferring of jurisdiction on the state court to determine and enforce the lien, it follows that the limitation of time within which the proceedings to enforce the lien in the state court must be commenced as provided by section 1190 of the Code of Civil Procedure should be extended during the period of time necessarily required to appoint the trustee in bankruptcy and to procure the consent of the federal court to institute and maintain the action. Section 356 of the Code of Civil Procedure provides: "When the commencement of an action is stayed by injunction *or statutory prohibition,* the time of the commencement of the injunction or prohibition is not part of the time limited for the commencement of the action."

[5] Until the appellant could have lawfully commenced his suit in the state court to enforce his mechanic's lien, he should not be charged with the lapse of statutory time within which to do so. The statute of limitations is deemed to run against a lienholder only while he may, with the exercise of due diligence, institute the proceeding *of his own volition.* When the consent of a United States District Court is a necessary prerequisite therefor, it should be tolled until its consent can be procured after the appointment of the trustee, who becomes a necessary party to the application therefor.

In the present case the trustee was not appointed until January 18, 1936, which was forty-three days after the recording of his notice of lien. We assume that un-

til the appellant could, without unnecessary delay, procure the consent of the District Court to maintain his action in the state court, the statute would be tolled. In the case of Hoff v. Funkenstein, 54 Cal. 233, the statute of limitations within which a suit on a promissory note could be commenced, was held to be tolled by the pendency of bankruptcy proceedings. The court said: "The theory of our Statute of Limitations is, that a creditor has four years (or other time, as the case may be), on any day of which he may, *of his own volition*, commence an action."

[6] The mere application to the United States District Court or the granting of leave to maintain the action for foreclosure of the mechanic's lien in the state court does not constitute the *commencement of proceedings* to enforce the lien, contemplated by section 1190 of the Code of Civil Procedure. That application is merely preliminary to the commencement of the action. Union Tank & Pipe Co. v. Mammoth Oil Company, Ltd., 134 Cal.App. 229, 25 P.2d 262; 16 Cal.Jur. 564, sec. 160; 7 Words and Phrases, Perm.Ed., p. 729. Many cases hold that the commencement of an action or proceeding dates from the issuing of process with the bona fide intention of serving it upon the adverse parties to the controversy. Some cases hold that the summons or process must actually be placed in the hands of the officer with directions to serve it.

[7, 8] The mere fact that permission of the federal court was actually granted to maintain the action in the state court within ninety days from the filing of the notice of lien, would be insufficient compliance with section 1190 of the Code of Civil Procedure, since the suit to foreclose the lien was not filed within that period, provided there was no "statutory provision" which otherwise tolled the statute of limitations. But we have previously held the Bankruptcy Act does have the effect of absolutely divesting the state court of jurisdiction to entertain a suit to foreclose a mechanic's lien affecting real property belonging to the estate of a bankrupt, after the adjudication of bankruptcy has been made, in the absence of consent therefor by the federal court. It follows that, under the circumstances of this case, the "statutory provision" of the Bankruptcy Act precluded the plaintiff from prosecuting his action to foreclose his mechanic's lien for the period of forty-three days from the recording of his notice of lien, and that the statute of limitations would therefore be tolled for at least that period of time.

Upon a careful analysis of the authorities cited by the respondent upon that issue, we find nothing in conflict with what we have previously said in that regard. We are of the opinion this suit to foreclose the mechanic's lien was not barred by the statute of limitations, and that the findings and judgment of the trial court to that effect are not supported by the evidence.

The judgment is reversed.

TUTTLE, J., and PULLEN, P. J., concurred.



47 Cal.App.2d 773

CLARK v. METROPOLITAN LIFE INS. CO. et al.

Civ. 2925.

District Court of Appeal, Fourth District, California.

Nov. 14, 1941.

1. Appeal and error ⇐1003, 1012(1)

The question of weight to be given evidence is for the jury and trial court and not a court of review.

2. Appeal and error ⇐1002, 1011(1)

Where there is a conflict between scientific testimony and testimony regarding facts, the jury or trial court must determine their relative weight.

3. Insurance ⇐516

"Total disability" under group policy which prevents insured from engaging in any occupation or performing any work for compensation is a disability which prevents his working with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his station and physical and mental capacity.

See Words and Phrases, Permanent Edition, for all other definitions of "Total Disability".

4. Insurance ⇐668(11)

Where evidence is conflicting, question whether insured is totally disabled under terms of total and permanent disability provision of group policy is a "question of fact" for the jury to decide from all circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

5. Appeal and error ⇐1001(1)

Where evidence is legally sufficient to sustain conclusion of jury on question whether insured is totally disabled within meaning of total and permanent disability provision of group policy, it is beyond the power of appellate court on appeal to interfere therewith.

6. Appeal and error ⇐1001(1)
Insurance ⇐665(5)

Insured's evidence that as early as 1924 he had some difficulty with his hearing which became acute by 1930, that by 1937, his hearing was entirely gone, that since 1928 he had serious stomach trouble, that in 1937, he had dizzy spells and heart trouble, that in 1936 he had sore lungs, and in 1936 began having eye trouble which resulted in loss of sight, although contradicted by insurer's evidence, sustained jury's finding that insured was "totally and permanently disabled" within provisions of group policy and verdict could not be disturbed on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Totally and Permanently Disabled".

7. Insurance ⇐629(1)

Where complaint alleged terms of policy a copy of which was attached thereto and made a part thereof, that insured became totally and permanently disabled on or about October 31, 1937, that proof thereof was furnished to insurer, and that insurer refused to make payments of benefits due, and claimed that certain sum was due and payable by the insurer, the complaint stated a cause of action on the group policy against the insurer.

8. Insurance ⇐124

Insurer issuing group policy owed insured no duty other than the performance of the contract on insurer's part.

9. Insurance ⇐629(1)

Where complaint stated a cause of action against insurer on group policy for total and permanent disability benefits and additional paragraphs were added to the complaint to show a conspiracy on the part of employer and insurer to defraud insured out of benefits due, the allegations of fraud and conspiracy were material only to the question of liability of the employer, and they added nothing to the cause of action against the insurer.

10. Conspiracy ⇐1

A conspiracy itself is not actionable but only that which is done under the conspiracy.

11. Insurance ⇐645(2)

Where complaint stated a cause of action against insurer on group policy for total and permanent disability benefits, but contained additional paragraphs to show conspiracy and fraud on part of employer and insurer to defraud insured out of benefits due, recovery against insurer for breach of contract was authorized without proof of conspiracy.

Appeal from Superior Court, Orange County; Harry C. Westover, Judge.

Action by James A. Clark against the Metropolitan Life Insurance Company and others to recover total and permanent disability benefits under a group policy. From an adverse judgment, the named defendant appeals.

Affirmed.

Walker, Adams, Duque & Smith, of Los Angeles (Henry Duque and Mark E. True, both of Los Angeles, of counsel), for appellant.

Harold A. McCabe, of Fullerton, for respondent.

GRIFFIN, Justice.

This is an action by respondent to recover from the defendants and from appellant Metropolitan Life Insurance Company, a corporation (hereinafter called the Insurance Co.) for total and permanent disability benefits which respondent claims he was entitled to receive under the provisions of a policy of group insurance issued by appellant to respondent's former employer, Tidewater Associated Oil Company (hereinafter called the Oil Co.), successor to the Associated Oil Company, a corporation. The two last named companies were joined as defendants under an alleged claim of conspiracy to defraud respondent of the benefits due under the poli-

cy. At the conclusion of respondent's case motions for dismissal and nonsuit in the action as to these defendants were granted. As to appellant, the cause was submitted to the jury. Judgment was rendered on its verdict in the sum of "$2587.50 as total disability benefits provided for in the policy". Special interrogatories were submitted and returned.

From 1922 to 1936 respondent was employed as a plumber for the Oil Co. In 1924, he first noticed some difficulty with his ability to hear. He gradually continued to lose his power of hearing and in 1930 it became necessary for him to wear a hearing aid. From 1936 to 1937 respondent was assigned to duties as a "roust about", apparently due to his lack of hearing, impairment of vision, hand and feet tremors, myocardial damage to the heart, and indigestion—gaseous distention. He was given these lighter duties until October 31, 1937, when the Oil Co. placed respondent, with approximately twenty other employees, on the "inactive pay roll" at a salary of $60 per month. During all of this time deductions were made from respondent's salary to pay his proportionate share of the cost of the policy. This arrangement was continued until April 30, 1938, at which time respondent's employment with the Oil Co. was terminated by it. In September, 1939, respondent filed with appellant a claim for total and permanent disability benefits in which he stated that he had become totally and permanently disabled on October 29, 1937, by reason of deafness and partial blindness which had developed over a period of years.

Appellant disclaimed any liability for the payment of disability benefits. This action followed. The amended complaint sets up the terms of the policy and avers in part that on December 31, 1923, appellant agreed with defendants to insure the life of respondent as an employee of defendants; that said agreement contained certain provisions relative to total and permanent disability benefits reading as follows:

"(8) Total and Permanent Disability Benefits. Upon receipt, at the Home Office in the City of New York, of due proof that any employee, not working in Mexico, while insured hereunder, and prior to his sixtieth birthday, has become totally and permanently disabled, as the result of bodily injury or disease, so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit, the company will, in lieu of the payment at death of the insurance on the life of the said employee, as herein provided pay equal monthly installments as hereinafter described. * * *"

The answer of appellant admits the issuance of the policy as alleged but denies that respondent has been disabled as alleged in his complaint; admits that certain proofs of disability have been furnished to it and that claim has been made for total and permanent disability benefits in the sum of $2,587.50 and that it has refused to pay or grant said benefits. The answer further denies any knowledge of or participation in a conspiracy to defraud respondent of said claimed disability benefits.

On the trial of the issues and at appellant's request, the following special interrogatories were propounded to the jury: "(1) Was plaintiff, James A. Clark, totally and permanently disabled so as to be permanently and continuously and wholly prevented thereby from performing any work for compensation or profit prior to May 1, 1938?" The jury answered in the affirmative. "(2) Did plaintiff, James A. Clark, prior to May, 1938, furnish to defendant, Metropolitan Life Insurance Company, due proof that he was totally and permanently disabled so as to be permanently and continuously and wholly prevented thereby from performing any work for compensation or profit?" The jury answered in the negative. A general verdict in favor of respondent was returned by the jury in accordance with the prayer of the complaint. Appellant appeals from the judgment entered upon the verdict.

Appellant first contends that the evidence was insufficient to support the judgment in that respondent failed to prove that he was totally disabled within the meaning of the group policy sued upon and at a time prior to the termination of his employment or at any time while insured under the policy.

From a chronological history of the development of respondent's claimed total and permanent disability it appears from his testimony that while working for the Oil Co. as a plumber as early as 1924, he had some difficulty with his hearing which became acute by 1930; that by 1936 or 1937, his hearing was entirely gone; that since 1928, he has had serious stomach trouble (stomach ulcers); that in 1937, he had dizzy spells and heart trouble; that in 1936, he had sore lungs; and in 1936, he began having eye trouble. On cross-examination,

in answer to counsel's inquiry: "Are you near-sighted?" respondent replied: "Well, no, I ain't near-sighted, my eyesight has gone." He also testified that his condition was practically the same in April, 1938, as it was at the present time. In regard to respondent's ability to work he testified as follows:

"Q. Now, Mr. Clark, have you worked any since you were let off over there on November 1st, 1937? A. No.

"Q. Why not? A. I ain't able. * * A. Yes, I tried to get a job but nobody don't want me. I ain't able to work. They all tell me I ain't able."

A Dr. Curtis was called as a witness for respondent. He testified that he had treated respondent in the past for minor ailments; that he had examined him over a period of ten years and found that as "far as air conduction is concerned he is totally deaf in both ears"; and "as far as bone conduction is concerned he is almost totally deaf"; that his deafness is progressive and a permanent condition; that he is extremely nervous and quite imaginative; that he thinks people are talking about him; that this condition has "affected his mind, his mentality"; that he complains of extreme pain over the entire abdomen; that he has complained of his heart condition for several years; that in his opinion that (heart condition) refers back to his nervousness. In response to this question: "In your opinion is his physical condition at the present time such as to render him unable to perform substantial and material acts pertaining to his business in the oil fields?" the doctor replied: "If his business is such it would require him to work around machinery; if it is rig building, I would say absolutely yes. If he was a plumber where he was working alone and had certain routine work to do I think possibly he could handle that, but as far as working around machinery is concerned, it would be extremely dangerous to himself and fellow employees. * * * I feel that he will be totally disabled because of his nervous condition and his mental condition if he does not find something that he has been used to doing over these years. * * *

"Q. What would your opinion be, doctor, as to whether he was disabled in April of 1938? A. I don't think there is any question but what he was the same." On cross-examination, however, the doctor testified as follows:

"Q. Would you say in April of 1938, he was unable to engage in the occupation of a plumber? A. No, I think that he could do that work. Yes, I think it would be all right if he was not around machinery or around other people * * * I mean in anything that would endanger * * * I mean where he would be in a dangerous spot. * * *

"Q. And so far as the deafness was concerned, in April of 1938, and at any time prior thereto, that deafness was disabling to him only in that it prevented him from engaging in work which entailed him working in machinery or in employments where he could not hear a warning sound? A. That is right." Respondent then established the fact that the witness had been on the panel for one of the defendant oil companies for five or six years. The witness was shown a statement signed by him which was forwarded to the insurance company with the respondent's proof, showing the following: "Q. Is he (Clark) wholly disabled at the present time? Is he wholly unable to engage in any work, occupation, or business?" After which questions he wrote: "Yes".

A Dr. Harwood was called by respondent. He examined respondent for the first time on November 19, 1940, the second day of the trial. He testified that respondent had hand and feet tremors; was totally deaf; had definite impairment of vision and myocardial damage to the heart; that in his opinion respondent, in April, 1938, was not able to do his work either as a "roust about" or plumber in the oil fields; that in his opinion he was unable to perform any occupation from which he might gain a livelihood.

Appellant produced no medical testimony on the subject. Its witness, a production foreman of the Oil Co., testified that respondent did "his work as well the last day I knew him as he did the first day I knew him". Another witness for appellant, superintendent of the Oil Co., testified that respondent's employment was terminated "because the job he was doing was over".

It is now claimed that in the light of the testimony, respondent's physical activities were such as to preclude any finding of total disability but on the contrary prove that he was not totally disabled on October 31, 1937, or on or prior to April 30, 1938; that the medical testimony of neither doctor establishes total disability; that the testimony of Dr. Harwood is entitled to little,

if any weight due to the fact that he had never examined respondent until the second day of the trial.

[1, 2] The question of the weight to be given evidence is for the jury and the trial court and not a court of review. Where there is a conflict between scientific testimony and testimony as to facts, the jury or trial court must determine their relative weight. Rolland v. Porterfield, 183 Cal. 466, 191 P. 913.

[3] Appellant recognizes the rule applied in this state and quotes from Hurwit v. Prudential Insurance Company of America, 45 Cal.App.2d 74, 113 P.2d 691, 695, citing Hill v. New York Life Insurance Co., 38 Cal.App.2d 627, 101 P.2d 752 (opinion by this court); and Wright v. Prudential Insurance Co., 27 Cal.App.2d 195, 80 P.2d 752, as follows:

"The authorities supporting this rule define total disability which prevents the insured from engaging in any occupation or performing any work for compensation as a disability which prevents his working with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his station and physical and mental capacity." (Citing cases.)

[4-6] It is contended, however, that the evidence does not bring respondent within this rule. The facts most favorable to respondent in the instant case, if believed by the jury, clearly bring them within the rule and permit a recovery under the total disability clause of the policy. The question whether respondent was totally disabled, under the rule and terms of the policy, is a question of fact for the jury to decide from all the circumstances surrounding the employment, and where the evidence is legally sufficient to sustain its conclusion thereon, it is beyond the power of the appellate court on appeal to interfere therewith. Sherman v. Continental Casualty Co., 103 Cal.App. 518, 284 P. 946; Ives v. Prudential Insurance Co., 12 Cal.App.2d 306, 308, 55 P.2d 273. The evidence being substantial and legally sufficient, the conclusion reached by the jury in this respect cannot be disturbed on appeal.

The second point presented is this: Appellant contends that under the provisions of the policy here in question the condition precedent to liability for disability benefits was the presentation to the insurer of proof of total and permanent disability while appellant was insured thereunder. Several pages of appellant's opening brief are devoted to a discussion of this point. In his reply brief, however, counsel now states: "Although we believe that this contention is amply supported by the authorities, we have been instructed by the Metropolitan Life Insurance Company to withdraw this defense inasmuch as it might be deemed to be a technical defense * * * and respectfully requests that the same be not considered by this court in its determination of this appeal." This point will therefore not receive our consideration.

The third and last point raised by appellant is this: It contends that the only cause of action set forth in respondent's amended complaint is an action for conspiracy to defraud him of certain claimed rights to coverage under the group policy; that respondent failed to prove fraud or a conspiracy as alleged; that since the gist of respondent's cause of action is the alleged fraud or conspiracy, it was an ex delicto action, and his failure to prove the fraud or conspiracy was fatal to his case and the trial court's action in submitting the case to the jury on an ex contractu theory was prejudicially erroneous.

[7] Respondent's amended complaint sets forth a cause of action on the policy against the appellant. It alleges the terms of the policy. A copy of the policy is attached thereto and made a part thereof. It alleges that respondent became totally and permanently disabled on or about October 31, 1937; that proof thereof was furnished to appellant; and that appellant refused to make payments of the benefits due. Respondent claimed that $2,587.50 was due and payable by the Insurance Co. Additional paragraphs were added endeavoring to show a conspiracy on the part of the oil companies and appellant to defraud respondent out of the benefits due. Judgment was sought against all defendants.

[8-11] It becomes immediately apparent that the two oil companies were dismissed from the action due to failure of proof of any conspiracy or fraud. This left a cause of action against appellant based upon the terms of the policy. The Insurance Co. owed respondent no duty other than the performance of the contract on its part. The allegations of conspiracy and fraud between the oil companies and appellant were material only to the question of the liability

of the oil companies. They added nothing to the cause of action against the Insurance Co. A conspiracy itself is not actionable but only that which is done under the conspiracy. Kittle Manufacturing Co. v. Davis, 8 Cal.App.2d 504, 47 P.2d 1089. Here the respondent stated a cause of action based on the contract of insurance in the first nine paragraphs of the complaint. A violation of such contract being the gist of the action, recovery thereon is authorized without proof of the conspiracy. More v. Finger, 128 Cal. 313, 60 P. 933.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.



47 Cal.App.2d 702

BECKER et al. v. COUNCIL OF CITY OF ALBANY et al.

Civ. 11826.

District Court of Appeal, First District, Division 1, California.

Nov. 10, 1941.

Rehearing Denied Dec. 10, 1941.

Hearing Denied Dec. 31, 1941.

1. Municipal corporations ⇐78

Under provision of charter of city of Albany that all general laws of state applicable to municipal corporations "now or hereafter enacted", and which were not in conflict with charter or with ordinances thereafter enacted, should be applicable to the city, the recall provisions of the election code were made part of city charter and were applicable to all elective officers of the city. St.1927, pp. 2325, 2326, §§ 38(a, c, f), 40; St. 1935, p. 2154, § 2.2020; St.1939, p. 302, § 11100 et seq.; Const. art. 11, § 8, and § 8½, subd. 2.

2. Municipal corporations ⇐211

The school system of the state is a matter of general concern and not a municipal affair, and, with respect to exercise of their duties and functions and as to matters involving the responsibilities, members of a board of education elected pursuant to charter provisions are governed by state laws, and to that extent are deemed to be officers of the school district.

3. Municipal corporations ⇐211

As to matters relating to election, tenure of office, compensation, and removal of members of city board of education, members are considered "municipal officers" and hence are subject to recall as elective municipal officers. St.1927, pp. 2325, 2326, §§ 38(a, c, f), 40; St.1935, p. 2154, § 2.2020; St.1939, p. 302, § 11100 et seq.; Const. art. 11, § 8, and § 8½, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Officer".

4. Municipal corporations ⇐211

On issue of right to recall members of city board of education, members of such board are not administrative officers of the city, since when elected they administer the affairs of a school district, and the school system is a state and not a municipal affair. St.1927, pp. 2317, 2325, 2326, §§ 8, 38(a, c, f), 40; St.1935, p. 2154, § 2.2020; St.1939, p. 302, § 11100 et seq.; Const. art. 11, § 8, and § 8½, subd. 2.

5. Municipal corporations ⇐78

To invoke the process of a recall election against the members of board of education who were elected under city charter and who became officers of school district, it was not essential that specific authority to that effect should be embodied in the charter, where recall provisions of the general law became part of the charter under a charter provision and were operative against the holder of any office elected by voters of city. St.1927, pp. 2317, 2325, 2326, §§ 8, 38(a, c, f), 40; St.1935, p. 2154, § 2.2020; St.1939, p. 302, § 11100 et seq.; Const. art. 11, § 8, and § 8½, subd. 2.

Proceeding in mandamus by Hugo E. Becker and others to compel the Council of the City of Albany and others to call a special election for the recall of three elective members of the board of education and one member of the city council serving ex officio as the fifth member of the board.

Peremptory writ ordered to be issued as prayed.

Johnson & Harmon, of San Francisco, for plaintiffs.

Joseph J. Yovino-Young, of Oakland, for respondents.

KNIGHT, Justice.

Petitioners instituted this proceeding in mandamus to compel the City Council of

the City of Albany to call a special election for the recall of three elective members of the board of education and one member of the City Council serving ex officio as the fifth member of said board. The fourth elective member of the board is not involved. The sufficiency of the recall petition is not challenged, either as to its form or the number or qualification of the signers; but the council refuses to call the election upon the ground that members of the board of education are not subject to recall. The position taken by the council is not sustainable.

The city was chartered under section 8 of article XI of the state Constitution; and section 8 of the charter provides that "The members of the Council [there being five, one of whom officiates as Mayor], City Clerk, City Treasurer, City Attorney, City Judge and Chief of Police shall be elected from the City at large, and shall hold office for four years and until their successors are elected and qualified", and that the other officers and employees enumerated in said section shall be appointed by the council. Section 8½ of article XI of the Constitution declares that it shall be competent in all charters framed under the authority of said section 8 of article XI to provide in addition to those provisions allowable by the Constitution and by the laws of the state: "2. For the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, for their qualifications, compensation and *removal,* and for the number which shall constitute any one of such boards" (italics ours); and pursuant to the constitutional authority thus granted section 38 of the charter of the city of Albany, which bears the title "Department of Education", contains the following provisions: "(a) The control of the School Department shall be vested in a Board of Education which shall consist of five members who shall receive no compensation. A member of the City Council selected by the vote of the majority of the members of the Council as in this Charter provided shall be one of the members thereof. The other four members of the Board shall be elected at large by the electors qualified to vote, at municipal elections in the same manner and time as the members of the Council. * * *" "(f) Any vacancy in the elected members of the Board shall be filled by the vote of a majority of the Board until the next general city election for municipal officers, when a member shall be elected to fill the unexpired term. * * *" "(c) The Board shall have the entire management of the public schools of the City and in addition to the powers and duties prescribed by the provisions of this Charter shall have all the powers that are now or may hereafter be conferred and discharge the duties imposed, by law upon City Boards of Education." Stats.1927, p. 2312. The school district over which said board exercises its management is known as Albany Unified School District. It is created under state law (sec. 2.2020, School Code, St.1935, p. 2154) and it is coterminous with and includes within its boundaries all of the city of Albany. The city charter contains no specific procedural provisions for the removal of any of the persons holding office by election by the voters of the city, but section 40 of said charter declares: "All general laws of the State applicable to municipal corporations, now or hereafter enacted, and which are not in conflict with the provisions of this Charter or with ordinances hereafter enacted, shall be applicable to the City * * *"; and the general law (sec. 11,100, Elections Code, St.1939, p. 302) provides that "The holder of any elective office of any city who has held office at least six months, and against whom no recall petition has been filed within six months, may be removed or recalled at any time by the voters by following the procedure set forth in this article".

[1] Respondents agree that by virtue of section 40 of the charter the recall provisions of article I, chapter 3, of the Elections Code entitled "Municipal Officers" (which includes section 11,100), are made part of the city charter and consequently are applicable to all elective officers of the city; but they contend that members of the board of education are not municipal officers; and it is upon that ground they refused to call the election. In support of this contention they argue that notwithstanding the city charter provides, as permitted by the Constitution, for the election of the members of said board, prescribes their qualifications and the manner in which and the times at which they shall be elected, fixes their term of office and deals with the matter of their compensation, the members of said board, when elected, become officers of the Albany Unified School District, and therefore, in the absence of any recall provisions in the School Code, are not subject to recall by the voters by whom they were elected.

[2, 3] It is well settled that the school system of the state is a matter of general concern and not a municipal affair, and that with respect to the exercise of their duties and functions and as to matters involving their responsibilities members of a board of education elected pursuant to charter provisions are governed by state laws, and to that extent are deemed to be officers of the school district. Ward v. San Diego School Dist., 203 Cal. 712, 265 P. 821; Mitchell v. Hartman, 112 Cal.App. 370, 297 P. 77; Kelso v. Board of Education, 42 Cal.App.2d 415, 109 P.2d 29. But it is equally well settled that as to those matters set forth in subdivision 2 of section 8½ of article XI of the Constitution, that is, matters relating to their election, tenure of office, compensation and removal, they shall be considered municipal officers (Stern v. City Council of Berkeley, 25 Cal.App. 685, 145 P. 167; Mitchell v. Hartman, supra; Mertz v. City of Los Angeles, 16 Cal.App. 2d 697, 61 P.2d 346; Ackerman v. Moody, 38 Cal.App. 461, 176 P. 696; Gerth v. Dominguez, 1 Cal.2d 239, 34 P.2d 135), and therefore as elective municipal officers are subject to recall. Ackerman v. Moody, supra; Gerth v. Dominguez, supra.

In the Ackerman case the charter of the city of San Diego provided for the election of a board of education in language almost identical with that here employed, and in holding that the members of the board were subject to recall as municipal officers the court said [38 Cal.App. 461, 176 P. 697]: "The provisions of the city charter leave no room for doubt that the charter recognizes members of the board of education as municipal officers. That the Constitution authorizes a city in its charter to create such municipal offices is also entirely clear and certain. The legislation of the state concerning school districts has been framed with an evident intent to harmonize with the power of cities to act as school districts and to be governed by boards of education"; and further on the court said: "While those decisions [referring to Wetmore v. City of Oakland, 99 Cal. 146, 33 P. 769, and Los Angeles City School Dist. v. Longden, 148 Cal. 380, 83 P. 246] recognize the principle that the school system of the state is a matter of general concern, and not a municipal affair, they also recognize the right of a municipality to maintain educational departments running current with the general laws of the state touching the common school system. For such purposes there is no reason why a city should be denied the right to have municipal officers to take charge of the educational activities of the city." In support of its determination the court cited and quoted from Stern v. City Council of Berkeley, supra, and in concluding its opinion said: "It is our opinion that the right to recall members of the board of education, equally with the right to elect such members, is vested in the city of San Diego." In the Gerth case the court held that members of the board of education of the city of Los Angeles were subject to the recall provisions of the city charter notwithstanding the boundaries of the school district over which the board exercised its management extended beyond the boundaries of the municipality; and that the voters residing in those portions of the district lying outside of the municipal boundaries were entitled to vote at such election. No sound reason has been advanced by respondents which in our judgment differentiates the present case from the two last mentioned.

[4, 5] Unlike the San Diego and Los Angeles charters, the Albany charter does not set forth a list of its "municipal officers". Section 8 thereof is entitled "Administrative Department", and then proceeds as follows: "The administrative officers of the City of Albany shall consist of" * * * etc. Included therein are those to be elected and appointed, and the members of the board of education are not enumerated therein. But the obvious reason for the omission is that as pointed out by the cases above cited, members of a city board of education are not administrative officers "of the City". When elected they administer the affairs of a school district; and the school system is a state and not a municipal affair. Nor in order to invoke the process of a recall election against the members of said board was it essential that specific authority to that effect be embodied in the charter. As already shown, the recall provisions of the general law became part of the charter by virtue of the adoption of section 40 of the charter, and are therefore operative against the holder of any office elected by the voters of the municipality.

For the reasons above stated, it is ordered that a peremptory writ of mandate issue herein as prayed for in the petition.

PETERS, P. J., and WARD, J., concurred.

47 Cal.App.2d 735

PEOPLE v. ALLEN.

Cr. 2200.

District Court of Appeal, First District, Division 1, California.

Nov. 13, 1941.

1. False pretenses ⇐49(1)

Evidence that defendant by false and fraudulent representations induced another to transfer to defendant two pieces of real property in return for stock of a foreign corporation and that the sale of the stock in California without a permit violated provisions of the Corporate Securities Act sustained conviction for grand theft. St.1917, p. 673.

2. Criminal law ⇐742(1)

In prosecution for grand theft and for violating the Corporate Securities Act, credibility of prosecuting witness and whether her testimony at trial was impeached by affidavit signed by her eight days before trial were questions for the jury. St.1917, p. 673.

3. Witnesses ⇐255(10)

In prosecution for grand theft and for violating the Corporate Securities Act, where 76 year old witness was confused and nervous and frequently, after she failed to testify on certain matters, deputy district attorney would refresh her recollection by first letting her read portions of her testimony given at preliminary hearing and then the former testimony was read aloud to her and she was asked if the former testimony refreshed her recollection and if the former testimony was true, and witness answered in affirmative method used in the direct examination of the witness was not objectionable since the testimony read by and to the witness was used solely to refresh her recollection

4. Witnesses ⇐255(9)

Where a witness fails to testify as to matters previously within his recollection, or gives evidence somewhat at variance with his former evidence, the party producing the witness may, with propriety, refresh the recollection of the witness by using transcript of his previous testimony.

5. False pretenses ⇐51

In prosecution for grand theft and for violation of Corporate Securities Act by inducing, through false and fraudulent representations, transfer to defendant of real property in return for stock of foreign corporation, the existence of a nebulous contract to sell the mining property of the corporation and estimates of witnesses regarding value of the mine were "questions of fact" for the jury. St.1917, p. 673.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

6. False pretenses ⇐49(4)

In prosecution for grand theft and for violation of Corporate Securities Act by inducing, through false and fraudulent representations, transfer to defendant of real property in return for stock of foreign mining corporation, evidence that a prior corporation had expended large sum of money in developing the mine and that the project had been abandoned justified jury's implied finding that the mine was worthless and the defendant knew that it was so. St.1917, p. 673.

7. Licenses ⇐42(4)

Evidence sustained conviction for violation of Corporate Securities Act by sale in California of stock of a foreign corporation without a permit. St.1917, p. 673.

8. Licenses ⇐18½

The bona fide owner of shares of corporate stock, where such owner is not engaged in the business of buying and selling stock, may sell stock without a permit required by the Corporate Securities Act. St.1917, p. 673.

9. Corporations ⇐1

In prosecution for violation of the Corporate Securities Act, evidence that defendant and two others owned all authorized stock of the corporation, that defendant and another completely dominated the corporation and that the defendant and the other had given corporation practically nothing in return for 375,000 shares of stock, justified finding that the corporation was the alter ego of defendant and the other and that the corporation was simply a means used by them to assist them in selling worthless stock to the public. St.1917, p. 673.

10. Licenses ⇐18½

Where a corporation is simply a means used to assist owner of stock in selling stock to the public, a sale of stock in California without a permit violates the Corporate Securities Act. St.1917, p. 673.

11. Witnesses ⇐200

In prosecution for violating the Corporate Securities Act, where attorney of de-

fendant was statutory agent of corporation and custodian of its books and as such custodian attorney had gained knowledge of their contents upon which his testimony was based and facts testified to by him were not acquired as result of relationship of attorney and client, facts regarding which attorney testified were not privileged. St.1917, p. 673.

12. Criminal law ⇐565

Where information charging grand theft and violation of Corporate Securities Act was filed three years and five months after offenses were committed in June of 1937, rebuttal evidence including testimony that defendant admitted being outside state from June of 1938 to August of 1939, was sufficient to sustain jury's finding that prosecution was not barred by three-year statute of limitations. St.1917, p. 673; Pen.Code, §§ 800, 802.

13. Criminal law ⇐406(5)

Witnesses ⇐380(2)

Where information charging grand theft and violation of the Corporate Securities Act was filed three years and five months after offenses were committed in June of 1937, testimony of an alleged participant in the offenses that he had a conversation with defendant who stated that he knew a complaint had been signed against him and that he was leaving the state until he could get money to "square" the charge constituted impeachment of defendant who testified that he was outside the state not to exceed 90 days and also constituted "admissions against interest" which, if believed, constituted direct evidence on issue whether prosecution was barred by three-year statute of limitations. St.1917, p. 673; Pen.Code, §§ 800, 802.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission Against Interest".

14. Criminal law ⇐684

In prosecution for grand theft and for violating the Corporate Securities Act, the mere fact that the prosecution should have introduced evidence on issue regarding whether the prosecution was barred by three-year statute of limitations in its case in chief but did not, and did not introduce such evidence except in rebuttal, in no way detracted from the evidence as direct evidence on the issue. St.1917, p. 673; Pen.Code, §§ 800, 802, 1093.

15. Criminal law ⇐145½

The Legislature, by the passage of various sections of the Penal Code relating to the statute of limitations, has declared it will not prosecute crimes after the period has run, and such provisions limit the power of the courts to proceed in such cases. Pen. Code, §§ 800, 802.

16. Criminal law ⇐881(1)

Where information charging grand theft and violation of the Corporate Securities Act specifically charged that defendant was outside the state during a sufficient period to bring the prosecution within the three-year limit and evidence amply supported allegation of information, general verdict finding defendant guilty as charged in the information implied a finding on that portion of the charge relating to the statute of limitations. St.1917, p. 673; Pen.Code, §§ 800, 802.

17. Criminal law ⇐145½

The fact that the statute of limitations is jurisdictional necessarily determines that a prosecution within the period specified is an essential element of the offense. Pen. Code, §§ 800, 802.

18. Criminal law ⇐290

A special plea is required in order that defense of once in jeopardy may be raised, and if a special plea is not made, such defense is "waived". Pen.Code, § 1016.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

19. Criminal law ⇐870

The code confers on the jury the power to bring in a special verdict under proper circumstances, but it makes the power optional with the jury. Pen.Code, § 1152.

20. Criminal law ⇐870

Where information for grand theft and for violating the Corporate Securities Act alleged that defendant was outside state during a sufficient period to bring prosecution within the three-year limit and evidence amply supported allegation of information and jury returned general verdict of guilty as charged and defendant did not request special verdict on issue relating to statute of limitations, failure of jury to bring in a special verdict on that issue did not require reversal. St.1917, p. 673; Pen.Code, §§ 800, 802, 1152.

21. Criminal law ⇐371(3), 372(9)

In prosecution for grand theft and for violating the Corporate Securities Act, where evidence showed that defendant by false and fraudulent representations induced another to transfer to defendant realty in return for stock of a foreign corporation without a permit to sell stock in California, testimony that defendant made false representations to other people similar to those made to prosecuting witness was admissible as tending to show a common plan, scheme and design to defraud in connection with the sale of worthless stock. St.1917, p. 673.

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

George O. Allen was convicted of grand theft and of violating the Corporate Securities Act, and he appeals.

Affirmed.

F. H. Bowers, of Roseville, for appellant.

Earl Warren, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Ralph E. Hoyt, Dist. Atty., and George C. Perkins and Arthur H. Sherry, Deputy Dist. Attys., all of Oakland, for respondent.

PETERS, Presiding Justice.

On November 28, 1940, appellant was charged by information with four felonies —two counts of grand theft and two counts of violating the corporate securities act. In the two grand theft counts it was charged that in June of 1937, on two separate dates, appellant unlawfully secured from one Eva C. Metz deeds to two parcels of real property located in Oakland, each parcel being of the approximate value of $2,500. In the two corporate security act counts it was charged that on separate dates in June of 1937 appellant sold to Eva C. Metz, without first securing a permit from the state corporation department, two certificates for 5,000 shares each of the capital stock of the Castle Rock Gold Mining Company, an Arizona corporation, which shares constituted securities of appellant's own issue. In addition to alleging that each of the offenses was committed in Alameda county, each count charged that appellant "fled from the State of California to the State of Pennsylvania and was absent from and outside the boundaries and jurisdiction of the State of California continuously from the 1st day of June, 1938, to the 4th day of August, 1939". The jury found appellant guilty on each count. From the judgments of conviction, and from the court's orders denying his motions in arrest of judgment and for a new trial, appellant prosecutes this appeal.

[1] Appellant first challenges the sufficiency of the evidence to sustain his conviction on each count. A reading of the record demonstrates that this contention is without merit. The evidence produced by the prosecution shows that appellant, by false and fraudulent representations, induced Eva C. Metz to transfer to him two pieces of real property in return for stock of the Arizona corporation, and that, under the circumstances, the sale of that stock in California without a permit violated the provisions of the corporate securities act, St. 1917, p. 673.

The record shows the following: Andrew Moutier and his wife Iva owned a number of mining claims in Arizona totaling about 180 acres. These claims had been formerly owned by an Arizona corporation in which the Moutiers were interested. That corporation had expended about $75,000 in an unsuccessful attempt to develop the property. This corporation constructed some 600 feet of tunnel, 100 feet of shaft, purchased some machinery and removed some ore. No ore, however, had gone to the smelter. In 1911 the corporation had been dissolved and the mine abandoned. In 1920 the Moutiers purchased the claims at a tax sale. The claims lay dormant after 1911. In May of 1936 the Moutiers entered into a written agreement with appellant and his associate Dibert. By the terms of this agreement the Moutiers transferred the claims to Allen and Dibert with the understanding that these two men, at their own cost and expense, would organize the Castle Rock Gold Mining Company of Arizona, and would transfer the claims to that corporation. It was agreed that Moutier was to be president of the corporation, and that he and his wife were to receive 125,000 shares of stock for their claims, 25,000 shares of which they agreed to sell to Allen and Dibert at 25 cents a share, or to permit Allen and Dibert to sell such shares for them at 25 cents a share. The written agreement did not specify the total number of shares to be issued, but Moutier testified that it was agreed that it should have a total of 500,000 shares of which 125,000 were to go to him and his wife, 100,000

shares each to Allen and Dibert for their services in financing and operating the mine, and 175,000 shares to be sold to furnish capital for the operation of the mine. Allen and Dibert told the Moutiers that this stock would have to be sold in the East because the blue sky laws of California were "too tough".

Pursuant to this agreement, the corporation was organized in Arizona with Moutier as president, and appellant as secretary. These two, together with Dibert, constituted the board of directors. On December 12, 1936, the board held its only meeting. At that meeting the board authorized the issuance of 75,000 shares to Andrew Moutier and 25,000 shares to Iva his wife. The balance of 25,000 shares coming to the Moutiers was not then issued because of the side agreement that Allen and Dibert would sell those shares for the Moutiers at 25 cents a share. Allen testified that he and Dibert received 375,000 shares, and that 125,000 shares were issued to Moutier and his wife. The record is clear that Allen issued to himself half of the 375,000 shares. These figures are important because they support the inference that the plan from the first was a stock-selling scheme, and that there never was an intent to finance the operation of the mine. Obviously, with all of the stock of the company in the hands of stockholders, none of the money received from the sale of the stock would be available to the corporation. The corporation had no stock in its treasury—its sole asset was the claims.

After the organization meeting Dibert and Allen came to California. In February of 1937 they were both brought to the district attorney's office in Alameda county. At that time they had in their possession 330,000 shares of the capital stock of the company. These shares were in various units, and some were in Allen's name, some in Dibert's, and some in both their names as joint tenants. At this time Dibert and appellant were warned that the stock could not be sold in California without a permit. Allen assured the deputy that he knew the stock could not be sold without a permit, and that he had no intention of selling the stock in California.

Appellant testified that he paid to Moutier some $400 for back taxes on the mine property, and that he and Dibert paid attorney Stack $2,000 for his fees and expenses in connection with the incorporation. The attorney fixed the sum paid him at $1,000. Thus, at most, Dibert and Allen invested $2,400 in the corporation, for which they received 375,000 shares of its stock. The Moutiers received 125,000 shares for the claims. The only asset of the corporation was the claims. As already pointed out, it had no stock left that could be sold to finance operations.

After the corporation was created Allen and Dibert apparently attempted to interest various people in buying stock or in buying some of the mining claims. Some time prior to June of 1937 appellant met Walter Edborg, nephew of Eva C. Metz, at Santa Monica. Edborg had no money to invest but he told Allen about his aunt, Eva C. Metz, who, he thought, might have some money to invest. Edborg, Allen and Dibert came to Oakland early in June, 1937, and Edborg introducted them to his aunt. Allen tried to interest her in several propositions, among them being the purchase of some stock in the Castle Rock Gold Mining Company. Allen visited Mrs. Metz at her home on several occasions, sometimes accompanied by Dibert. Mrs. Metz was then seventy-three years of age. Allen took her out automobile riding and to various restaurants. He represented that the mine was very rich; that Dibert was a mining engineer; that he was a lawyer; that someone in the East had offered a million dollars for the mine; that it was worth more; that ore had already been "blocked out" (i. e., exposed on three sides) at the mine; that he knew a man in Illinois who owned some stock; that he, Allen, was authorized to sell it for $2,500. All these representations were false. When appellant discovered that Mrs. Metz had no available cash he told her he was authorized to accept a piece of real property for the stock. Mrs. Metz, in reliance on these representations, agreed to exchange her Lawton Street property in Oakland for some of the stock. By a deed dated June 7, 1937, she deeded this property to Allen. This deed was executed in Los Angeles where she had gone with Allen at his request. Thereafter, through the mail, she received certificate No. 46, dated June 18, 1937, made out in her name for 5,000 shares of stock in the Castle Rock Gold Mining Company. This certificate had been mailed from Prescott, Arizona, and was signed by Allen as secretary and Dibert as president of the company.

On June 18, 1937, Mrs. Metz received a telegram from Prescott, Arizona, signed by "Kellington Inc." offering to buy her

5,000 shares for 60 cents a share, and giving a box number at Prescott, Arizona, as the sender's address. The box number was the post office box of Leo Stack, attorney for the Castle Rock Gold Mining Company and for Allen and Dibert. Mrs. Metz replied to the telegram by letter which Stack, under date of June 28, 1937, returned to her unopened. Admittedly, the telegram was sent by appellant, Kellington being one of his many aliases. Admittedly, there was no such company by that name. Appellant testified that he had sent the telegram while under the influence of liquor.

After Mrs. Metz had received the telegram Allen again visited her. She told him about the telegram and expressed the thought that it was "phoney". He took the telegram and put it in his pocket but told her Kellington, Inc., was a very rich company.

Mrs. Metz purchased from Allen another block of 5,000 shares by transferring to Allen her Calaveras Street property. She received certificate No. 48 of the Castle Rock Gold Mining Company. This certificate is dated June 28, 1937, and was unsigned by the officers of the company. It was issued by Stack, the custodian of the books and records of the company, and mailed to Mrs. Metz with the statement that Allen and Dibert would no doubt supply the omissions in the certificate. Allen testified, however, as did Stack, that the intention was to issue a valid certificate. Stack issued certificate No. 48 to Mrs. Metz at the request of Allen and upon Allen returning to him a prior certificate for 5,000 shares issued in the name of Helen Madison which had been endorsed over to Allen. The endorsement of Helen Madison's name on this certificate was admittedly made by Allen. The inference is clear that no such person as Helen Madison existed, and that the certificate had been made in her name to give the impression that there were other stockholders in the company.

In transferring the Calaveras Street property to Allen for the stock Allen had Mrs. Metz deed the real property to a dummy by the name of Hutchinson. Hutchinson then deeded the property to Allen. The deed to Hutchinson is dated June 5, 1937, but the acknowledgment by Mrs. Metz is dated June 25, 1937.

Mrs. Metz testified the properties transferred to Allen were each worth $2,500. Immediately after receiving the deeds to these properties both parcels were quickly sold by Allen, he receiving either $1,500 or $1,600 (the record not being entirely clear) for one parcel, and $1,250 for the other.

Various witnesses called by the prosecution testified as to similar representations made by Allen to them. This testimony clearly showed a common plan and scheme to defraud on the part of Allen.

There can be no doubt that the evidence demonstrates that Allen made many false and fraudulent representations to Mrs. Metz and that the deeds were transferred to him in reliance on these false and fraudulent representations. That evidence clearly supports counts 1 and 2 in the information. Appellant makes much of the fact that Mrs. Metz at one place in her testimony indicated that she had already agreed to transfer the Calaveras Street property before she received the bogus telegram. That telegram was sent June 18, 1937, and, although the deed is dated June 5, 1937, it was not acknowledged and apparently not delivered until June 25, 1937. Moreover, independently of that telegram, the other false and fraudulent representations heretofore set forth were made prior to June 5, 1937, and they alone are sufficient to sustain the conviction.

[2] Appellant attacks Mrs. Metz's testimony on several grounds. In the first place, the defense produced an affidavit signed by Mrs. Metz on February 23, 1941, some eight days before the trial. This affidavit recites that she signed the complaints against Allen while acting under the threats of a Mr. Easterday, who apparently had also defrauded her; that investigators of the district attorney's office had been frightening her; that they told her she must testify against Allen; that the deputy district attorney told her what she must say in court; that she was so mentally upset at the preliminary hearing, and so in fear of her life, that her testimony was not entirely truthful; that she did not rely on the telegram in purchasing the stock; that she has never believed that Allen intended to cheat her. The circumstances under which this affidavit were secured speak for themselves. On the morning of February 23, 1941, a Mr. Jackson appeared at Mrs. Metz's home. He represented that his sole purpose in coming to see her was to assist her in getting back her money. He took her to church and that afternoon took her to dinner in San Francisco and later for an automobile ride. Later in the evening

he took her to a notary public in San Francisco and got her to sign the alleged affidavit, which she testified she never read. He told her that the only way to get her money back was to sign the paper. This affidavit found its way into the hands of the defense. There was evidence that Jackson had been seen with Allen several days before the trial. The defense made no attempt to produce Jackson as a witness. Mrs. Metz testified as to the circumstances under which the affidavit was secured, and went over it sentence by sentence and testified as to what was true and what was false. Her credibility, and whether her testimony at the trial was impeached by the affidavit, were obviously questions for the jury.

[3, 4] Appellant also objects to the method used by the deputy district attorney in the direct examination of Mrs. Metz. The witness was seventy-six years of age at the time of trial and obviously was confused and nervous. Frequently, after she had failed to testify on certain matters, the deputy district attorney would refresh her recollection by first letting her read portions of her testimony given at the preliminary hearing of Dibert several years before, and her testimony given at the preliminary hearing of Allen. After reading this former testimony, the former testimony was read aloud to her and she was asked if that former testimony refreshed her recollection and if that former testimony was true. The witness usually answered that her former testimony did refresh her recollection and that it was true. There can be no doubt that the testimony thus read by, and to, the witness was used solely to refresh her recollection, and that as a witness in this case she testified as to the truth of these statements. This serves to distinguish such cases as People v. Creeks, 141 Cal. 529, 75 P. 101; In re Estate of Packer, 164 Cal. 525, 129 P. 778; People v. Allen, 37 Cal.App. 180, 174 P. 374, where the prior memorandum or testimony was sought to be used as evidence at the subsequent trial as to the truth of the facts there stated, and not solely to refresh the recollection of the witness. The law is clear in this state that where a witness called by a party fails to testify as to matters previously within his recollection, or gives evidence somewhat at variance with his former evidence, the party producing the witness may, with propriety, refresh the recollection of the witness by using the transcript of his previous testimony. People v. Durrant, 116 Cal. 179, 48 P. 75; People v. Duncan, 8 Cal.App. 186, 96 P. 414; People v. Izlar, 8 Cal.App. 600, 97 P. 685; People v. Selby, 198 Cal. 426, 245 P. 426.

[5, 6] Appellant urges that the alleged false and fraudulent representations were not in fact false and fraudulent. He claims the mine was not worthless and points out that he actually had an offer to buy it for a large sum of money. Actually this was an offer to buy the mine and to pay for it entirely out of royalties. The deal was never consummated. The evidence shows that each material representation made by appellant to Mrs. Metz was false and known by appellant to be false, and that such representations were relied upon by her in purchasing the stock. The existence of the nebulous contract to sell, and the estimates of the witnesses Moutier and Mitchell as to the value of the mine, were questions of fact for the jury. The jury knew that the old corporation had expended a large sum of money in developing the mine, and that the project was abandoned. The mine remained abandoned from 1911 to the date of trial. Under these circumstances, the jury was amply justified in its implied finding that the mine was worthless and that Allen knew that this was so.

[7-10] There can be no doubt that the evidence also supports the conviction on the third and fourth counts relating to the sale of stock in this state without a permit in violation of the corporate securities act. Appellant urges that there is no evidence that the stock was his individual issue, or that he was the underwriter thereof, and urges that an owner may sell his own stock without a permit. Such cases as People v. Pace, 73 Cal.App. 548, 238 P. 1089; People v. Lesser, 123 Cal.App. 489, 11 P.2d 668; Ex parte Quarg, 149 Cal. 79, 84 P. 766, 5 L.R.A.,N.S., 183, 117 Am.St.Rep. 115, 9 Ann.Cas. 747, and Pollak v. Staunton, 210 Cal. 656, 293 P. 26, are relied upon to support this contention. Those cases undoubtedly permit the bona fide owner of shares of corporate stock, where such owner is not engaged in the business of buying and selling stock, to sell such stock without a permit. But those cases have no application here. In the present case the facts justify the legitimate inference that the corporate mechanism was used as the alter ego of Allen and Dibert for the purpose of defrauding purchasers of the stock. The

evidence shows that appellant Dibert and the Moutiers owned all the authorized stock of the corporation. Moutier took no part in the affairs of the company, except to participate in its organization. Shortly thereafter he resigned as president and director. Allen and Dibert completely dominated and controlled the corporation. They had given the corporation practically nothing in return for 375,000 shares of stock. Originally it had been intended that 175,000 shares should be sold for the purpose of financing the corporation, but Allen and Dibert had those shares issued to themselves so that there was no stock at all available to produce funds to finance the corporation. Under these circumstances the jury was warranted in finding that the corporation was the alter ego of Allen and Dibert, who dominated and controlled it. The jury was justified in inferring that the corporation was simply a means used by Allen and Dibert to assist them in selling this worthless stock to the public. There are many cases holding that under such circumstances a sale of the stock in this state without a permit violates the corporate securities act. People v. Murphy, 17 Cal.App.2d 575, 62 P.2d 592; People v. Smith, 111 Cal.App. 177, 295 P. 105; People v. Ratliff, 131 Cal.App. 763, 22 P.2d 245; People v. Craven, 219 Cal. 522, 27 P.2d 906.

[11] Appellant also urges that it was error to permit Leo Stack, attorney for Allen and for the corporation, to testify over appellant's objections as to certain facts which appellant contends were privileged. Appellant fails to set forth by reference to the transcript the facts to which he now takes exception. Nevertheless, we have read the record, including Stack's testimony. He was the statutory agent of the corporation and the custodian of its books and records, as well as being Allen's and Dibert's attorney. As such custodian Stack had access to the books and so gained the knowledge of their contents upon which his testimony was based. The facts testified to by him were not acquired as a result of the relationship of attorney and client. People v. Eiseman, 78 Cal.App. 223, 248 P. 716.

[12-14] Appellant raises several contentions in reference to the statute of limitations. The offenses charged in the information were committed in June of 1937. The information was filed on November 28, 1940, three years and five months after the offenses were committed. The statute of limitations on the offenses charged is three years (§ 800, Pen.Code). Under § 802 of that code, however, "no time during which the defendant is not an inhabitant of, or usually resident within this state, is part of the limitation". The information charged that after the commission of the offenses set forth therein the defendant "fled from the State of California to the State of Pennsylvania and was absent from and outside the boundaries and jurisdiction of the State of California continuously from the 1st day of June, 1938, to the 4th day of August, 1939". The prosecution, in its case in chief, failed to introduce any substantial evidence on this issue. The defendant, as a witness on his own behalf, testified that, although he had made several trips outside the state, the total time he was outside the state during the period in question did not exceed ninety days; that at all times he lived and maintained a residence in Los Angeles at a designated bungalow court operated by his mother. His sister and brother-in-law, residents of San Francisco offered some slight corroboration. Appellant failed to produce his mother as a witness, or to explain her absence. Appellant denied, or could not remember, a conversation had with the deputy district attorney and the arresting officers in which he admitted having fled the state, and in which he stated that he had lived outside the state during the period charged in the information. A stenographer was produced by the prosecution in rebuttal who testified that she took down the conversation in shorthand, and that in that conversation appellant admitted being outside the state from June of 1938 to August of 1939, and stated in detail where he had been during this period. The arresting officer testified as to a conversation had with appellant immediately after his arrest in which appellant stated he had been out of the state during the period in question. Dibert testified that just before he was arrested in 1938 he had a conversation with appellant in Los Angeles in which appellant stated he knew a complaint had been signed against him and that the police were looking for him, and that he was going to get out of the state until he could get some money to "square" the charge. Obviously, this evidence not only constituted impeachment of appellant, but also constituted admissions against interest, which, if believed by the jury, as they apparently were, constituted direct evidence on the issue. The

mere fact that the prosecution should have introduced evidence on the issue in its case in chief but did not, and did not introduce such evidence except in rebuttal, in no way detracts from the evidence as direct evidence on the issue. (§ 1093, Pen.Code; 8 Cal.Jur., p. 237, § 305.)

[15, 16] Appellant also urges that the jury should have been instructed to make a special finding on this issue, and that where the information, as here, shows on its face that it is barred unless the allegation that the accused was out of the state for a designated period is supported, a general verdict of guilt is a nullity unless supported by a special verdict and finding in reference to the statute of limitations. This contention is without merit. While it is true that the legislature, by the passage of the various sections of the Penal Code relating to the statute of limitations, has declared it will not prosecute crimes after the period has run, and that such provisions limit the power of the courts to proceed in such cases (People v. McGee, 1 Cal.2d 611, 36 P.2d 378), it is also true that in this case the information specifically charged that appellant was outside the state during a sufficient period to bring the prosecution within the three-year limit as defined in section 802 of the Penal Code, and that the evidence amply supports this allegation of the information. The verdicts returned by the jury found the appellant guilty of the specific charge contained in each count, and each verdict contained the language "guilty * * * as charged in the * * * count [designating it] of the information". Each verdict was a general verdict. A general verdict of this nature implies a finding on all facts necessary to a conviction of the charge contained in the information. People v. Jochinsky, 106 Cal. 638, 39 P. 1077; People v. Du Fault, 1 Cal.App.2d 105, 36 P.2d 196; People v. Flohr, 30 Cal. App.2d 576, 86 P.2d 862. This included that portion of the charge relating to the statute of limitations.

[17, 18] The fact that the statute of limitations is jurisdictional necessarily determines that a prosecution within the period specified is an essential element of the offense. Thus, the problem is essentially different from the defense of once in jeopardy. The Penal Code specifically requires a special plea in order that this defense may be raised (Penal Code, § 1016). If a special plea is not made, this defense is waived. Rebstock v. Superior Court, 146 Cal. 308, 80 P. 65; People v. Solani, 6 Cal.App. 103, 91 P. 654. But there is no provision of the Penal Code requiring or permitting a special plea in reference to the statute of limitations. A general verdict of guilty as charged, therefore, necessarily includes a finding on this element as it does in reference to the other elements of the offense.

[19, 20] This does not mean that it would have been improper for the jury to have brought in a special verdict on this issue. The code confers on the jury the power to bring in a special verdict under the proper circumstances (Pen.Code, § 1152), but that section makes this power optional with the jury. People v. Smith, 215 Cal. 749, 12 P.2d 945. There was no request by defendant for a special verdict on this issue.

[21] Objection is made that the trial court improperly admitted evidence that appellant had made similar false representations to other people as those made to Mrs. Metz. The testimony of these various witnesses was admissible as tending to show a common plan, scheme and design to defraud in connection with the sale of worthless stock. People v. Morani, 196 Cal. 154, 236 P. 135; People v. Eppstein, 108 Cal.App. 72, 290 P. 1054.

The other contentions of appellant dealing with objections to the instructions given and refused, and also dealing with alleged newly-discovered evidence, are so unsubstantial as not to require specific discussion. All such objections have been considered and found to be without merit.

The judgments and orders appealed from are, and each is, affirmed.

KNIGHT, and WARD, JJ., concurred.

47 Cal.App.2d 611

SESSIONS v. SOUTHERN CALIFORNIA EDISON CO.

Civ. 13296.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1941.

1. Frauds, statute of ⇐49

The only oral contracts which are within provisions of statute of frauds making an oral contract void if by its terms it is not to be performed within a year from the making thereof are those which cannot be performed within a year of their making. Civ. Code, § 1624.

2. Frauds, statute of ⇐44(1)

The basic test for determining whether an oral contract is within the statute of frauds lies wholly with the terms of contract. Civ.Code, § 1624.

3. Appeal and error ⇐1010(1)

Ordinarily, the District Court of Appeal will turn to findings and accept them as measure of terms of an oral contract, except to extent that findings are not sustained by evidence.

4. Frauds, statute of ⇐44(1)

Whether an employer's oral promise was to place an employee on a retirement or inactive basis for six years, until employee became 60 years of age, and thereafter to pay employee a monthly pension for life, or, as claimed by employee, to pay employee a certain sum until he became of pension age and then to pay him a pension, the contract for pension was within the statute of frauds. Civ.Code, § 1624.

5. Frauds, statute of ⇐50(2)

Where an employer's oral contract to give an employee a pension was otherwise within the statute of frauds, the contract could not be removed from statute under the principle that a promise of performance during life of a specified person is not within statute, as death of person may occur within the year. Civ.Code, § 1624.

6. Estoppel ⇐85

The doctrine of "promissory estoppel" is distinct from the ordinary "equitable estoppel", in that the representation is promissory, not a misstatement of an existing fact.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel" and "Promissory Estoppel".

7. Estoppel ⇐87

To bring a case within rule of "promissory estoppel", it is essential that promisee could and would have performed the condition, or would not have allowed the defense to arise, had it not been for promisor's waiver.

8. Master and servant ⇐78

Where evidence showed that employee, although ill, would have continued in employment for six more years, thereby becoming entitled to a pension under a pension plan effective as to employees employed by employer continuously for 20 years prior to attaining 60 years of age but for employee's reliance upon employer's oral promise that if employee retired he would not jeopardize his right to qualify for a pension, under doctrine of "promissory estoppel" the employer would have been barred at expiration of 6-year period from claiming that employee was not entitled to pension, notwithstanding that oral agreement was within statute of frauds, if pension plan had remained in effect. Civ.Code, § 1624.

9. Master and servant ⇐78

Evidence warranted conclusion that employer had waived its right, if any, to object that a retired employee who, under doctrine of promissory estoppel, would have been entitled to a pension at age of 60 if a pension plan in operation when employee retired had remained in effect, was not entitled to a pension under a subsequently adopted retirement plan.

10. Master and servant ⇐78

Evidence warranted conclusion that employer did not intend, by abolition of a pension plan and adoption of a retirement plan, to eliminate equitable contingent rights acquired by employees and former employees under the pension plan, but rather to amend and supersede such plan preserving, so far as was consonant with new retirement plan, all contingent rights under pension plan.

11. Master and servant ⇐78

Evidence did not support finding that employee did not actually retire from active service on a certain date, as regards employee's right to recover pension from former employer.

12. Master and servant ⇐78

Where employee who had been in defendant's employment for 20 years, and who retired in reliance upon defendant's oral promise that employee's right to qualify for a pension in six years, at age of 60, would not be jeopardized thereby, was granted a pension by committee charged with determination of questions under a retirement plan in effect when pension was granted, the pension should have been computed on basis of 20 years of service, rather than on basis of 26 years of service, as urged by employee, or of 24 years of service as inadvertently fixed by committee.

13. Master and servant ⇐78

In absence of a contract, an employer is not required to enlarge the pension payments of all retired pensioners in a class merely because employer does so for some one or more out of its own treasury.

14. Master and servant ⇐78

In determining whether a retired, pensioned employee was entitled to an increase in pension payments under a resolution of employer's board of directors providing for increased pensions for certain employees, resolution was to be read as a whole and particular effect given to specific language bearing on employee's claim rather than general language.

15. Master and servant ⇐78

A retired, pensioned employee whose name was omitted from list of pensioners entitled to receive increased pension payments under resolution of employer's board of directors providing for increased pensions for employees who would have been entitled to higher pensions if an abolished pension plan had been in effect on their retirement, could not maintain an action against employer to compel payments to be made to employee on the higher basis.

Appeals from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Henry N. Sessions against the Southern California Edison Company respecting plaintiff's right to a pension. From an unsatisfactory judgment, plaintiff and defendant appeal.

Reversed with instructions.

Robert T. Linney and Hampton Hutton, both of Los Angeles, for plaintiff.

Gibson, Dunn & Crutcher and Frederic Sturdy, all of Los Angeles, for defendant.

HANSON, Justice pro tem.

This case presents appeals taken by both the plaintiff and defendant from a declaratory judgment, and so we shall refer to the parties here as they were referred to below.

This is a controversy between a former employee and a former employer as to what, if any, pension the former employee is entitled to receive from the former employer. The case is unique in that for several years both parties assumed that the employee was not only entitled to a pension but the pension was paid by the employer in an amount that both parties thought was correctly due. It was not until the employer promulgated a new pension plan that the former employee became dissatisfied and discord arose between them. The case is a reminder of the fable of the dog with a bone in his mouth who, in crossing a stream, suddenly saw his own reflection in the brook beneath and, annoyed at what he thought was a larger bone in the mouth of another dog, snapped for it, dropped his own bone and so lost all. While it is no doubt unfortunate for the plaintiff, it appears that by his suit he has only shown that he is entitled to a lesser amount than he had before.

The appeal of the plaintiff presents a single question, and that is whether the court should have found him entitled to a pension under the defendant's so-called 1938 plan. The appeal of the defendant is from the finding that plaintiff is entitled to a pension of $126.34 per month based on the retirement plan of 1934, its contention being that no pension is payable or, in the alternative, that it should only be in the sum of $102.42 per month.

The facts which give rise to this controversy are these: On June 22, 1919, plaintiff entered the employ of defendant on a month to month basis without duration as to time. In 1919 the defendant company voluntarily promulgated, in writing, a pension plan or system (herein called the 1919 plan) applicable to all of its then or future employees but effective as to any employee only when such employee had attained the age of sixty and had been employed by the company continuously for twenty years prior to the attainment of such age. The plan was signed by the company and its

then employees, among them being the plaintiff. It is conceded that while the plan provided it might be canceled at any time without liability to any employee who had not achieved a pension status, it was not an offer of a gratuity by the company to the employees. The plan expressly recited that "said pensions are not to be paid as gratuities but as compensation on account of compliance with the conditions herein set out upon which said pensions are to be paid". The plan contemplated that all pensions should be paid by the company from its own funds, without any financial contribution by the employees by way of deduction of wages or otherwise.

On June 10, 1930, plaintiff had been employed by the company continuously for a period of twenty years. Accordingly on that date he had qualified as to one of the two conditions for a pension under the plan, i. e., twenty years of continuous employment by the company, but he could not then meet the other condition precedent for a pension, and that was age, as he was then only fifty-four. Shortly prior to July 1, 1930, he ascertained that he had a bad heart condition which made him fearful of his ability to serve the company on full time for the next six years so that he might achieve his pension if the company was disposed to continue him in its service. He had no reason to anticipate that it did not or would not desire his service and the record suggests none. He had been an efficient and loyal employee of the company and it in turn fully measured up in its loyalty to him. Because of the dangerous illness which was then upon him, plaintiff sought the good offices of the general manager of his company, under whom he had served for twenty years, to permit him to serve the company on half time at half pay. He was then drawing a salary of approximately $500 per month. As the request was of a character which should have been submitted to the assistant manager, Mr. Lewis, plaintiff was referred to him by the general manager. The facts of the conversation necessary to be stated are these: The plaintiff told Mr. Lewis that he had a bad heart; that he would be unable to work more than half time; and he proposed that his employment be changed from a full time job on full salary to a half time job on half salary. Mr. Lewis stated that half time workers were not satisfactory and rejected the proposal, but countered by suggesting that plaintiff retire and he would be treated as a special case and be relieved of *all* his duties, and that the arrangement would not jeopardize his right to qualify for a pension. There was no discussion as to the amount of money plaintiff would receive if he retired. Plaintiff accepted the proposal and has not since that date rendered any personal services to the company. Plaintiff testified that his understanding was that "my pension would be given me when I was of age", i. e., had attained sixty years of age.

Beginning with July 1, 1930, until July 1, 1936, the defendant mailed the plaintiff each month a check (charged against its payroll account as a matter of bookkeeping) in the sum of $175, except that beginning with October 1, 1931, when the defendant slashed by 9 per cent the compensation of all employees not on pension, he received $159.25 per month until July 1, 1936. Since July 1, 1936, plaintiff has received a monthly pension check in the sum of $126.34. From July 1, 1930, until the date this action was filed in the lower court on April 27, 1939, the plaintiff received a total of $16,124.35 from the defendant company.

Pursuant to a right reserved to it the company in 1934 abolished the 1919 plan except as to employees who prior to July 1, 1934, had fully attained the right to receive pensions or disability benefits under the plan. Thereupon the company promulgated its so-called retirement plan of 1934. Unlike the 1919 plan, the 1934 plan provided for a retirement income based on contributions made by an employee and an annuity to be provided by the company. By the plan a pension committee, consisting of five employees selected by the company, was given authority, subject to the approval of the board of directors of the company, to determine conclusively all questions arising in the administration and application of the plan. Only such employees as were employed on a full time basis and who received a stated regular compensation for their services were eligible under the plan. Part time employees and those receiving a pension, retainer or fee were expressly excluded. Continuous service was defined as meaning continuous employment, with a proviso that the continuity of the term of service should be deemed not broken by absence from service without pay due to illness or disability of the employee which prevented him from following his regular work with the company. "Any absence from service

without pay for any reason other than those mentioned occurring previous to the date of this plan shall be considered a break in the continuity of service unless in individual cases, upon recommendation of the Pension Committee, the Board of Directors shall determine otherwise. No absence from service with pay shall be deemed a break in the continuity of service."

A subsequent pension plan, promulgated in 1938, will be outlined, so far as that is necessary, when we come to the discussion of it later in this opinion.

[1-4] The parties devote the major portion of their briefs to a discussion as to whether the oral agreement is or is not within the statute of frauds, and so we shall first discuss the applicability of the statute. Defendant company contends that the oral agreement alleged to have been made in 1930 between plaintiff and its assistant manager is invalid and unenforceable against it, as its promise made through Lewis, if it be bound thereby, is a promise which falls within that particular category of the statute of frauds which requires a writing where the promise "by its terms is not to be performed within a year from the making thereof". Civ.Code, § 1624. In view of the contention it is important to observe that the only oral contracts of the character here involved which are within the statute are those which cannot be performed within a year of their making. Hollywood Motion Picture Equipment Co. v. Furer, 16 Cal.2d 184, 105 P.2d 299; Williston on Contracts, Rev.Ed., sec. 495; Restat., Contracts, sec. 198. The basic test for determining whether the oral contract is within or without the statute lies wholly with the terms of the oral contract. Brock v. Button, 187 Wash. 27, 59 P.2d 761. To ascertain the terms of the oral contract in the instant case we would normally turn to the findings and accept them as the measure of the terms except to the extent the findings were not sustained by the evidence. Here, however, it will suffice to point out that whether we accept defendant's or plaintiff's statement as to the terms of the contract it is obvious that both show the contract to be within the statute. As defendant states its promise, it was to place plaintiff on a retirement or inactive basis until he became sixty (that is, for a period of six years), and *thereafter* to pay him a monthly pension for life. As plaintiff states defendant's promise, it was to pay him a certain sum until he became of pension age (*i. e.,* for six years) and *then* to pay him a pension.

[5] Plaintiff argues that under the contract as he states it, it does not fall within the statute. To sustain his position he relies on the principle that a promise of performance during the life of a specified person is not within the statute, as the death of the person may occur within the year. The difficulty with the plaintiff's position here, and throughout his brief, is that he fails to observe the distinction between performing a contract and being discharged from liability under it. See Williston on Contracts, Rev.Ed., sec. 496. Plaintiff leans heavily on Weatherford Mineral Wells & N. W. R. Co. v. Wood, 88 Tex. 191, 30 S.W. 859, 28 L.R.A. 526, which held that a promise to give an annual pass for ten years was not within the statute, as the recipient might die within the year and so the promise might be fulfilled within the year. It is enough to say of that case that it has not been followed outside its jurisdiction and it has been criticized. 2 Williston on Contracts, sec. 496, note 2.

It is self-evident that the contract in this case was within the statute of frauds. The trial court's fourth conclusion to the contrary was erroneous.

Retirement plan of 1934: At the time of the oral conversation in 1930 between plaintiff and Mr. Lewis the only pension plan which was outstanding and discussed by the parties was the 1919 plan. That plan had no provision, in terms, permitting part time employment to be calculated as full time or part time as to either its twenty-years or sixty-years requirements. There is nothing in the record to indicate that either the plaintiff or Mr. Lewis recalled or knew that the plan was deficient in the particular just mentioned. As plaintiff makes no claim that the defendant could not after July 1, 1930, abrogate the 1919 plan in its entirety, so far as he was concerned, we need not further consider it. It is enough to say here that the only promise made to plaintiff was that his retirement in 1930 on pay should not jeopardize his right to claim a pension in 1936. There was no agreement that he would receive a special pension if the pension plan of 1919 was not then in effect, nor any promise that he might have a pension under any other plan which might then be in effect.

It is evident from a reading of the retirement plan of 1934 that plaintiff not only was ineligible to a pension under that plan but, what is more, he did nothing in an attempt to get under the plan. This may have been due to the fact that he simply assumed the plan covered his case. The 1934 plan did, however, provide that the pension committee, subject to the approval of the board of directors, should have complete authority to determine all questions arising in the application of the plan. In 1935 the pension committee, evidently proceeding on the theory that the plan in terms embraced the plaintiff, caused an official of the company to forward to plaintiff for his signature an application for a pension under the 1934 plan. This application was duly signed by plaintiff and returned to the company. On March 20, 1936, the same official wrote the plaintiff advising him that on July 1, 1936, he would "be transferred to the pension payroll, at the rate of $126.34 per month *in accordance with pension rules and requirements.*" (Italics ours.) Subsequently the pension committee on July 1, 1936, granted a pension of $126.34, proceeding on the assumption that plaintiff had twenty-four years of service to his credit. There was no approval of the act of the committee by the board of directors. However, it seems evident the pension was granted under and pursuant to the 1934 plan, otherwise it would not have been within the authority of the pension committee. That being the case, may the company now contend that the plaintiff did not have a vested right to a pension under the plan?

The pension plan of 1919 was a bonus plan, not merely to encourage performance by the employee of his contract but to induce him to refrain from exercising his right of quitting. While the employee concedes that his employer could have abrogated the plan without substituting another without liability to him, yet having granted the pension he contends it may not now revoke it. In support of this claim plaintiff relies upon and states that the instant case "is identical with Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154", and that "Grant v. Long, 33 Cal.App.2d 725, 92 P.2d 940 [is] another nearly identical case". We do not see that the one is identical or the other nearly identical. In fact, neither case is here an authority. In the Seymour case it was held that the statute of frauds could not be set up by way of defense as a bar to an oral contract of employment for ten years, where (1) defendant prior to plaintiff's change had promised to embody the oral agreement in a writing and (2) plaintiff gave up a life position with less compensation in reliance upon the promise. In the Seymour case the employer sought to have the employee effect a change in his situation; in the instant case it was the employee alone who sought such change, along with a waiver of condition in the existing contract with his employer. In the Grant case the court found an implied contract based on a valuable consideration; that the contract had been fully executed on the part of the plaintiff and that for a long period the parties had not only placed their construction on the contract but the defendant had performed in accordance with it, and so could not rely on a defense under the statute of frauds.

[6-9] Even though the doctrine of equitable estoppel—the basis of the cases just cited—is not here applicable, we are of the opinion that the doctrine of *promissory estoppel* is on the facts applicable and that the case may be solved on that basis. That doctrine is "distinct from the ordinary equitable estoppel, since the representation is promissory, not a misstatement of an existing fact. The promisor misstates no fact; he says, at most, simply, 'I will perform though you do not comply with the condition', or, 'though you subject yourself to a legal defense'. To bring the case within the reason of the rule it is essential that the promisee could and would have performed the condition, or would not have allowed the defense to arise, had it not been for the promisor's waiver". 3 Williston on Contracts, sec. 689. In the instant case the employer promised to forego the condition of twenty years' continuous service immediately prior to the date upon which the employee should attain sixty years of age. There was evidence upon which the trial court could and did find that the employee would not have ceased his employment except for his reliance upon the promise of his employer, and that despite his illness he could have continued in his employment. We have to accept the facts as found. Accordingly it is clear that on the doctrine of promissory estoppel, despite the statute of frauds, the employer would have been barred from setting up in 1936 that the employee was not then entitled to a pension under the 1919 plan had it been in effect. Even though it was not in effect, and even though plaintiff was not eligible to qualify

under the terms of the retirement plan of 1934, the pension committee under that plan voluntarily determined he was eligible. By the very terms of the plan such a determination was conclusive except that it was subject to the approval of the board of directors. While no formal approval was given, the evidence warrants a holding that the company by its conduct waived any right which it might have had to object. Viewing, then, the latter plan as largely a continuation of the former plan, it is evident that the doctrine of promissory estoppel may not only be invoked but is here controlling.

[10] Moreover, although the question is close, we think it may fairly be said that the defendant company did not intend by the adoption of the retirement plan of 1934, after having held out to its employees for fifteen years the possibility of a pension under the 1919 plan, to eliminate the equitable contingent rights acquired by them or former employees under the 1919 plan. Rather, we think it sought by the retirement plan of 1934 to amend and supersede the 1919 plan, preserving, however, so far as was consonant with the new plan, all contingent rights under the superseded plan. This is indicated by the letter it wrote its employees and former employees wherein it said: "It [the 1919 plan] was more or less inflexible in many respects and imposed upon the company a continually increasing financial burden which eventually would have led to the necessity of abandoning it altogether. To prevent such an unfortunate occurrence, its officers, after a number of months of intensive study with the aid of pension experts, have developed a new pension plan, which has been approved and adopted by the Board of Directors in lieu of the old pension agreement."

[11, 12] The only further question we have to decide is the amount of pension payable under that plan. It is clear that the plaintiff actually retired from active service on July 1, 1930. The trial court's finding to the contrary has no evidence to support it. It is likewise clear that it was not in the contemplation of either Mr. Lewis or the plaintiff that a pension should be computed on more than twenty years' continuous service. Both the plaintiff and defendant are here claiming the pension committee erred. On the part of plaintiff the claim is that he had twenty-six years of continuous service; on the part of the defendant the claim is that plaintiff had only twenty years of continuous service; the pension as allowed was based on twenty-four years of service. It is plain on this record that the pension committee sought to pension plaintiff under and in accordance with the plan based on his attained age and number of years of actual, active and continuous service. It inadvertently erred in pensioning him on the basis of twenty-four years of continuous service, as he had only twenty years of such service. On that point no estoppel or waiver is shown. Accordingly the trial court should have declared that plaintiff was entitled to a pension based on twenty years of service and not twenty-four, and found $102.42 as the amount due him monthly instead of $126.34.

We turn now to plaintiff's contention that he should have been awarded by the court below a pension based on the 1938 plan. It appears from the record that on December 30, 1937, the board of directors of the defendant company, by resolution effective as of February 28, 1938, terminated, pursuant to a right reserved therein, the retirement plan of 1934 except as to annuities then in force for employees previously retired under that plan. In lieu of this plan, to the extent it was terminated, it provided for pensions in accordance with the terms of a Pension Manual effective March 1, 1938. However, the resolution additionally recited that the company had pensioners who had been retired under the 1934 plan who would have qualified for retirement under the 1919 plan had it been in effect on their retirement, and as to such it provided, in general terms, that if a computation set forth in the resolution, when applied to their case, indicated a greater pension in their favor than they were receiving they should thereafter receive such larger pension and, in a lump sum, the difference between such amount and what had been received from the date of retirement. Nevertheless, the resolution went forward to identify specifically the names of those thus entitled and their respective pensions computed by the formula. *The plaintiff's name was not in the list.* The resolution further recited that "if any errors or omissions shall be discovered in said list or in the computations as contained therein, the same may, with the approval of this Board, be corrected to conform to the foregoing formula"; and that "the Board of Directors in its discretion shall have the right at any future time and from time to time to rescind or modify the action taken by this

Resolution, or any part thereof, or to amend or modify the same in any respect, except as to the pension of any employee who shall have arrived at retirement age prior to such rescission, modification or amendment".

[13-15] A form letter referring to the resolution and enclosing a copy of the Pension Manual was sent to every employee of the company. Such a letter and manual was sent to plaintiff. Thereafter he made demand on the company for a pension in accord with the computation set up in the resolution, even though he was not on the list of pensioners therein named. The demand was refused. His claim here for such pension is predicated on several theories, but the reasoning presented in support of the various theories seems to us to contain within it its own answer. No rule is suggested, and none can be, which would require the company in the absence of a contract to enlarge the pension payments of all retired pensioners in a class just because it does so for some one or more out of its own treasury. We may not read isolated general portions of the resolution that are helpful to plaintiff's case, but instead we must read it as a whole, and particularly give effect to specific language that bears on plaintiff's claim rather than general language. The purport of the resolution and its limitations are too plain to call for discussion. Incidentally, it may be said that it is one thing to be obligated to pay a pension pursuant to a plan under which an employee has retired; it is quite another thing to assume that a company may not subsequently single out such pensioners as it chooses from a class and gratuitously pay them a larger pension from its own corporate funds. Moreover, even those of the class who are singled out have no vested right in that portion of the excess pension paid, as appears from the reservations in the 1938 plan. The finding of the trial court that plaintiff had no cause of action based on the resolution or the Pension Manual is adequately sustained.

The judgment is reversed with instructions to the trial court to amend its findings, conclusions and judgment to accord with our holding. Appellant Southern California Edison Company to recover costs on appeal.

WOOD, Acting P. J., and McCOMB, J., concurred.



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